FIG. 7 is a family of graphs showing talk time as a function of the answer ratio for various line to operator ratios for a connect time of approximately 60 seconds;

FIG. 8 is a family of graphs showing talk time as a function of the answer ratio for various line to operator ratios for a connect time of approximately 90 seconds;

FIG. 9 is a family of graphs showing talk time as a function of the answer ratio for various line to operator ratios for a connect time of approximately 120 seconds;

FIG. 10 is a family of graphs showing talk time as a function of the answer ratio for various line to operator ratios for a connect time of approximately 150 seconds;

FIG. 11 is a family of graphs showing talk time as a function of a percentage of nuisance calls for various values of connect time;

FIG. 12 is a graph showing contacts per hour per operator and talk time each plotted as functions of connect time;

FIG. 13 is a graph showing the frequency of calls plotted as a function of the time of calls illustrating the mean time and standard deviation of time of calls during a session;

FIG. 14 is a graph illustrating the manner in which the value of a constant C_1 is determined as a relation with the maximum value of nuisance calls;

FIGS. 15A and 15B, taken together, are a flow chart showing the logic of an implementation of the new pacing algorithm according to the invention;

FIG. 16 is a timing diagram illustrating the operation of the continuity model on which the front and back algorithm according to the invention is based; and

FIG. 17A and 17B, taken together, are a flow chart showing the logic of an implementation of the front and back algorithm.

DETAILED DESCRIPTION OF A PREFERRED EMBODIMENT OF THE INVENTION

In the following description, the following terms are used. Definitions are provided next to each of the terms.

A_{ratio} is the ratio of answered calls to the number of call attempts per session.

$CONN_{ratio}$ is the ratio of calls connected to an operator to the number of call attempts per session. Note that this ratio is typically different from A_{ratio} since all calls which are answered may not be connected to an operator if an operator is unavailable when the call is answered.

CON_{time} is the average conversation time per call per session, measured in seconds.

LO_{ratio} is the number of lines (trunks) divided by the number of operators (stations).

N is the average number of lines to dial on all the time.

$N_{inprogress}$ is the number of calls currently in progress. Note that this number is included in N and must be taken into account when new calls are to be dialed.

NOP_{max} is the maximum ratio of no operator available (i.e., nuisance) calls to call attempts.

NOP_{ratio} is the number of nuisance calls (no operators available) divided by the number of call attempts.

OP_{num} is the number of operators logged into the system.

T_{setup} is the average time to complete a call attempt.

T_{talk} is the average talk time per hour per operator, measured in minutes.

The goal of any call origination management system is to have each operator connected to each call answered. Under these conditions, there would be maximum talk time and no nuisance calls. To accomplish this, however, requires a priori knowledge of the time it takes to connect a call and exactly how long each operator talks. In practice both of these can be highly variable, within limits. The system can not predict exactly when or if a placed call will result in an answer and, of course, the amount of time an operator talks will depend on the responses of the client. Therefore, scheduling the next answered call to occur exactly when an operator finishes talking is impossible. An answer may occur before or after the operator finishes the previous call, and the result is an increase in the nuisance call rate or an increase in operator idle time or both. Intuitively, it is clear that the system variables which affect talk time are A_{ratio} and CON_{time} and the goal to achieve optimization (maximum efficiency) is maximum talk time per operator with a minimum of nuisance calls.

FIG. 4 is a family of graphs illustrating the relation between talk time in minutes and the answer ratio (A_{ratio}) at lowest speed for an eight station system. These graphs show that as the A_{ratio} increases, the talk time increases, but as the connect time (CON_{time}) decreases, the talk time decreases. On the other hand, the shorter the connect time, the greater will be the number of clients contacted. A similar relation holds for the system operating at maximum speed as shown in FIG. 5 except that the family of curves is shifted upwards indicating that the talk time has been maximized.

FIG. 6 is a family of graphs which plots the talk time as a function of the answer ratio for different line to operator ratios and a connect time of 30 seconds. FIG. 7 is a similar family of graphs for a connect time of 60 seconds, and FIGS. 8, 9 and 10 are similar families of graphs for connect times of 90, 120 and 150 seconds, respectively. From these graphs, it is readily apparent that the higher the conversation time, the less number of lines are required to maintain a certain amount of talk time. For example, in FIG. 6, for a 20% answer ratio and a conversation time of 30 seconds, a 3:1 line to operator ratio is required to achieve approximately 44 minutes of talktime in an hour, but can be achieved with a 2:1 line to operator ratio for a conversation time of 60 seconds as shown in FIG. 7.

FIG. 11 shows the talk time plotted as a function of the percentage of nuisance calls. The upper graph is for a conversation time of 120 seconds, the next graph is for a conversation time of 60 seconds, and the lower graph is for a conversation time of 30 seconds. It will be observed that a greater talk time can be achieved for a given level of nuisance calls the longer the conversation time. But as mentioned before, the longer the conversation time, the fewer number of clients will be contacted in a given period of time during the campaign. If the type of campaign has a high conversation time, there is no need to generate a high percentage of nuisance calls in order to achieve a high talk time.

FIG. 12 shows talk time plotted as a function of conversation time. It will be observed that this graph asymptotically approaches the 60 minute line as the conversation time increases. FIG. 12 also shows the number of contacts per hour per operator plotted as a function of conversation time. This curve decreases as a hyperbolic function as the conversation time increases, illustrating the divergent requirements of maximizing both talk time and the number of contacts per hour per operator in call origination management systems.

FIG. 13 shows a graph which plots the frequency of calls as a function of the times of the calls. This graph is

typical of what has been observed in a specific class of call origination management systems; i.e., systems of the nonqueuing type. It will be observed that the graph is distorted to the right from a standard distribution or bell curve. As a result, the mean time, T_{mean}, deviates to the right from the average time, T_{ave}, by an amount defined as the standard deviation, represented by the Greek letter sigma. What this means simply is that while most calls are short, there are a significant number of calls which are long. Were the curve to be a standard distribution or bell curve, T_{mean} and T_{ave} would be the same, and for short connection applications, the standard deviation would be small.

Using the foregoing definitions, the number of call attempts per hour is computed as

$$N \times \frac{3600}{T_{setup}},$$

and the number of connections per hour is computed as

$$\frac{T_{talk} \times 60}{CON_{time}} \times OP_{num}.$$

Nonqueuing Algorithm

Now, according to the nonqueuing algorithm implemented by the present invention, the connect ratio is computed as follows:

$$CONN_{ratio} = \frac{T_{talk} \times 60}{CONN_{time}} \times OP_{num} \times \frac{T_{setup}}{N \times 3600},$$

but, by definition, the connect ratio is the difference of the answer ratio and the maximum number of nuisance calls, which is computed as follows:

$$A_{ratio} - NOP_{max} = \frac{Talk}{60} \times \frac{T_{setup}}{CONN_{time}} \times \frac{OP_{num}}{N}.$$

Setting the right hand side of these two equations equal to one another and solving for N, the following equation is obtained:

$$N = \frac{T_{talk}}{60} \times T_{setup} \times \frac{OP_{num}}{A_{ratio} - NOP_{max}}.$$

Thus, N is directly proportional to the setup time and the number of operators available and inversely proportional to the difference between answer ratio and the maximum number of nuisance calls allowable. It has been found by experimental tests, however, this relation needs to be modified to adjust for the NOP_{ratio} which is given to the supervisor to vary depending on his or her application, as indicated by the following equation:

$$N = \frac{T_{setup}}{T_{mean} \pm (C_1 \times T_{sigma})} \times \frac{OP}{C_2 \times A_{ratio} - NOP_{max}}$$

The foregoing equation assumes $T_{talk} = 60$ minutes and takes into account the distortion of the curve illustrated in FIG. 13. C_1 and C_2 are constants which have been empirically determined. More specifically, C_2 is a function of T_{mean}, A_{ratio} and NOP_{ratio}. C_2 is not defined as a mathematical function but is, instead, determined empirically and varies depending of how far the ratio of

nuisance calls deviates from a set level. In a specific implementation, C_2 has three values depending on how far the number of nuisance calls deviates from the set value for NOP_{max} and works as a pushup/pushdown factor (for maintaining the NOP_{max}).

FIG. 14 illustrates the concept. The value NOP_{max} is in the center of two bands 47 and 48, defining ranges of values for the number of nuisance calls, which is ±0.5%. It is desired to operate the system within band 47, and as long as this condition exists, C_2 *is a first empirically determined value. Should the number of nuisance calls go higher, falling into band 48,* C_2 is a second empirically determined value greater than the first value. Moreover, if the number of nuisance calls goes even higher, falling outside band 48, C_2 is an even larger value. The second constant C_1 may also be a function of the T_{mean}, A_{ratio} and NOP_{ratio}, but it has been determined experimentally that setting the second constant equal to ±25% of T_{sigma} provides good performance.

Referring now to FIGS. 15A and 15B of the drawings, there is shown a flow chart illustrating the logic which implements the algorithm. The process begins at 50 by setting initial conditions. These include the A_{ratio}, T_{mean}, T_{sigma}, T_{setup}, C_1, C_2, the NOP_{max}, $N_{Inprogress}$, and the number of operators. Some of the values are default values which are set at the beginning of a campaign, but others such as the number of nuisance calls and the number of operators are specified by the supervisor. The actual values of the default values are good initial "guesses" based on empirically determined data from other, similar campaigns.

The number of calls is computed in function block 51. In the initial phase, this computation is based on the initial condition values, including the default values. The number of calls to dial is then determined in function block 52 as the number computed in function block 51 less the number of calls currently in progress. In decision block 53, a test is made to determine if 30 seconds have elapsed. 30 seconds is the duration of a phase. If 30 seconds have elapsed, the phase clock is reset to zero in function block 54, and a further test is made in decision block 55 to determine if the answers for the phase was greater than or equal to five, an empirically determined value. If so, the answer ratio is computed in function block 56 as the number of answers divided by the number of attempts. Then, in decision block 57, a test is made to determine if the number of answers for the phase is greater than or equal to ten times the number of operators logged on. Note again that ten is an empirically determined number. If so, the answers per phase is set to zero in function block 58, and in function block 59, the actual values for T_{mean} and T_{sigma} are computed based on the data accumulated for the preceding phase. Then in decision block 60, a test is made to determine if a two second clock has expired. The purpose of this two second clock is to minimize the load on the CPU. If so, the two second clock is reset in function block 61 and then, in function block 62, the nuisance call ratio is computed as the ratio of nuisance calls to the number of attempts. Now, the setup time is computed in function block 63, in function block 64, the constants C_1 and C_2 are adjusted The process then returns to function block 51 where, based on the adjusted values for constants C_1 and C_2, the number of calls to dial are again computed.

Going through the flow diagram again, if the test in decision block 53 is negative indicating that a phase has

not yet timed out, the phase clock is incremented in function block 65 before the process jumps to decision block 60. If the test in decision block 55 is negative, the process jumps directly to decision block 60. Next, in decision block 57, if that test is negative, the process jumps directly to function block 59 where new values of T_{mean} and T_{sigma} are computed. Finally, if the test in decision block 60 is negative, the two second clock is incremented in function block 66 before the process loops back to decision block 53 to test the phase clock.

Queuing Algorithm

In a queuing system, there are by definition no nuisance calls. Instead, if there is no operator available when a call is answered, the call is routed to a source of a recorded message, an example of which is disclosed in copending application Ser. No. 07/027,240 for "Alternate Memory Addressing for Information Storage and Retrieval" filed by James J. Frimmel, Jr. et al. and assigned to the assignee of this application, now Pat. No. 4,875,157. It is desirable, however, to minimize the number of calls in the queue since, as the number of clients in the queue listening to the recorded message increases, the longer time each client will be in the queue and the greater the probability that a client in the queue will hang up. Therefore, the basic algorithm for the nonqueuing system is used with the modification that NOP_{max} and NOP_{ratio} are not used in the computations but, instead, the ratio of clients on hold to the number of call attempts.

Front and Back Operators Algorithm

The front and back operators applications can be considered to be a hybrid of the nonqueuing and queuing systems. More specifically, the front operators will make many contacts, each of which will be of short duration. Since the purpose of the front operator contact is to ask the client whether they will listen to a recorded message, the front operator part of the algorithm is essentially the same as the nonqueuing algorithm already described, although the nonqueuing algorithm may be used in some applications. The back operator part of the algorithm, on the other hand, is inherently a queuing algorithm since those clients who have agreed to listen to the recorded message may be considered to be in a queue for an available back operator.

To achieve the best performance, the invention uses a continuity model for the front and back operators algorithm. According to this continuity model, the rate of answered calls should be equal to the rate of calls finished, as is illustrated in the timing diagram of FIG. 16. Accordingly, the algorithm calculates the number of playing messages as follows:

$$\text{msg_stack_length} = \frac{\text{msg length}}{(\text{ave_expected_duration_front} + \text{ave_expected_duration_back}) * \text{OPnum}}$$

The message stack_length is the average number of messages to be required in order to keep the operators (front and back) busy all the time. The algorithm also calculates the number of calls to be dialed in the same way as the basic algorithm except that those who handle front calls in an adjustable mean time (T_{fmean}) and those who handle back calls are expected to be done in an adjustable mean time (T_{bmean}). Thus, the basic algorithm is modified to compute N as follows:

$$N = \frac{T_{setup}}{T_{fmean} \pm C_{1f} \times T_{fsigma}} + \frac{T_{setup}}{T_{bmean} \pm C_{1b} \times T_{bsigma}} \times \frac{OP_{num}}{C_2 \times A_{ratio} - NOP_{max}},$$

where T_{fsigma} and T_{bsigma} are the standard deviations associated with front and back operators, respectively, and the constants C_{1f} and C_{1b} are functions of those standard deviations.

The number of clients on hold for front and back is subtracted from the total calculated number to dial. More specifically,

$$N_{DIAL} = N - (N_{inprog} + N_{fhold} + N_{bhold}),$$

where N_{fhold} and N_{bhold} are the number of clients on hold for front and back operators, respectively. Obviously, if a nonqueuing algorithm is used for front operators, N_{fhold} would be zero.

The size of the message queue is directly related to the number of answered calls and, consequently, the number of clients who have listened to a message may grow. If that number exceeds the message queue length, the system stops dialing.

Referring now to FIGS. 17A and 17B of the drawings, there is shown a flow chart illustrating the logic which implements the front and back operators algorithm. The process begins at 70 by setting initial conditions. These include the A_{ratio}, T_{fmean}, T_{bmean}, T_{fsigma}, T_{bsigma}, T_{setup}, C_{1f}, C_{1b}, C_2, the NOP_{max}, $N_{inprogress}$, and the number of operators. Again, some of the values are default values which are set at the beginning of a campaign, but others such as the number of nuisance calls and the number of operators are specified by the supervisor.

The number of calls is computed in function block 71. In the initial phase, this computation is based on the initial condition values, including the default values. A test is made in decision block 72 to determine if the number of clients currently listening to the recorded message equals the message que. If so, no more calls should be made. Thus, in function block 73 the dialing operation is interrupted and the process goes into a holding loop. When the number of clients currently listening to the recorded message is less than the message que, then the process continues.

The number of calls to dial is then determined in function block 74 as the number computed in function block 71 less the sum of the number of calls currently in progress, the number of clients on hold for a front operator (in a front queuing system) and the number of clients currently listening to the recorded message. Obviously, if a front queuing system is not being used (i.e., the basic nonqueuing algorithm is being used), then N_{fhold} is not used. In decision block 75, a test is made to determine if 30 seconds have elapsed. If 30 seconds have elapsed, the phase clock is reset to zero in function block 76, and a further test is made in decision block 77 to determine if the answers for the phase was greater than or equal to five. If so, the answer ratio is computed in function block 78 as the number of answers divided by the number of attempts. Then, in decision block 79, a test is made to determine if the number of answers for the phase is greater than or equal to ten times the number of operators logged on. If so, the answers per phase is set to zero in function block 80, and in function block 81, the actual values for T_{fmean}, T_{bmean}, T_{fsigma}, and

T_{bsigma} are computed based on the data accumulated for the preceding phase. Then in decision block 82, a test is made to determine if a two second clock has expired. If so, the two second clock is reset in function block 83 and then, in function block 84, the nuisance call ratio is computed as the ratio of nuisance calls to the number of attempts. Now, the setup time is computed in function block 85, in function block 64, the constants C_{1f}, C_{1b} and C_2 are adjusted The process then returns to function block 71 where, based on the adjusted values for constants C_{1f}, C_{1b} and C_2, the number of calls to dial are again computed.

While the invention has been described in terms of a single preferred embodiment, those skilled in the art will recognize that the invention can be practiced with modification within the spirit and scope of the appended claims.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent is as follows:

1. A method of adaptively pacing telephone calls in a call origination management system comprising the steps of:

determining a number of calls to dial as an inverse function of a mean time of all calls and a standard deviation of the mean time multiplied by a first constant, said number of calls to dial also being an inverse function of a second constant times a ratio of answered calls to attempts per session;

dialing a number of calls according to the determined number of calls to dial;

computing new values of said ratio of answered calls to attempts per session, said mean time and said standard deviation; and

using said new values in repeating the step of determining the number of calls to dial.

2. The method of adaptively pacing telephone calls as recited in claim 1 further comprising the step of reducing the determined number of calls to dial by a number of calls in progress.

3. The method of adaptively pacing telephone calls as recited in claim 1 wherein said first constant is ±0.25 of said standard deviation.

4. The method of adaptively pacing telephone calls as recited in claim 1 further comprising the step of adjusting values of said first and second constants after computing said new values, the adjusted values of said first and second constants being used when repeating said step of determining the number of calls to dial.

5. The method of adaptively pacing telephone calls as recited in claim 4 further comprising the step of reducing the determined number of calls to dial by a number of calls in progress.

6. The method of adaptively pacing telephone calls as recited in claim 1 further comprising the step of reducing the product of said second constant and the ratio of answered calls to the call attempts per session by a preset number of a maximum allowable number of nuisance calls, said nuisance calls being calls which are answered for which there is no operator available.

7. The method of adaptively pacing telephone calls as recited in claim 6 further comprising the step of computing a ratio of nuisance calls to the call attempts per session, said ratio being used to adjust the value of said second constant.

8. The method of adaptively pacing telephone calls as recited in claim 7 wherein said first constant is ±0.25 of said standard deviation.

9. The method of adaptively pacing telephone calls as recited in claim 7 further comprising the step of adjusting values of said first and second constants after computing said new values, the adjusted values of said first and second constants being used when repeating said step of determining the number of calls to dial.

10. The method of adaptively pacing telephone calls as recited in claim 9 further comprising the step of reducing the determined number of calls to dial by a number of calls in progress.

11. The method of adaptively pacing telephone calls as recited in claim 1 wherein said call origination system includes a source of recorded message, said method further comprising the step of connecting an answered call to said source of recorded message whenever an operator is not available, but when an operator becomes available, connecting the answered call to the available operator.

12. The method of adaptively pacing telephone calls as recited in claim 11 further comprising the step of adjusting values of said first and second constants after computing said new values, the adjusted values of said first and second constants being used when repeating said step of determining the number of calls to dial.

13. The method of adaptively pacing telephone calls as recited in claim 12 further comprising the step of reducing the determined number of calls to dial by a number of calls in progress.

14. The method of adaptively pacing telephone calls as recited in claim 1 wherein said call origination management system routes calls to front operators and back operators, said front operators connecting those answered calls in which clients express an interest in hearing a recorded message to a source of recorded message and said back operators being connected to those clients who have heard the recorded message, said method further comprising the step of separately computing the mean time and the standard deviation of the mean time for each of said front and back operators.

15. The method of adaptively pacing telephone calls as recited in claim 14 further comprising the step of testing to determine if the number of clients currently listening to the recorded message is equal to a maximum queue for the message and, if so, temporarily suspending said step of dialing said calls.

16. The method of adaptively pacing telephone calls as recited in claim 14 wherein said call origination system includes a second source of recorded message, said method further comprising the step of connecting an answered call to said second source of recorded message whenever a front operator is not available, but when a front operator becomes available, connecting the answered call to the available front operator.

17. The method of adaptively pacing telephone calls as recited in claim 14 further comprising the step of adjusting values of said first constant for each of said front and back operators and adjusting said second constant after computing said new values, the adjusted values of said first and second constants being used when repeating said step of determining the number of calls to dial.

18. The method of adaptively pacing telephone calls as recited in claim 17 further comprising the step of reducing the determined number of calls to dial by a number of calls in progress.

* * * * *

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Re: False and dishonest claims by the FCC

Dear Mr. Keithley:

I have attached the Amicus Curiae Brief of Charles R. Messer, which I have sent via Federal Express for filing tomorrow in the United States Court of Appeals for the District of Columbia Circuit.

The brief demonstrates that Commissioners' statements about the bases of their 2003, 2008, and 2015 ATDS Rules, are false and dishonest.

When persons in the private sector make false and dishonest statements that inflict a billion dollars in losses, federal authorities investigate with zeal and rigor. Your office should investigate this serious matter with similar zeal and rigor.

Your investigation should determine: What did Commissioners and their staff know, and when did they know it? I cannot answer those questions from my office in Los Angeles. The Commissioners probably believed that their false claims about changes in technology would not be detected and could not be proven. The attached brief demonstrates detection. Proof is in your bailiwick.

Please also forward this letter and the attached brief to your colleagues Thomas C. Cline (Deputy Inspector General of the FCC), and David L. Hunt (Inspector General of the FCC).

Thank you for your attention to this serious matter.

Very truly yours,

Charles R. Messer
CARLSON & MESSER LLP

CRM/nk

Attachment (Amicus Curiae Brief of Charles R. Messer)

SECTION I

THE BACKGROUND

235-2273
1-7msgs
Compression

Set of Things for Demo
Drop in for Melissa

Software

Suite 160
next to Phil Walden

how many DTMF channels on

1- 64 K
2- 32 ADPCM
3- 24 Subband
4 24 ADP
5 16 ADP
6 16 ADP
7 8 K ADP

CRMAPP0160

1.1 INTRODUCTION

Gannett Co., Inc. ("Customer"), is soliciting bids for an automated telemarketing system which when implemented will serve the needs of Circulation Telemarketing at the Arkansas Gazette in Little Rock. This center is located at 112 W. Third Street, Little Rock, Arkansas 72201.

The Arkansas Gazette is a regional daily newspaper with distribution in Arkansas. Its primary market area is Pulaski County where the city of Little Rock is located.

To maximize the advertising base, the Arkansas Gazette-must increase its paid subscription base. Currently, the largest source of new subscriptions has been through the circulation department's telemarketing operation. This is a manual dial operation with thirty two telemarketing sales reps authorized for 1988. The telemarketing department obtains leads four new customers from a variety of sources. Currently, the primary source of generated telephone numbers is from the telephone book. The directory pages or lists are provided to the telephone sales representative (TSR) who attempts to call each entry. Other sources include classified customer/non subscriber lists, New Sales lists, previous subscriber (renewal) lists and Stop Notice lists. Each sales rep manually dials, and writes up an order when received. In addition to the sales reps, there is a telemarketing supervisor. The operation runs Monday through Thursday from 9:30 a.m. to 1:30 p.m. with a second shift from 5:00 p.m. to 9:00 p.m. and also four hours late Saturday morning. The amount of time a sales rep spends actually talking to a prospective subscriber is approximately 20 minutes of every hour and averages 1.0 sales per hour.

Management is currently exploring new technologies which will provide the Arkansas Gazette with the most cost effective and efficient means to achieve its telemarketing operations. New technologies include the use of "predictive" telemarketing systems which maximize the amount of time a sales rep actually spends selling to a prospect. In addition to cold call selling, the newspaper wishes to call current subscribers to check on missing payments, service errors, and start verification. The latter calls are intended to be made while adjacent sales reps are making "cold call" subscription sales. This would consist of multiple concurrent dialing modes.

This Request for Proposal (RFP) requests responses from bidders for the purpose of providing an outbound calling system to acquire and deliver customer contacts at the highest and most effective rate possible to operators. Further, the information exchanged during this contact must be accurately documented in a timely manner, and include management analysis throughout the process to facilitate effective company policy decisions.

If our initial automated system proves effective it is anticipated that other Gannett newspaper telemarketing operations will be automated in 1989. A detailed outline of our goals and objectives follows.

GOALS AND OBJECTIVES

PRIMARY GOALS

* To increase circulation of the Arkansas Gazette by generating a high volume of paid subscriptions using telemarketing.

* To provide the future platform from which other Gannett newspapers will automate their telemarketing operations.

PRODUCTIVITY

* To maximize productivity and to achieve consistent levels of productivity and results from telemarketing service representatives regardless of the external contact rate.

* To increase the number of potential subscribers contacted to meet sales goals while controlling personnel costs.

FLEXIBILITY

* To have variable screen formats to enhance effectiveness of calling efforts through the use of highlighting techniques for multiple campaigns.

* To provide an efficient transfer of data between the "system" and the Arkansas Gazette DEC VAX circulation computers.

ANALYSIS AND CONTROL

* To install a system with sophisticated management reporting capabilities to enhance management control and decision making.

* To be able to quantify the specific results of each telemarketing effort -- by job, by shift, by operator, by call.

EXPANSION

* To provide for future growth with a modular system. Eliminate the need to throw out one system to replace with a larger system as demand for services increases.

1.2 BACKGROUND INFORMATION

Although there is no assurance that the capital requested for this project will be approved, it is anticipated that if approved, the equipment and services requested in this RFP will be needed on September 6, 1988.

It must be emphasized that the Customer reserves the right not to award a contract as a result of this RFP.

1.3 QUESTIONS ON THIS RFP

Specific questions concerning this Request for Proposal can and should be directed to:

Telecommunications:	Dave Wright Manager Telecommunications Applications Gannett Co., Inc. 1100 Wilson Boulevard 21st Floor Arlington, VA 22209
Circulation:	Mr. Fritz Jacobi Regional Circulation Director Gannett Co., Inc. 1100 Wilson Boulevard Arlington, Virginia 22209 (703) 284-6633
Circulation:	Mr. Bobby Marshall Circulation Manager Arkansas Gazette 112 West Third Little Rock, Arkansas 72201 (501) 371-3935
Systems:	Mr. Riley Suit Information Systems Manager Arkansas Gazette 112 West Third Little Rock, Arkansas (501) 371-3717

The Bidders are encouraged to visit the site to become familiar with the exact nature of the building and site conditions. Mr. Suit will coordinate all visits in response to this RFP. Bidders are responsible for site familiarization and are expected to fully inform themselves as to any site conditions prior to submitting a response to this proposal.

1.4 PROCUREMENT SCHEDULE

This procurement will adhere to the following schedule:

- RFP issued to vendors on July 26, 1988.
- Bidders conference scheduled July 26, 1988.
- Proposals received by the Customer no later than August 9, 1988.
- Anticipated contract award date is August 22, 1988.
- System delivery is anticipated on September 2, 1988.
- System implementation is anticipated on September 6, 1988.

1.5 IMPLEMENTATION SCHEDULE

The bidder shall supply a schedule for the dates of completion of the proposed system.

They shall include the following, as a minimum:

- System order date
- Initial design meeting.
- Facilities modifications completion
- Delivery of system
- On site user training
- Implementation of system
- Documentation delivery

The desired system cutover date is September 6, 1988.

The bidders will identify any switchroom modifications which are required in order to implement and cutover their system over a weekend while the existing (manual) system provides service until cutover.

1.6 CONDITIONS OF BIDDING

1.6.1 PROPOSALS: Bids shall be submitted in writing utilizing the format of this RFP. The bidder shall submit four copies signed and sealed to the individuals indicated in Section 2.1.19.

1.6.2 LATE BIDS: Formal bids, amendments thereto, or requests for withdrawal of bids received by the Customer after time specified in Paragraph 1.4, Procurement Schedule, for bid receipt will not be considered.

1.6.3 WITHDRAWAL OF BIDS: A written request for the withdrawal of a bid or any part thereof may be granted if the request is received by the Customer prior to the time specified in Paragraph 1.4, Procurement Schedule.

1.6.4 COMPLETENESS: All information required by this RFP must be supplied to constitute a proper bid.

1.6.5 BID BINDING 90 DAYS: Unless otherwise specified, all formal bids submitted shall be binding for ninety calendar days following bid receipt, unless the bidder(s), upon request of the Customer, agrees to an extension.

1.6.6 CONDITIONAL BIDS: Qualified bids are subject to rejection in whole or in part.

1.6.7 AUTHORITY TO ACT AS AGENT: Upon request, the bidder will provide proof to the Customer that the signature on the proposal form has the authority to bind the bidder to the price(s) quoted.

1.6.8 BIDS FOR ALL OR PART: Unless otherwise specified by the Customer or the bidder, the Customer reserves the right to make award on all items, or on any of the items according to the best interests of the Customer. Bidder may restrict his bid to consideration in the aggregate by so stating, but should name a unit price on each item bid upon; any bid in which the bidder names a total price for all the articles without quoting a price on each and every separate item, may be rejected at the option of the Customer.

1.6.9 ERRORS IN BIDS: When an error is made in extending total prices the unit bid price will govern. Carelessness in quoting prices, or in preparation of bid or otherwise, will not relieve bidder. Erasures or changes in bids must be initialed.

1.6.10 QUESTIONS RE: SPECIFICATIONS: Any information relative to interpretation of specifications shall be requested from the Customer, in ample time before the receipt of the bids.

1.6.11 RESPONSE TO INVITATIONS: In the event bidder cannot submit a bid on the stated requirements, please return all forms with an explanation as to why bidder is unable to bid on these requirements.

1.6.12 COMPETENCE OF BIDDER: No proposal will be accepted from or contract awarded to any person, firm or corporation that is in the arrears or is in default to the Customer upon any debt or contract, or that is a defaulter, as surety or otherwise, upon any obligation to the Customer, or its affiliated companies, or had failed to perform faithfully any previous contract with the Customer, or its affiliated companies. The successful bidder will be required to present evidence satisfactory to the Customer of performance ability and possession of necessary facilities, resources and adequate insurance to comply with the terms of these specifications and contract documents.

Specifications

1.6.13 FORMAL SPECIFICATIONS: The bidder shall abide by and comply with the true intent of the specifications and not take advantage of any unintentional error or omission, but shall fully complete every part as the true intent and meaning of the specifications and drawings. Whenever herein mention is made of any article, material, or workmanship to be in accordance with laws, ordinances, building codes, underwriter's codes, or similar expressions, the requirements of these laws, ordinances, etc., shall be construed as the minimum requirements of these specifications.

All deviations from the specifications must be noted in detail by the bidder in writing, on the Deviations Form, at the time of submittal of the formal bid. The absence of a written list of specification deviations at the time of submittal of the bid will hold the bidder strictly accountable to the Customer to the specifications as written. Any deviation from the specifications as written not previously submitted, as required by the above, will be grounds for rejection of the material and/or equipment when delivered.

1.7 DEVIATIONS FORM

In the event that the undersigned Bidder cannot meet or otherwise intends to deviate from the specifications, all such deviations are listed hereon, with complete and detailed specifications and information being also attached. The absence of any entry on the Deviations Forms, then the Bidder assures the Buyer of their Full compliance with the specifications and condition.

-THIS FORM MUST BE SIGNED EVEN BY THOSE NOT PLANNING DEVIATIONS-

APPROVED DISAPPROVED

GANNETT CO., INC.

SIGNED _____

TITLE _____

SUBMITTED FOR CONSIDERATION

BIDDER _____

SIGNED _____

TITLE _____

1.8 STATEMENT OF ETHICS CERTIFICATION

By submission of this bid or proposal, the bidder certifies that:

(a) This bid or proposal has been independently arrived at without collusion with any other bidder or with any competitor.

(b) This bid or proposal has not been knowingly disclosed and will not be knowingly disclosed, prior to the receipt of bids, or proposals for this project, to any other bidder, competitor or potential competitor.

(c) No attempt has been or will be made to induce any other person, partnership or corporation to submit or not to submit a bid or proposal.

(d) Bidder has not been convicted of price fixing nor pleaded "no contest" to such charges within the last five (5) years.

(e) Bidder is not a subsidiary of a company that has been convicted of price fixing nor pleaded "no contest" to such charges within the last five (5) years.

_____
BIDDER

_____
AUTHORIZED SIGNATURE

_____
TITLE

SECTION II

THE PROPOSAL

2.1 GENERAL CONDITIONS

2.1.1 The equipment submitted in response to this Request for Proposal must be capable of performing all functions and features described in the specifications. Where a bidder wishes to make a proposal that does not meet the specifications, the Deviations Form shall be supplied stating all features and functions to which the exception is being taken, and the effect of this exception.

2.1.2 The equipment shall be designed and constructed to give a good commercial grade of service and reliability, taking into account present and future requirements. The vendor shall specify the station CCS at a P.01 grade of service.

2.1.3 The basic system must be modular in design, enabling it to be custom tailored to Customer requirements. The modularity of design should be made possible by the extensive usage of plug-in circuit boards or packs for such things as additional trunks or stations.

2.1.4 Installation work shall be performed by competent personnel. All work shall be done in a neat craftsman-like manner and shall be carefully laid with sufficient radius of curvature and protected at corners and bends to ensure that all applicable laws, ordinances, rules, regulations, and order of any public authority having jurisdiction for the installation for communications equipment are complied with. Generally accepted installation practices should be used at all times.

2.1.5 All cables must be cut to length and secured tightly and neatly. Fixed length double ended connectiorized cables installed with slack not be accepted and will be grounds for rejection of the work.

2.1.6 All cables must be labeled on both ends with a unique cable number.

2.1.7 All telephone extension designation tags must be typed and completed with the and extension, if applicable. Electronic multi-line phones utilizing one button feature access keys must also have typed feature descriptions on the faceplates.

2.1.8 The bidder will further guarantee that the equipment shall satisfy and meet the growth requirements as detailed under Equipment Specifications.

2.1.9 All equipment and materials to be installed on this project must be new unless otherwise agreed to in writing by the Customer.

2.1.10 The installation must provide for system protection from externally generated current surges and transient voltages. System component failures resulting from improper line protection shall be the sole responsibility of the vendor for the life of the system. Your submission of a proposal constitutes acceptance of this. UPS 02 generator power is not available.

2.1.11 The Customer shall have the express right to modify station requirements up to one month prior to the cutover date at no increase in cost other than that defined by adjusting the extended price according to current unit prices.

2.1.12 Drawings, and all other appropriate documentation will be supplied to the Customer at mutually agreed dates. The documentation shall become property of the Customer.

2.1.13 The responsibility for completing the initial system data base programming is that of the successful bidder. Training the Customer to perform the programming is not an acceptable substitute.

2.1.14 Training classes to teach the operation of each type of telephone/terminal is the responsibility of the Vendor. Training the Customer to perform this user training is not an acceptable alternative.

2.1.15 Certificates of insurance in addition to other clauses in the contract protecting the Customer from costs arising out of permits, patent protection, building damage clean up and subcontractors will be required of the successful bidder.

2.1.16 All General Conditions of this RFP and the technical specifications therein as well as the proposal itself will be included in any contract award pursuant to this RFP. All responses to this RFP will follow the format on the following pages. Any information or brochures not specifically requested but deemed necessary by the bidder shall be included in a section entitled "Additional Information".

2.1.17 Submitted proposals will become the exclusive property of the Customer.

2.1.18 The Customer reserves the right to determine whether a Bidder is responsive and has the ability and resources to perform the contract in full and comply with the specifications. The Customer also reserves the right to request additional information from the bidder to satisfy any questions which might arise. The Customer further reserves the right to reject any or all bids or to issue invitations for new bids.

2.1.19 One original of proposals (four total) for the furnishing, installation, and maintenance of the specified system should be addressed to and received by:

Mr. William O. Hider
Vice President
Telecommunications
Gannett Co., Inc.
1100 Wilson Boulevard, 21st Flr
Arlington, Virginia 22209

Mr Fritz Jacobi
Regional Circulation Director
Gannett Co., Inc.
1100 Wilson Boulevard, 26th Flr
Arlington, Virginia 22209

Mr. Bobby Marshall
Circulation Manager
Arkansas Gazette Co., Inc.
112 West Third Street
Little Rock, Arkansas 72201

Mr. Riley Suit
Systems Information Manager
Arkansas Gazette Co., Inc.
112 West Third Street
Little Rock, Arkansas 72201

no later than as indicated in the Procurement Schedule section, Paragraph 1.4 of this RFP.

2.1.20 Each bidder shall submit with his proposal sales and technical information which completely describes the equipment covered by the bid. Copies of all warranty, and maintenance contracts shall also be included in the proposal.

2.1.21 This Request for Proposal is a summary of the Customer's anticipated requirements and a solicitation for system solutions. It must be emphasized that costs will be a major consideration in the selection decision.

2.1.22 Prior to cutover to the new system, the customer will conduct an acceptance test to validate that the system meets the contract specifications and that all components specified in the successful bidder's proposal have been installed. All operating problems identified as a result of the test will be corrected before the system is used.

2.1.23 The successful bidder shall, without charge, replace any material or correct any workmanship found by the Customer not to conform to the contract requirements. If the bidder does not promptly replace rejected material or workmanship, the Customer may by contract or otherwise replace such material or correct such workmanship and charge the cost thereof to the bidder.

2.1.24 This RFP and the response will be made part of the Purchase Agreement with the selected vendor.

2.1.25 A complete schedule of the equipment to be installed should accompany the proposal along with the following:

Comprehensive System Description Manual
Sales Manager & Sales Rep User Manuals
Management Statistics Report details and sample Reports
Traffic Statistics Report details and sample reports
Technical and Environmental Specifications

2.1.26 A standard Purchase Agreement (Appendix A), is the form of contract that will be executed with the selected vendor. Protracted contract negotiations will not be undertaken to change the terms and conditions stated in this standard Purchase Agreement. The selected vendor must be prepared to execute this form of agreement.

2.2 PROPOSAL FORMAT - Response Instructions

2.2.1 All proposals shall be typed. Each page shall be numbered in sequence with the vendor's identification. Each section shall start on a new page. Please provide as much pertinent information as necessary in the following format. Additional information shall follow after Section VII, including any brochures.

2.2.2 Title Page

Identify the name, address, and telephone number of the vendor, the name, address and telephone number of the vendor's representative if different from the vendor, and the manufacturer's name, address and contact if different from the vendor. Identify the name and address of the Gannett location to which this RFP refers.

2.2.3 Table of Contents

A listing of all major topics and subtopics with their associated page numbers.

2.2.4 Overview/Executive Summary - I

Introduce and give a summary of the proposed system and its price and delivery dates. Identify why your company, equipment and service is best and any other reasons why you are better than the competition to meet our requirements.

2.2.5 Equipment/System Features - II

Provide a detailed description of the availability, characteristics, capabilities, and limitations of each major feature or component of the system. Enumerate the system's maximum capacity for stations, trunks, terminals and any special features that are limited. Differentiate between standard and optional features. (If predictive dialing is an indicate, quote it as such). Describe the complexity of expanding the system.

Describe the floor and space loadings, environmental requirements in BTUs, power requirements in volts and amps AC, power consumption in KW hours, and equipment size for the proposed system, and for the proposed system only. Generic responses to this section may cause the bid to be considered noncompliant.

The successful bidder will provide complete answers to the following questions, in order, and specifically addressed by number and section.

1. Provide a system component block diagram showing how the various hardware and software components interface. Clearly detail whether the management system's applications processor is shared with call processing CPU. Also indicate if the autodialers are integrated into the "switch" or are connected as adjunct outboard devices.

2. Provide an explanation on how the called number list is loaded into the system. List all methods including compatibility with other manufacturers' equipment.

3. Explain how busy signals, ring-no-answers, and phone company intercept recordings are handled by the system.

4. Is the operating program RAM, ROM or PROM?

5. Is the generic configuration software of a volatile or non-volatile nature?

6. If the generic software is volatile, over what period of time is the program memory maintained before reloading is required?

7. Is the memory reloaded automatically or manually at the expiration of this period? Media used?

8. Following an 8 hour loss of power, when primary power is restored, how long will it take the system to recover? Can it recover completely without operator intervention.

9. List the type of telephones used by the system, their operation and their differences. The telephones function under a proprietary operating system or are they "2500" type compatible.

10. Describe the protective measures and devices that will be employed to protect the system and trunks from external power surges and transients.

11. What distance limitations are there for placement of the phones, and terminals from the applications processor?

12. Describe all types of SMDR offered for the system and the cost of each. What types of printers are required to support the feature? Provide a sample printout.

13. Will the Vendor provide System Management Training for the System Administrator? What level of access will the administrator be allowed?

14. Over what period of time will minor software based changes be provided at no charge after the system is placed in service? What is your definition of minor?

15. Will all software difficulties incurred during the first year of operation be corrected at no additional cost? (Those which are not induced by the System Administrator.)

16. Can stations and trunks be added while the system is operational? Do software moves and changes interfere with system operation?

17. As improvements to the operating software are released, will they be made at no charge? If a new operating system is introduced, will it be compatible with the system being proposed?

18. Will the software be guaranteed to be supported for the life of the system? (Minimum (10) ten years).

19. If possible, describe future enhancements in the system.

20. Please state the extent to which the proposed system is/is not compatible with Integrated Services Digital Network (ISDN).

21. What is the bidder company's or hardware manufacturer's migration plan with respect to ISDN?

22. What is the maximum number of agents in any one sales group on the proposed system?

23. What is the maximum number of operational concurrent sales positions supported by the proposed system?

24. Can agents take themselves out of service? Will their absence be recorded in any of the desired reports?

25. What is the maximum amount of connects the system can deliver on an hourly basis?

26. Provide copies of the various reports required by the specification in the appendix of your proposal.

27. Describe the capability of the system to provide the supervisor with the ability to perform software moves and changes of agents, station equipment, and trunks.

28. Can trunk status be verified via CRT or printer by the supervisor?

29. Does the system have inbound capabilities? If so, what is required to switch from outbound to inbound?

30. Does the system, as proposed, provide a redundant backup computer, or power supply(s)?

31. How many cabinets will be installed in the proposed system?

32. How many simultaneous call are possible with the system equipped as proposed?

33. What release of software will be installed?

34. Explain how the system administrator alternates between dialing modes. How is the predictive dialing mode monitored and controlled?

35. In the event of a power or system failure, explain how the agents can resort to a "manual mode" of operation.

36. How can the system administrator determine if one or more of the telephone company trunk lines are in-operative.

37. Does the system permit service observation for the supervisor. How does the feature work.

38. Explain the changes in hardware and/or software to change a regulator TSR station into a supervisor station for monitoring and control purposes.

39. Explain how your system handles different dialing lists for different compaigns. How does the least cost routing software integrate with these lists and campaigns.

40. Under which operating system does the applications software run.

41. Under what circumstance would the customer be permitted access to the applications software program code.

2.2. 6 Price - III

Provide detailed pricing to the fullest extent possible on the Equipment Specification configuration of this RFP. Purchase Price should be complete, including sales tax, installation and delivery costs, as required to meet the cutover specifications.

Provide as an option a schedule for a 5 year lease/purchase arrangement. Include conditions and interest applied.

Describe any pay for performance plans available.

Revisions in the prices quoted in your bid will be allowed only to the extent described herein. Therefore, your original bid should contain the lowest possible price.

The successful bidder will provide complete answers to the following questions, in order, specifically addressed by number and section, and also complete the Economic Analysis Specification Summary Sheet.

2.2.7 Service - IV

Describe your company's service policies associated with this system. Explain any maintenance that the Customer must provide. Explain the policy for insurance of the equipment. Specify responsibility for insurance prior to cutover and after cutover.

Describe in detail what is covered under the warranty and for how long.

Provide a proposed maintenance agreement for all options.

Specify frequency, cost, and type of traffic studies which will be provided. Also, outline the traffic information available on a demand basis for the system as proposed (manufacturer specification or brochure acceptable).

The successful bidder will provide complete answers to the following questions, in order, and specifically addressed by number and section.

1. How many comparable systems have been installed by the bidder? Where?

2. Approximately how many total station lines are in service on these systems?

3. How many local service people are trained and certified to service and maintain the type of system quoted?

4. What portion, if any, of the service installation work will be done on a subcontractor/third party basis? What is the name of the third party?

5. How many vehicles are available solely for service?

6. Can service personnel be contacted by pager? Or radio?

7. What is the guaranteed response time to a "Major System Failure" service call; i.e., the inability to make external calls?

8. What is the guaranteed response time to a "Minor System Failure" service call; i.e., a few station or trunk lines out of service?

9. During what hours of the day is service provided? Days of the week?

10. What is the estimated value of spare parts inventory in the local area which is directly applicable to the equipment being quoted herein?

11. What is the stated Mean Time Between Failure for the proposed system? Terminals? Are these figures calculated or measured?

12. Identify the service addresses from where technicians are based and would be dispatched to each Customer site.

13. Can client personnel be factory trained? Where? What is the cost? What courses are required?

14. What is the current hourly charge for T&M work?

15. What is the geographic area that you serve?

16. What is the guaranteed interval involved in relocating or installing a new TSR work station from the time the order is placed?

17. What is the guaranteed interval involved in performing software changes remotely from the time the order is placed?

18. Describe Maintenance Facilities to Remain On Site

19. System Environmental Considerations (Provide response for each site):

Power Consumption - KW Hours _____
Heat Generated - BTU _____
Temperature Range - Fahrenheit _____
Relative Humidity ____% ____%
Air Conditioning Req'd Tons Hr. _____
Current/Planned Equipment Room(s) Adequate? _____
Describe Changes Required _____

_____

_____

20. Number Terminal Cards Per Carrier/Shelf _____

21. Number Carriers/Shelves Quoted _____

22. Number Expansion Slots Available As Wired - Trunks _____

23. Number Expansion Slots Available As Wired - Terminals _____

24. Maximum System Simultaneous Calls _____

25. System Simultaneous Calls As Quoted _____

26. Trunk Groups Available _____

27. System Software Change/Revision Grace Period from Cut _____

28. Describe 2nd year maintenance options and client purchasable spare parts inventories _____

2.2.8 Training - V

On-site user training will be required. Training formats should take the form of both group and one-on-one personalized sessions. Describe completely how the initial training will be performed, who will provide ongoing training and the cost of such training.

2.2.9 Future Enhancements - VI

Provide anticipated future enhancements to the proposed system which might influence Gannett's purchasing decision.

2.2.10 Provide vendor history and financial data so that the Customer can have an appreciation of your company's ability to accomplish this project. Include number of years in business, other work or areas of activity, and interconnect experience.

Vendor must provide the latest financial statement.

2.2.11 Reference Data - VII

Provide information on previous systems you have installed which are similar to the one on which you are bidding. Contact names and addresses where those systems are installed are required.

SECTION III

THE SYSTEM

3.1 SYSTEM DESCRIPTION

The following system and station features are required to be supported by the system:

Automatic Route Selection*
Call Detailed Reporting Capability* (Historical and Current)
Call Transfer for verifications
DTMF Network Addressing (touchtone to trunks)
Manual System Failure Transfer and Automatic Power Failure Transfer*
Remote System Maintenance*
Release Line & Release Record
Customized User Defined Screens
Direct Host Interface (with DEC VAX)
Predictive Dialing Algorithm (dial ahead)*
Automatic Dialing*
Automatic Detection of Voice & Telephone Signals without Hold Messaging
Modular Architecture
Automatic Display of Company Specific Information on Operator Work Station
Screen Echo
Multiple Job Runs Simultaneously (maximum number)
Output on Tape and Hard Copy by Desired Sorts
Data Automatically Attributed to a Sales Call
Comparison Checks & Computations
Dispositions
Managing Callbacks
Multiple Concurrent Dialing Campaigns
Multiple Concurrent Dialing Modes
Multiple Supervisor Stations
Customized Scripting
Automatic Dialing Adjustment in Predictive Dialing Mode
Objection & Help Screens
Visual Display of Call-Run Stats on Supervisor Real Time Workstation
Smart Keys
Recording Call Results
Work Schedule
System Security and Pass Words
Script Printing
Telemarketing Sales Rep Production and Job History Report
Correcting Incorrect Answers

For those items indicated with an "*", the bidder shall provide a detailed discussion of function and use of the feature.

3.2 EQUIPMENT SPECIFICATIONS

The following is a list of hardware specifications which the proposed system(s) is required to support.

The "Installed" column is the estimated number of stations, terminals, or trunks to be placed in service at system cutover.

The "Equipped" column is the quantity of stations, terminals, or trunks which the system must support without the addition of circuit cards (instruments required).

The "Wired" column is the quantity of stations, terminals, or trunks which the system must support with the subsequent addition of circuit cards and instruments. Shelves and motherboards must be already present.

NOTES ON HARDWARE ITEMS:

Hardware	Installed	Equipped	Wired
TSR Work Stations	16	16	24
Headsets	18	18	--
Supervisor Work Stations	2	2	2
Outbound local lines	10	--	--
Southwestern Bell Feature Group A	30	--	--
Total Trunks	40	40	60

3.3 TELEMARKETING TO VAX INTERFACE

The system must provide a mechanism for sending address data to the host VAX computer to determine home delivery route information while the customer is on the line. The preferred method would be to emulate a DEC VT100 or VT220 terminal and communicate directly with the Collier-Jackson application system. An acceptable alternative would be to send a transaction to a process on the VAX which would return the routing status.

New starts may be transferred to the host in a batch made on standard 9-track magnetic tape with ASC11 character code on on 1600 or G250 bpi density.

Call lists will be transferred from the host via magnetic tape. The address data must be maintained in multiple fields for future host updates when sales are made. (Number, street name, direction, street type)

3.4 SYSTEM FEATURE CHECKLIST

Bidders shall submit the following completed form summarizing the features in the proposed system. Each item should be completed with one of the following codes:

Y - Yes, the feature is included in the proposed system.

OI - Yes, the Optional feature is included in the proposed system.

ON - Optional feature, not included in the proposed system. LIST THE PRICE TO INCLUDE THE OPTION.

N - No, the feature is not available in the proposed system.

System Features:

Automatic Call Distribution _____
Automatic Route Selection _____
Call Detailed Reporting Capability*(Historical/Current) _____
Call Transfer for verifications _____
Direct Outward Dialing _____
DTMF Network Addressing _____
Manual System Failure Transfer _____
Automatic Power Failure Transfer _____
Remote System Maintenance _____
Trunk Queuing _____
Release Line & Release Record _____
Customized User Defined Screens _____
Direct Host Interface (with DEC VAX) _____
Predictive Dialing Algorithm (dial ahead) _____
Automatic Dialing _____
Automatic Detection of Voice & Telephone Signals without Hold Messaging _____
Modular Architecture _____
T-1 Interface _____
Automatic Display of Company Specific Information on Operator Work Station _____
Remote and Off-Site Monitoring (voice and job stats) _____
Screen Echo _____
Multiple Job Runs Simultaneously (maximum number) _____
Output on Tape and Hard Copy by Desired Sorts _____
Data Automatically Attributed to a Sales Call _____
Quotas _____
Comparison Checks & Computations _____
Dispositions & Queues _____
Managing Callbacks _____
Multiple Concurrent Dialing Campaigns _____
Multiple Concurrent Daily Modes _____
Ability to Merge Projects into One Campaign _____
Multiple Supervisor Stations _____
Customized Scripting _____

Automatic Dialing Adjustment in Predictive Dialing Mode _____
Objection & Help Screens _____
Generating List of Numbers _____
Visual Display of Call-Run Stats on Supervisor Real Time Workstation _____
Time Zone Management _____
Smart Keys _____
Recording Call Results _____
Work Schedule _____
System Security and Pass Words _____
Script Printing _____
Telemarketing Sales Rep Production and Job History Report _____
Correcting Incorrect Answers _____
Bad Line Reporting _____
Supervisor Override/Barge-In _____
Controlling Restrictions
  Origination _____
  Outward _____
  Station to Station _____
  Trunk Groups _____
Direct Trunk Group Selection _____
Display Information
  Alarm Indication _____
  Station Busy Indication _____
  Trunk Group Busy Indication _____
Call Connect Indication _____
Call Hold _____
Call Transfer _____
Repeat Last Number Dialed _____
Headset Connectors _____
Supervisor Help Key _____

ECONOMIC ANALYSIS SPECIFICATION SUMMARY

(Parts & Labor) Fully Installed and Operational

	Pre-Cut	Post-Cut (12 Months)
Station Line Card		
8 Station (2500)	$_____	$_____
16 Station (2500)	_____	_____
Station Line Card		
8 Station (EKT)	_____	_____
16 Station (EKT)		
Terminal Port Card	_____	_____
Terminal (Work Station)	_____	_____
CO Trunks Card		
4 Trunks	_____	_____
8 Trunks		
Touch Tone Receiver/Register	_____	_____
Network Card	_____	_____
Card Carrier/Shelf	_____	_____
Single Line Telephone	_____	_____
Electronic Feature Set	_____	_____
Design Engineering Charge		_____
System Programming Charge		_____
Moves and Changes:		
Terminal and Single Line to Prewired Loc.	_____	_____
Electronic Key Set Prewired	_____	_____
Software Changes to Stations	_____	_____
Software Changes to System	_____	_____
Maintenance:	Cost	
First Year Software	$_____	
First Year Hardware	_____	
Second Year Software	_____	
Second Year Hardware	_____	

APPENDIX A

GANNETT STANDARD PURCHASE AGREEMENT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1211

September Term, 2016

FCC-80FR61129
FCC-15-72

Filed On: September 15, 2016 [1635849]

ACA International,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

Cavalry Portfolio Services, LLC, et al.,
Intervenors

Consolidated with 15-1218, 15-1244,
15-1290, 15-1304, 15-1306, 15-1311,
15-1313, 15-1314, 15-1440, 15-1441

ORDER

Upon consideration of the requests for judicial notice filed by pro se amicus curiae Charles R. Messer, it is

ORDERED that the requests be deferred pending further order of the court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1211 **September Term, 2017**

FCC-15-72
FCC-80FR61129

Filed On: March 16, 2018

ACA International,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

Cavalry Portfolio Services, LLC, et al.,
Intervenors

Consolidated with 15-1218, 15-1244,
15-1290, 15-1304, 15-1306, 15-1311,
15-1313, 15-1314, 15-1440, 15-1441

BEFORE: Srinivasan and Pillard, Circuit Judges; Edwards, Senior Circuit Judge

ORDER

Upon consideration of the requests for judicial notice filed by pro se amicus curiae Charles R. Messer, it is

ORDERED that the motion be dismissed as moot in light of the court's opinion issued herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

***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**

Congress passed the Telephone Consumer Protection Act (TCPA) to crack down on intrusive telemarketers and over-the-phone scam artists. It prohibits telemarketing in violation of our Do-Not-Call rules and prohibits any person from making calls using the tools that telemarketers had at their disposal in 1991. And the TCPA includes a three-prong enforcement mechanism for remedying violations: States, the FCC, and individual consumers can all take illegal telemarketers to court with statutory penalties starting at $500 per violation.[553]

Yet problems persist. Last year, the FCC received 96,288 complaints for violations of federal Do-Not-Call rules, more than any other category of complaints.[554] On June 10, the Senate Special Committee on Aging held a hearing on ending the epidemic of illegal telemarketing calls.[555] At that hearing, the Attorney General of Missouri testified that the *number one* complaint of his constituents is illegal telemarketing. His office alone received more than 52,000 telemarketing complaints in 2014.[556] And the Federal Trade Commission has reported that "increasingly, fraudsters, who often hide in other countries in an attempt to escape detection and punishment, make robocalls that harass and defraud consumers." The FTC noted that a single scam artist made over 8 million deceptive robocalls to Americans.[557]

The bottom line is this: Far too many Americans are receiving far too many fraudulent telemarketing calls. I know because my family and I get them on our cellphones during the day and on our home phones at night. It's a problem that's only getting worse.

And none of this should be news to the FCC. As I remarked in this very room back in January: "Unwanted telemarketing calls in violation of the National Do-Not-Call Registry are on the rise. In fact, such complaints made up almost 40 percent of consumer complaints in our latest report--and the number of complaints jumped dramatically last year from 19,303 in the first quarter to 34,425 in the third. Let's fix this problem."[558] What has the Commission done since then to enforce the rules? It has issued a single citation to a single potential violator of federal Do-Not-Call rules.[559] That's not going to solve the problem.

The courts haven't been better. The TCPA's private right of action and $500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the

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[553] 47 U.S.C. §§ 227(b)(3), 227(c)(5), 227(g), 503(b).

[554] *See* FCC, Quarterly Reports – Consumer Inquiries and Complaints, http://go.usa.gov/3VFkB (summing complaints for 2014 from the "Top Complaint Subjects" tables).

[555] Hearing before U.S. Senate Special Committee on Aging, "Ringing Off the Hook: Examining the Proliferation of Unwanted Calls" (June 10, 2015), *available at* http://go.usa.gov/3wVHY.

[556] Overview of Statement of Attorney General Chris Koster, Special Committee on Aging Panel Discussion, at 1 (June 10, 2015), *available at* http://go.usa.gov/3VFkQ.

[557] Federal Trade Commission, Prepared Statement on Combatting Illegal Robocalls: Initiatives to End the Epidemic, United States Senate Special Committee on Aging, at 4 (June 10, 2015), *available at* http://go.usa.gov/3VFkw.

[558] Statement of Commissioner Ajit Pai on FCC Consumer Help Center: A New Consumer Gateway (Jan. 29, 2015), *available at* http://go.usa.gov/3VF9k.

[559] *FreeEats.com Inc.*, File No. EB-TCD-13-00007717, Citation and Order, 30 FCC Rcd 2659 (Enf. Bur. 2015).

foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target. As Adonis Hoffman, former Chief of Staff to Commissioner Clyburn, recently wrote in *The Wall Street Journal*, a trial lawyer can collect about $2.4 million per suit by targeting American companies.[560] So it's no surprise the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.

Here's one example. The Los Angeles Lakers offered its fans a fun opportunity: Send a text-message to the team, and you might get to place a personalized message on the Jumbotron at the Staples Center. The Lakers acknowledged receipt of each text with a reply making clear that not every message would appear on the Jumbotron. The trial bar's response? A class-action lawsuit claiming that every automated text response was a violation of the TCPA.

Or here's another. TaxiMagic, a precursor to Uber, sent confirmatory text messages to customers who called for a cab. Each message indicated the cab's number and when the cab was dispatched to the customer's location. Did customers appreciate this service? Surely. But one plaintiffs' attorney saw instead an opportunity to profit, and a class-action lawsuit swiftly followed.

Some lawyers go to ridiculous lengths to generate new TCPA business. They have asked family members, friends, and significant others to download calling, voicemail, and texting apps in order to sue the companies behind each app. Others have bought cheap, prepaid wireless phones so they can sue any business that calls them by accident. One man in California even hired staff to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. Only after he was the lead plaintiff in over 600 lawsuits did the courts finally agree that he was a "vexatious litigant."

The common thread here is that in practice the TCPA has strayed far from its original purpose. And the FCC has the power to fix that. We could be taking aggressive enforcement action against those who violate the federal Do-Not-Call rules. We could be establishing a safe harbor so that carriers could block spoofed calls from overseas without fear of liability. And we could be shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers.

Instead, the *Order* takes the opposite tack. Rather than focus on the illegal telemarketing calls that consumers really care about, the *Order* twists the law's words even further to target useful communications between legitimate businesses and their customers.[561] This *Order* will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public.

I respectfully dissent.

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[560] Adonis Hoffman, "Sorry, Wrong Number, Now Pay Up," *The Wall Street Journal* (June 16, 2015), *available at* http://on.wsj.com/1GuwfMJ; *see also* John Eggerton, "FCC's Hoffman Looks Back, Moves Forward," *Broadcasting & Cable* (Mar. 23, 2015), *available at* http://bit.ly/1GEQYNR (quoting Hoffman as saying "This consumer protection, anti-telemarketing statute has been leveraged by aggressive plaintiffs' lawyers to line their pockets lavishly with millions, while consumers usually get peanuts. . . . I think the TCPA should be known by its real acronym 'Total Cash for Plaintiffs' Attorneys.' This is just one example where the public interest is not being advanced responsibly.").

[561] The *Order* notes that the "TCPA makes it unlawful for any business—'legitimate' or not—to make robocalls that do not comply with the provisions of the statute." *Order* at note 6. Of course it does; rare is the statute that limits its scope to only illegitimate businesses. The point is that *Order* redirects the TCPA's aim away from undesirable practices commonly used by telemarketers (the elimination of which benefits consumers) and toward desirable communications between businesses and consumers (litigation against which benefits trial lawyers). As the very name makes clear, the TCPA is a consumer protection statute, not a trial-lawyer protection statute.

I.

The *Order* dramatically expands the TCPA's reach. The TCPA prohibits a person from making "any call" to a mobile phone "using any automatic telephone dialing system,"[562] except in certain defined circumstances. The statute defines an "automatic telephone dialing system" 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."[563] As three separate petitions explain, trial lawyers have sought to apply this prohibition to equipment that *cannot* store or produce telephone numbers to be called using a random or sequential number generator and that *cannot* dial such numbers.[564]

That position is flatly inconsistent with the TCPA. The statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the "capacity" to do.[565] If a piece of equipment *cannot* do those two things—if it *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers—then how can it possibly meet the statutory definition? It cannot. To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not.

That's long been the FCC's approach. When the Commission first interpreted the statute in 1992, it concluded that the prohibitions on using automatic telephone dialing systems "clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services[], because the numbers called *are not generated in a random or sequential fashion*."[566] Indeed, in that same order, the Commission made clear that calls not "dialed using a random or sequential number generator" "are not autodialer calls."[567]

Confirming this interpretation (what some proponents call the "present capacity" or "present ability" approach[568]) is the statutory definition's use of the present tense and indicative mood. An

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[562] 47 U.S.C. § 227(b)(1)(A)(iii).

[563] 47 U.S.C. § 227(a)(1). A random number generates numbers randomly: 555-3455, 867-5309, etc. A sequential number generator generates numbers in sequence: 555-3455, 555-3456, etc.

[564] TextMe, Inc. Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (Mar. 18, 2014); Glide Talk, Ltd. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Oct. 28, 2013); Professional Association for Customer Engagement Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 (Oct. 18, 2013).

[565] *See* Webster's New International Dictionary at 396 (2nd ed. 1958) (defining "capacity" in relevant part to mean "power of receiving, containing, or absorbing," "extent of room or space," "ability," "capability," or "maximum output").

[566] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8776, para. 47 (1992) (emphasis added).

[567] *Id.* at 8773, para. 39.

[568] *See, e.g.*, Chamber Comments on PACE Petition at 5; CI Comments on Glide Petition at 3–4; Covington Comments on PACE Petition at 4–5; DIRECTV Comments on PACE Petition at 2–3; Fowler Comments on PACE Petition at 1; Glide Reply Comments on PACE Petition at 6; Global Comments on PACE Petition at 2; Internet Association Comments on TextMe Petition at 2–3; NCHER Reply Comments on PACE Petition at 2; Nicor Comments on PACE Petition at 7; Noble Systems Comments on Glide Petition at 4; Path Comments on Glide Petition at 22; Twilio Comments on Glide Petition at 13; YouMail Reply Comments on PACE Petition at 4; Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1–2 (June 11, 2015); Letter from Steven A. Augustino, Counsel to Five9, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1–2 (June 11, 2015); Letter from Monica S. Desai, Counsel to ACA International, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2–6 (June 11, 2015); Letter from Stephanie L. Podey, Vice President and Associate General Counsel, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2–3 (June 10, 2015); Letter from Jennifer D. Hindin, Counsel to Sirius XM Radio, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (June 8, 2015).

automatic telephone dialing system is "equipment which has the capacity" to dial random or sequential numbers,[569] meaning that system actually can dial such numbers at the time the call is made. Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as "equipment which has, has had, or could have the capacity."[570] But it didn't. We must respect the precise contours of the statute that Congress enacted.[571]

The *Order* reaches the contrary conclusion and holds that the term "automatic telephone dialing system" includes equipment that *cannot* presently store or produce telephone numbers to be called using a random or sequential number generator and that *cannot* presently dial such numbers. The apparent test is whether there is "more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition."[572] To put it kindly, the *Order*'s interpretation is a bit of a mess.

For one, it dramatically departs from the ordinary use of the term "capacity." Although the *Order* points to dictionaries to suggest that the word "capacity" means "the potential or suitability for holding, storing, or accommodating,"[573] those definitions in fact undermine the *Order*'s conclusion. No one would say that a one-gallon bucket has the "potential or suitability for holding, storing, or accommodating" two gallons of water just because it could be modified to hold two gallons. Nor would anyone argue that Lambeau Field in Green Bay, Wisconsin, which can seat 80,000 people, has the capacity (i.e., the "potential or suitability") to seat all 104,000 Green Bay residents just because it could be modified to have that much seating.[574] The question of a thing's capacity is whether it can do something presently, not whether it could be modified to do something later on.

For another, the *Order*'s expansive reading of the term "capacity" transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices. Think about it. It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers. So under the *Order*'s reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that's not a "rotary-dial phone"[575]—is an automatic telephone dialing system.[576]

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[569] 47 U.S.C. § 227(a)(1).

[570] *See, e.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."), *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option.").

[571] *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (explaining that "like any key term in an important piece of legislation, the [statutory provision in question] was the result of compromise between groups with marked but divergent interests in the contested provision" and that "[c]ourts and agencies must respect and give effect to these sorts of compromises"); *see also* John F. Manning, *Second-Generation Textualism*, 98 Cal. L. Rev. 1287, 1309–17 (2010) (arguing that respecting legislative compromise means that courts "must respect the level of generality at which the legislature expresses its policies").

[572] *Order* at para. 18.

[573] *See Order* at para. 19.

[574] The *Order* responds that the analogy is "inapt" because "modern dialing equipment can often be modified remotely without the effort and cost of adding physical space to an existing structure." *Order* at para. 16. This misses the point. If asked the seating capacity of Lambeau Field, no one would first study whether one could seat more than 80,000 "without the effort and cost of adding physical space" (perhaps by adding benches). Instead, they'd respond with how many the stadium could seat as is, without *any* modification.

[575] *Order* at para. 18.

[576] Indeed, the *Order* both acknowledges that smartphones are swept in under its reading, *Order* at para. 21, and explicitly sweeps in all Internet-to-phone text messages via email or via a web portal, *Order* at para. 111.

Such a reading of the statute subjects not just businesses and telemarketers but almost all our citizens to liability for everyday communications. One need not bother with the legislative history to realize that lawmakers did not intend to interfere with "expected or desired communications between businesses and their customers."[577] And one need not be versed in the canon of constitutional avoidance[578] to know that courts and administrative agencies normally eschew statutory interpretations that chill the speech of every American that owns a phone.[579] Yet the *Order*'s interpretation does precisely that.

Let me give just one example. Jim meets Jane at a party. The next day, he wants to follow up on their conversation and ask her out for lunch. He gets her cellphone number from a mutual friend and texts her from his smartphone. Pursuant to the *Order*, Jim has violated the TCPA, and Jane could sue him for $500 in statutory damages.

In response, the *Order* tells smartphone owners not to worry: "We have no evidence that friends, relatives, and companies with which consumers do business find those calls unwanted and take legal action against the calling consumer."[580] That's little solace. There is no evidence of smartphone class-action suits yet because no one has thought the TCPA prohibited the ordinary use of smartphones—at least not before now. Now that they do, the lawsuits are sure to follow.[581]

The *Order* then protests that interpreting the statute to mean what it says—that automatic telephone dialing equipment must be able to dial random or sequential numbers—"could render the TCPA's protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer."[582] But what the Commission deems defeat is in fact a victory for consumers. Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along.

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[577] Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 17 (1991) (*House Report*).

[578] *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing the canon as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

[579] *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). Notably, the constitutional question is not whether this interpretation of the TCPA would meet the less strict standard governing "commercial speech," *see Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562–63 (1980), because the TCPA restricts the making of "*any* call"—not just commercial calls—using an automatic telephone dialing system, 47 U.S.C. § 227(b)(1)(A) (emphasis added). Instead, the question is whether this interpretation is "narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). How could anyone answer that question in the affirmative given that the majority of Americans carry a smartphone (what the *Order* now labels an automatic telephone dialing system) in their pockets?

[580] *Order* at para. 21.

[581] This is underscored by the *Order* itself, which opens by emphasizing its position that the TCPA applies not "just [to] bad actors attempting to perpetrate frauds, but also [to] 'legitimate businesses' employing calling practices that consumers find objectionable," and that the FCC "[has] not viewed 'legitimate' businesses as somehow exempt from the statute, nor do we do so today." *Order* at note 6. Having opened the door wide, the agency cannot then stipulate restraint among those who would have a financial incentive to walk through it.

[582] *Order* at para. 20.

Next, the *Order* seeks refuge in Commission precedent, claiming that it has "already twice addressed the issue."[583] Not quite. Those two rulings both involved "predictive dialers," which the FCC described as having "the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers."[584] In 2003, the FCC explained that pairing automatic telephone dialing equipment "with predictive dialing software and a database of numbers" (and calling the combination a predictive dialer) would not exclude that equipment from the statutory prohibition.[585] And in 2008, the FCC found that using such equipment was still prohibited even "when it dials numbers from customer telephone lists" and not "randomly or sequentially."[586] The key issue in each decision was that the equipment *had the capacity* to dial random or sequential numbers at the time of the call, even if that capacity was not in fact used. Or, as the Commission phrased it later, it doesn't matter "whether or not the numbers called actually are randomly or sequentially generated or come from a calling list"[587]; if the equipment has the requisite capacity, it's an automatic telephone dialing system. That's exactly what the statute requires, and it's a far cry from the issue we confront here.

In short, we should read the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an automatic telephone dialing system because it does not have the capacity to store, produce, or dial a random or sequential telephone number. The *Order*'s contrary reading is sure to spark endless litigation, to the detriment of consumers and the legitimate businesses that want to communicate with them.

II.

The *Order* opens the floodgates to more TCPA litigation against good-faith actors for another reason as well. There is no TCPA liability if a caller obtains the "prior express consent of the called party."[588] Accordingly, many businesses only call consumers who have given their prior express consent. But consumers often give up their phone numbers and those numbers are then reassigned to other people. And when that happens, consumers don't preemptively contact every business to which they have given their number to inform them of the change. So even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned to a new person. After all, over 37 million telephone numbers are reassigned each year.[589] And no authoritative database—certainly not one maintained or overseen by the FCC, which has plenary authority over phone numbers—exists to "track all disconnected or reassigned telephone numbers" or "link[] all consumer names with their telephone numbers."[590] As four separate petitions explain, trial lawyers have sought to apply a strict liability

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[583] *Order* at para. 15.

[584] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14091, para. 131 (2003) (*2003 TCPA Order*).

[585] *See id.* at 14092, para. 133.

[586] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 566, para. 12 (2008) (*2008 TCPA Order*).

[587] *Implementation of the Middle Class Tax Relief and Job Creation Act of 2012; Establishment of a Public Safety Answering Point Do-Not-Call Registry*, CG Docket No. 12-129, Report and Order, 27 FCC Rcd 13615, 13629, para. 29 (2012).

[588] 47 U.S.C. § 227(b)(1)(A); *see also* 47 U.S.C. § 227(b)(1)(B) (only prohibiting calls made "without the prior express consent of the called party").

[589] Alyssa Abkowitz, "Wrong Number? Blame Companies' Recycling," *The Wall Street Journal* (Dec. 1, 2011), *available at* http://on.wsj.com/1Txmowl.

[590] Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (Feb. 5, 2015).

standard on good-faith actors—so even if a company has no reason to know that it's calling a wrong number, it'll be liable.[591]

Imposing strict liability is not usually how the law works. Indeed, the Commission has previously rejected an interpretation of the TCPA that would have imposed strict liability on callers after a consumer ports his number from a landline to a wireless phone.[592] Instead, the FCC endorsed the view that "[i]t is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible."[593] That logic should apply here.

Perhaps more to the point, the statute takes into account a caller's knowledge. Recall that the statute exempts calls "made with the prior express consent of the called party." Interpreting the term "called party" to mean the expected recipient—that is, the party expected to answer the call—is by far the best reading of the statute.[594]

Start with an example of ordinary usage. Your uncle writes down his telephone number for you and asks you to give him a call (what the TCPA terms "prior express consent"). If you dial that number, whom would you say you are calling? Your uncle, of course.

No one would say that the answer depends on who actually answers the phone. If your uncle's friend picks up, you'd say you were calling your uncle. So too if the phone is picked up by the passenger in your uncle's vehicle or your uncle's houseguest. Nor would your answer change if your uncle wrote down the wrong number, or he lost his phone and someone else answered it. Who is the called party in each and every one of these situations? It's obviously the person you expected to call (your uncle), not the person who actually answers the phone.

And no one would say that the answer depends on who actually pays for the service. If your uncle and aunt share a landline, you'd still say you were calling your uncle even if your aunt's name was on the bill. And if your uncle and aunt are on a wireless family plan, it's still his number you're dialing even if she's picking up the tab. In other words, it doesn't matter who the actual subscriber is; what matters when placing a call is whom you expect to answer.

Given ordinary usage, it should be no surprise that the FCC has implicitly endorsed this approach before. As the Commission wrote in 2008, "calls to wireless numbers provided by the called party . . . are made with the 'prior express consent' of the called party."[595] In other words, the called party is the person who consented to a call and the person who would ordinarily be expected to answer.

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[591] Consumer Bankers Association Petition for Declaratory Ruling, CG Docket No. 02-278 (Sept. 19, 2013); Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Aug. 15, 2014); Stage Stores, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (June 4, 2014); United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Jan. 16, 2014).

[592] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 19215, 19219, para. 9 (2004).

[593] *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000).

[594] Most commenters term this the "intended recipient" approach. *See, e.g.*, CBA Petition at 3; AFSA Comments on CBA Petition at 2; Nonprofits Comments on Rubio's Petition at 4, 6; Twitter Comments on Stage Petition at 9–11; Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (June 11, 2015); Letter from Monica S. Desai, Counsel to ACA International, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 6–7 (June 11, 2015); Letter from Tracy P. Marshall, Counsel to NRECA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (June 10, 2015); Letter from Monica S. Desai, Counsel to Abercrombie & Fitch Co. and Hollister Co., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1-4 (May 13, 2015).

[595] *2008 TCPA Order*, 23 FCC Rcd at 564, para. 9. The *Order* tries to play gotcha by claiming that the next sentence of that same ruling "directly supports our finding here." *Order* at note 264. Not quite. That sentence states that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably

(continued....)

The expected-recipient approach respects Congress's intent that the TCPA "balanc[e] the privacy rights of the individual and the commercial speech rights of the telemarketer."[596] On the one hand, the expected-recipient approach gives individuals the right to stop unwanted, wrong-number phone calls in the first instance. Once an individual informs a caller that he has the wrong number, the caller can no longer expect to reach the party that consented and no longer claim to have to consent to continue calling. And so the expected-recipient approach rightfully sanctions the bad actors—often debt collectors[597]—that repeatedly call after an individual has told them they've got the wrong number.

On the other hand, the expected-recipient approach gives legitimate businesses a clear and administrable means of complying with the law and engaging in "normal, expected or desired communications [with] their customers."[598] A good actor can refuse to call anyone without first securing an individual's consent, and a good actor can stop calling as soon as it learns that a number is wrong. Although taking these steps may not always be easy, they are an administrable means of complying with the statute and a way for any legitimate business to conduct its communications lawfully.

The expected-recipient approach also aligns the incentives of all parties to welcome legitimate calls and punish bad behavior. Businesses will have every incentive to secure prior express consent before making a call,[599] to ensure that a number is properly dialed,[600] and to stop calling as soon as they learn that a number is wrong because those actions shield businesses from strict liability. And the approach gives individuals the incentive to tell callers that they've got the wrong number, leading to fewer intrusive calls.

Confirming the expected-recipient interpretation is the canon of avoidance, which counsels that if one interpretation of a statute "would raise a multitude of constitutional problems, the other should prevail."[601] Here, the expected-recipient interpretation fosters useful and desirable communications

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evidences prior express consent by the cell phone subscriber regarding the debt." *2008 TCPA Order*, 23 FCC Rcd at 564, para. 9. Like the previous sentence in that order, its clear import is that a creditor may rely on a debtor's provision of a number to call that number (at least so long as the creditor can reasonably expect to reach the debtor at that number). But the *Order*'s alternative reading would eviscerate that reliance since the creditor would become liable if the debtor wrote down the wrong number or if the debtor was not the subscriber but instead the customary user. Such a result would be doubly strange since the *Order* itself claims that the TCPA "anticipates" a reliance interest on the part of callers, *Order* at note 313, and the *Order* itself rejects the notion that only the subscriber can consent to receiving calls, *Order* at para. 75.

[596] *House Report* at 10.

[597] *See, e.g.*, Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene Dortch, Secretary, FCC, CG Docket No. 02-278, at 9 (June 6, 2014) ("The Consumer Financial Protection Bureau's Annual Report for 2013 shows that 33% of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called."); NCLC *et al.* Comments on CBA Petition at 4; NCLC *et al.* Reply Comments on CBA Petition at 2.

[598] *House Report* at 17.

[599] Indeed, the incentive to secure prior express consent is greater than under a strict liability approach. Under the expected-recipient approach, consent is more valuable because it is a shield from liability for every call made in good faith. In contrast, strict liability reduces consent's value to one free call. Given the substantial cost of securing consent, more businesses are likely to spend the resources in an expected-recipient regime than under strict liability.

[600] Notably, the caller would be not be liable for calls where the consenting party wrote down a wrong number (since the caller would still expect to reach the consenting party by dialing the number given) but would be liable for its own mistakes (since the caller could not expect to reach the consenting party by dialing a number different than that given).

[601] *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005); *see id.* at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.").

between businesses and their customers—communications that consumers have expressly consented to receiving. In contrast, the *Order*'s strict liability interpretation chills such communications by threatening a company with crippling liability even if it reasonably expects to reach a consenting consumer when making a call. It is difficult to see how chilling desired communications in this manner is "narrowly tailored to serve the government's legitimate, content-neutral interests."[602]

In contrast, the *Order* rejects the expected-recipient approach and endorses a mishmash interpretation. According to the *Order*, callers are subject to strict liability after a single attempted call to number that's been reassigned to a new subscriber. Its interpretation is a veritable quagmire of self-contradiction and misplaced incentives.

For one, the *Order*'s chief legal theory does not hold water. The *Order* insists that the "called party" for purposes of consent must be the subscriber because the TCPA elsewhere prohibits certain calls to "any service for which the called party is charged for the call" and restricts exemptions to calls "that are not charged to the called party."[603] But Congress did not use the phrase "called party" consistently throughout the TCPA. For example, the TCPA requires the FCC to prescribe technical standards for "systems that are used to transmit any artificial or prerecorded voice message via telephone" and requires those systems to release a line "within 5 seconds of the time notification is transmitted to the system that *the called party has hung up*."[604] The Commission has never interpreted this requirement to only apply when the actual subscriber hangs up the phone, which would leave a rather large loophole in the TCPA's enforcement regime. And the *Order* does not appear to embrace this absurd theory either. Instead, the law remains what it always has, that the called party for purposes of this provision is whoever picks up the phone.

What is more, the *Order* does not even subscribe to its own legal theory on the question at hand. Not one paragraph after positing the theory, the *Order* reinterprets the term "called party" to include a number's customary user even if that customary user is not charged for the call because a caller "cannot reasonably be expected to divine that the consenting person is not the subscriber."[605] But the *Order* can't have it both ways: Either the legal theory is right and a customary user is not the called party, or the legal theory is wrong.

For another, the *Order*'s strict liability approach leads to perverse incentives. Most significantly, it creates a trap for law-abiding companies by giving litigious individuals a reason *not* to inform callers about a wrong number. This will certainly help trial lawyers update their business model for the digital age.

This isn't mere hypothesis; it is fact. Take the case of Rubio's, a West Coast restaurateur. Rubio's sends its quality-assurance team text messages about food safety issues, such as possible foodborne illnesses, to better ensure the health and safety of Rubio's customers. When one Rubio's employee lost his phone, his wireless carrier reassigned his number to someone else. Unaware of the reassignment, Rubio's kept sending texts to what it thought was an employee's phone number. The new subscriber never asked Rubio's to stop texting him—at least not until he sued Rubio's in court for nearly half a million dollars.

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[602] *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). As noted earlier, the constitutional question is not whether this interpretation of the TCPA would meet the less strict standard governing "commercial speech," *see Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562–63 (1980), because the TCPA restricts the making of "*any* call"—not just commercial calls—using an automatic telephone dialing system or a prerecorded or artificial voice, 47 U.S.C. §§ 227(b)(1)(A), 227(b)(1)(B) (emphasis added).

[603] *See Order* at para. 74; 47 U.S.C. §§ 227(b)(1)(A)(iii), 227(b)(2)(C).

[604] 47 U.S.C. § 227(d)(3)(B) (emphasis added).

[605] *Order* at para. 75.

The *Order*'s defenses are underwhelming. The *Order* points out that callers have the option of "manually dialing"[606] but forgets that dialing a number by hand still violates the TCPA if the equipment is an automatic telephone dialing system (which almost all equipment is under the *Order*).[607] The *Order* claims a one-call exemption for reassigned numbers would not "demand the impossible"[608] but then imposes liability on callers even if the new subscriber does not tell them that the number has been reassigned. The *Order* rejects a knowledge standard as "unworkable" because "once there is actual knowledge, callers may not honor do-not-call requests"[609] but ignores the fact that good actors cannot implement a one-call standard while bad actors won't honor that standard anyway. And the *Order* offers a laundry list of ways that a caller might determine that a number has been reassigned[610] but declines to adopt a safe harbor for good actors that carry out these practices and instead subjects them to wrong-number litigation.

Perhaps most shocking is the *Order*'s claim that the answer to wrong-number calls is for companies to turn the liability back on their own customers. "Nothing in the TCPA or our rules prevents parties from creating . . . an obligation for the person giving consent to notify the caller when the number has been relinquished," the *Order* states before noting that "the caller may wish to seek legal remedies for violation of the agreement."[611] In other words, companies can sue their customers. To be sure, this will create yet more work for the primary beneficiaries of the *Order*: attorneys. But nothing in the TCPA or our rules suggests that Congress intended the TCPA as a weapon to be used against consumers that forget to inform a business when they switch numbers.

In short, we should not inject a strict liability standard into the TCPA. Instead, we should interpret the words of the statute in the way most would and make clear that "prior express consent of the called party" means the prior express consent of the party the caller expects to reach. The *Order*'s contrary reading is sure to encourage yet more litigation, to the detriment of consumers and the legitimate businesses that want to communicate with them.

III.

The *Order* will also make it harder to enforce our prohibitions on illegal telemarketing. The TCPA's chief sponsor in the Senate, Fritz Hollings, once called indiscriminate telemarketing calls "the scourge of modern civilization."[612] So it is unsurprising that the TCPA places additional restrictions, such

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[606] *Order* at para. 84.

[607] *See Order* at note 70 (agreeing that any call made from an automatic telephone dialing system triggers liability, even if the "functionalities" making that equipment an automatic telephone dialing system are not actually used to make a particular call).

[608] *Order* at note 312. The authority the *Order* relies on for its one-call exemption is less than clear. At one point, it says it is interpreting the phrase "prior express consent." *Order* at note 300. Elsewhere, the *Order* says that the TCPA "anticipates" a caller's "reliance" on prior express consent, which it then interprets to mean one call's worth of reliance for reassigned numbers (and zero call's worth of reliance for wrong numbers). *Order* at note 312. Still elsewhere, the *Order* is more forthright that it is just "balancing the caller's interest in having an opportunity to learn of reassignment against the privacy interests of consumers to whom the number is reassigned," *Order* at para. 85, which is to admit that the *Order* is rewriting the TCPA, not interpreting it.

[609] *Order* at para. 88.

[610] *Order* at para. 86.

[611] *Order* at para. 86 & note 302.

[612] 137 Cong. Rec. S9874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

as compliance with federal Do-Not-Call rules,[613] on telemarketing calls whether they are "telephone solicitations" or "unsolicited advertisements."[614]

The *Order* undermines these protections with a special carve-out for the prison payphone industry. This dispensation lets that industry repeatedly make prerecorded voice calls to consumers in order to "set up a billing relationship" to pay for future services.[615] You might have no interest in receiving phone calls from those behind bars, but prison payphone providers will be able to robocall you anyway. This exemption opens the door to more actual robocalls—the same types of robotic calls that made "Rachel from Cardholder Services" infamous.

Indeed, the rationale provided by the Commission to justify this decision provides a roadmap for those seeking a lawful way to avoid our telemarketing rules. That's because we cannot exempt calls that "include or introduce an advertisement or constitute telemarketing."[616] So the *Order* must (and does) find that robocalling to "set up a billing relationship" is not advertising the "commercial availability . . . of . . . services" even though no one would agree to set up billing relationship to pay for a service that isn't commercially available.[617] And so the *Order* must (and does) find that robocalling to "set up a billing relationship" is not "encouraging the purchase . . . of . . . services" even though the entire point of the call is to get the consumer to agree to pay for services not yet performed.[618] What telemarketer will continue to hock goods the old-fashioned way when it can escape the TCPA's particular constraints on telemarketing by claiming to just set up billing relationships for services not yet performed? In other words, the one type of call consumers hate most—telemarketing calls—just got easier.[619]

I do not support creating such a loophole. In my view, apart from truly exigent circumstances, the FCC should not condone new robocalls to American consumers, period.

* * *

There is, of course, much more to the *Order*. Many of the decisions just reiterate well-known, settled law that I support. Yes, the TCPA applies to text messages as the Commission decided back in 2003.[620] Yes, consumers have the right to revoke prior express consent as we confirmed in 2012.[621] And

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[613] *See* 47 U.S.C. § 227(c).

[614] *See* 47 U.S.C. §§ 227(a)(4)–(5).

[615] *Order* at para. 42.

[616] *See* 47 C.F.R. § 64.1200(a)(3)(iii); *see also* 47 U.S.C. § 227(b)(2)(B)(ii) (prohibiting the FCC from exempting commercial calls that "include the transmission of any unsolicited advertisement").

[617] *Order* at para. 42; 47 C.F.R. § 64.1200(f)(1).

[618] *Order* at para. 42; 47 C.F.R. § 64.1200(f)(12).

[619] In responding that it has crafted a "narrow exemption" reflecting "unique factual and legal circumstances" in a "unique context," *Order* at para. 42 & note 178, the *Order* misses the point. Of course non-prison payphone telemarketers won't qualify for this particular exemption. But telemarketers can now avoid federal Do-Not-Call regulations because the *Order* narrows the definitions of telemarketing and advertising to exclude calls to "set up a billing relationship." That's not even a loophole—that's an invitation for more robocalls.

[620] *See Order* at para. 107; *2003 TCPA Order*, 18 FCC Rcd at 14115, para. 165.

[621] *See Order* at paras. 56–57; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991: SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391, 15397, para. 11 (2012).

yes, a consumer may opt-in to a carrier's call-blocking services—which has been the law of the land since at least 2007.[622] None of these are surprising outcomes, but none advance the ball.

As for the decisions that strike new ground, a few are good law—for instance, app providers won't face TCPA liability because they don't initiate calls placed by their users.[623] But most just shift the burden of compliance away from telemarketers and onto legitimate businesses, sometimes in absurd ways.

For instance, how could any retail business possibly comply with the provision that consumers can revoke consent orally "at an in-store bill payment location"?[624] Would they have to record and review every single conversation between customers and employees? Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? What exactly would constitute revocation in such circumstances? Could a customer simply walk up to a McDonald's counter, provide his contact information and a summary "I'm *not* lovin' it," and put the onus on the company? The prospects make one grimace.

In all, the *Order* is likely to leave the American consumer, not to mention American enterprise, worse off. That's not something anyone should support. I certainly don't and accordingly dissent.

[622] *See Order* at paras. 154, 160; *Just and Reasonable Rate for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11631–32, para. 6 & n.21 (Wireline Comp. Bur. 2007).

[623] *See Order* at paras. 32, 36.

[624] *Order* at para. 64.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 16-24077-CIV-GOODMAN
[CONSENT CASE]

ESTRELLITA REYES,

Plaintiff,

v.

BCA FINANCIAL SERVICES, INC.,

Defendant.
_____/

ORDER ON PLAINTIFF'S SUMMARY JUDGMENT MOTION

Plaintiff Estrellita Reyes, individually and on behalf of others similarly situated, has sued Defendant BCA Financial Services, Inc. for allegedly violating the Telephone Consumer Protection Act (the "TCPA"). The TCPA prohibits, among other things, the use of an "automatic telephone dialing system" ("ATDS") or an artificial or prerecorded voice to call a person's cellphone absent an emergency or prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA defines an ATDS as equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and then to "dial such numbers." § 227(a)(1)(A). Each TCPA violation results in damages of no less than $500, which may be trebled for willful or knowing violations. § 227(b)(3)(B)–(C).

BCA Financial collects debts for healthcare companies. To call suspected debtors, it uses a "predictive dialer" maintained by a company named Noble Systems. BCA Financial also accompanies some of those calls with an "interactive voice response" ("IVR"), which is an artificial or prerecorded voice that prompts the person called to indicate whether BCA Financial has called the right number. It goes something like: "If this is Jane Doe, press 1; 'if this is a wrong number,' press 2." [ECF No. 86-1, p. 6].

The phone numbers BCA Financial automatically dials are fed to the Noble system from a separate collection-software system called "FACS." FACS is loaded with phone numbers supplied by BCA Financial's healthcare clients. Those clients, in turn, received the numbers from the patients.

The parties agree that BCA Financial uses the Noble predictive dialer to autodial phone numbers without human intervention. But facts suggest that the Noble system is incapable of generating random or sequential phone numbers (and instead dials from a fixed set of numbers supplied by separate debt-collection software).

On six occasions, and twice using an IVR, BCA Financial called Reyes' cellphone using the Noble predictive dialer. It was not an emergency. Nor did BCA Financial have Reyes' prior express consent. It was trying to reach a different person who had written Reyes' cellphone number on a medical consent form. Five calls went unanswered, and on the sixth call, Reyes picked up the phone, heeded the IVR prompts, and pressed two -- for wrong number. BCA Financial did not call Reyes again after that.

Reyes now moves for summary judgment on her individual TCPA claim. [ECF No. 86]. She seeks $1,500 for each of the eight TCPA violations (i.e., treble damages for six autodialed calls and two IVR uses, the latter constituting separate TCPA violations). BCA Financial filed an opposition response, and Reyes filed a reply. [ECF Nos. 92; 95].

The parties do not dispute the basic facts of this case: BCA Financial used a predictive dialer and a prerecorded or artificial voice to call Reyes' cellphone several times without her prior express consent or an emergency. But the parties vigorously debate the question of whether the Noble predictive dialer is an ATDS. If an IVR prompted *that* question, then Reyes would press one for "yes" and BCA Financial would press two for "no."

BCA Financial argues that the Noble predictive dialer, although capable of automatically dialing a phone number without human intervention, cannot generate random or sequential phone numbers and is therefore not an ATDS. Reyes, on the other hand, argues that such capability (or lack of capability) is inconsequential. The debate touches on several orders from the Federal Communications Commission ("FCC"), whose final orders interpreting the TCPA are binding on this Court. The debate also concerns a recent D.C. Circuit opinion, *ACA International v. Federal Communications Commission*, 885 F.3d 687, 691 (D.C. Cir. 2018), which struck down the FCC's latest 2015 order interpreting the TCPA.

In addition, the parties raise two more issues. First, they disagree on whether

Reyes is entitled to treble damages. And second, BCA Financial challenges Reyes' ability to raise claims for TCPA violations involving an artificial or prerecorded voice, arguing that those claims were not pled in the Complaint.

As outlined in detail below, the Court **grants in part** and **denies in part** Reyes' summary judgment motion. First, the Court **grants** summary judgment in Reyes' favor on the ATDS issue because the Noble predictive dialer, as BCA Financial uses it, *is* an ATDS under the TCPA. Second, the Court **denies** summary judgment to Reyes on the treble-damages issue because, at least at this stage, the Court cannot determine whether BCA Financial acted willfully or knowingly. Third, the Court **denies** summary judgment to Reyes on the artificial-or-prerecorded-voice issue because her Complaint alleged only that BCA Financial violated the TCPA through the use of an ATDS, not an artificial or prerecorded voice, which is a *separate* statutory basis for relief that she should have raised in an amended pleading.

I. Background

A. *Procedural History*

Reyes brings a two-count Complaint against BCA Financial. [ECF No. 1]. The first count is for allegedly violating the TCPA. [ECF No. 1, p. 9]. The second count was for allegedly violating the Fair Debt Collection Practices Act, but Reyes later dismissed that claim. [ECF Nos. 1, pp. 9–10; 78]. Thus, the TCPA claim remains, and Reyes brings

it on behalf of herself and a proposed class of persons. [ECF No. 1].[1]

In support of her TCPA claim, Reyes alleged under her general allegations that BCA Financial "routinely violates 47 U.S.C. § 227(b)(1)(A)(iii) by using an automatic telephone dialing system to place non-emergency calls to numbers assigned to a cellular telephone service, without prior express consent." [ECF No. 1, p. 1 ¶ 2]. Reyes alleged that BCA Financial placed several calls to her cellphone when trying to collect a debt owed by someone else. [ECF No. 1, pp. 3–5 ¶¶ 16–22, 26, 28–29].

She then alleged that "in light of the frequency, number, nature, and character of the calls, Defendant placed its calls to Plaintiff's cellular telephone number by using an automatic telephone dialing system." [ECF No. 1, p. 3 ¶ 23]. Reyes then makes several more references to BCA Financial using an ATDS to call her and to call others, including proposed class members. [ECF No. 1, pp. 3–7 ¶¶ 24–25, 33, 37–38, 43, 52].

Reyes includes just one specific paragraph under her TCPA count, which reads: "Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii) by using an automatic telephone dialing system to place non-emergency calls to Plaintiff's cellular telephone number, absent prior express consent." [ECF No. 1, p. 9 ¶ 74].

In neither her general allegations nor her one specific allegation that concerns the

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1 Reyes has moved for class certification, and the issue is fully briefed. [ECF Nos. 59; 82; 94]. The summary judgment motion, however, deals only with her individual claim. Moreover, it concerns threshold issues that may impact the class, if it is certified. Therefore, the Court deems it prudent to rule on the summary judgment motion first.

TCPA does Reyes allege that BCA Financial called her using an artificial or prerecorded voice. The only reference to artificial or prerecorded voices is within her initial proposed TCPA class action definition, which read:

> *TCPA class*: All persons and entities throughout the United States (1) to whom BCA Financial Services, Inc., placed, or caused to be placed, calls (2) directed to a number assigned to a cellular telephone service, (3) by using an automatic telephone dialing system *or an artificial or prerecorded voice*, (4) within the four years preceding the date of this complaint, (5) absent prior express consent—in that the called party was not the intended recipient.

[ECF No. 1, p. 6 ¶ 44 (emphasis added)].

But in her class certification motion, Reyes edited her class action definition, **removing** any explicit reference to artificial or prerecorded voices:

> All persons and entities throughout the United States (1) to whom BCA Financial Services, Inc. placed more than one call, (2) directed to a number assigned to a cellular telephone service, but not assigned to the intended recipient of BCA Financial Services, Inc.'s calls, (3) *by using computer assisted dialing technology manufactured or designed by Noble*, (4) from September 23, 2012 through September 23, 2016.

[ECF No. 59, p. 1 (emphasis added)].

In the Complaint's wherefore clause, Reyes generally asks, among other things, that the Court declare that BCA Financial violated the TCPA. [ECF No. 1 p. 10].

BCA Financial answered the Complaint, raising several affirmative defenses. [ECF No. 8]. As its second affirmative defense, BCA Financial raised "prior express consent" and alleged that "Plaintiff's claims under the TCPA are not actionable as Defendant has established the requisite 'prior express consent' to communicate with the

Plaintiff at the telephone number provided as authorized by the Federal Communication Commission and the law of this Circuit." [ECF No. 8, p. 6]. But BCA Financial later withdrew that defense, explaining in a notice that, "[b]ased on information learned and developed through the course of discovery in this case, BCA withdraws without prejudice its Second Affirmative Defense as to the individual named . . . Reyes only, and not as to any purported class members." [ECF No. 74, p. 1].

B. *Undisputed Facts*

The parties do not dispute the majority of the underlying facts. The undisputed facts pertinent to the summary judgment motion are as follows: BCA Financial is a receivable management company operating in the medical billing industry for the recovery of past due debt. [ECF Nos. 86-1, p. 1; 93, p. 5]. In general, BCA Financial "receives accounts from its various medical or healthcare provider clients and calls the telephone number provided to the client by the patient." [ECF Nos. 93, p. 1; 96, p. 4]. BCA Financial "utilizes 'computer assisted dialing technology' manufactured and designed by Noble Systems to place telephone calls." [ECF Nos. 86-1, p. 4; 93, pp. 3, 6; 96, p. 5].

The Noble dialing system is a "predictive dialer." [ECF Nos. 86-1, pp. 4, 5; 93, p. 6]. And the Noble predictive dialer, as BCA Financial uses it, "automatically dials telephone numbers without human intervention." [ECF Nos. 86-1, p. 5; 93, p. 6].

Also, from April 2016 to September 2016, BCA Financial used the IVR capability

of its Noble predictive dialer to greet called persons with an automated prompt, asking them to press one key if the correct person had been called and a different key if the wrong number had been reached. [ECF Nos. 86-1, p. 4; 93, p. 6]. When an answering party selects the number indicating a wrong call during an IVR message, the FACS system automatically generates a "B" flag. [ECF Nos. 93, pp. 2–3; 96, p. 11]. And if an answering person receives a call from a BCA Financial agent and indicates that the agent has called the wrong number, the agent selects a "WN" code within the Noble system to show that this is a wrong number. [ECF Nos. 93, p. 4; 96, p. 6]. At the end of each business day, the Noble system communicates to the FACS system which numbers received a "WN" code, and the next day, the Noble system would have no phone numbers with a "B" code. [ECF Nos. 93, p. 4; 96, p. 6].

BCA Financial obtained Reyes' cellphone number from one of its clients, Barnabas Health, to collect a debt. [ECF Nos. 86-1, p. 1; 93, pp. 2, 5; 96, pp. 4, 7]. Barnabas gave BCA Financial the patient's biographical information, including the phone number, as part of the patient's medical consent documentation. [ECF Nos. 93, p. 2; 96, p. 4]. But the name Barnabas associated with the cellphone number was not Reyes'. [ECF Nos. 86-1, p. 2; 93, p. 5].

BCA Financial did not ask Barnabas if the number was accurate. [ECF Nos. 86-1, p. 1; 93, p. 5]. Barnabas did not know that the number belonged to someone other than the patient. [ECF Nos. 93, p. 5; 96, p. 7]. And so Barnabas did not inform BCA Financial

that the number belonged to someone else. [ECF Nos. 93, p. 5; 96, p. 7].

Using the Noble predictive dialer, BCA Financial placed six calls to Reyes' cellphone number. [ECF Nos. 86-1, p. 4; 93, pp. 2, 6; 96, p. 4]. Reyes did not answer the first five calls, and BCA Financial stopped calling Reyes after the sixth call. [ECF Nos. 93, p. 2; 96, p. 4]. BCA Financial never spoke to Reyes during any of the attempted communications. [ECF Nos. 93, p. 2; 96, p. 4].

BCA Financial did not intend to call Reyes but was trying to reach someone else to collect a debt. [ECF Nos. 86-1, p. 1; 93, p. 6]. Moreover, Reyes never had a business relationship with BCA Financial. [ECF Nos. 86-1, p. 2; 93, p. 5]. BCA Financial did not call Reyes' number for emergency purposes. [ECF Nos. 86-1, p. 3; 93, p. 6]. And Reyes did not provide BCA Financial with prior express consent to call her cellphone. [ECF Nos. 86-1, p. 2; 93, p. 5].

BCA Financial did not manually dial Reyes' number first to confirm the intended caller. [ECF Nos. 86-1, p. 3; 93, p. 6]. And it is not BCA Financial's policy and procedure to manually dial a telephone number before autodialing it to make sure that the person on the other end is the intended recipient. [ECF Nos. 86-1, p. 3; 93, p. 6].

At least two of BCA Financial's calls to Reyes "were accompanied by an artificial or prerecorded voice." [ECF Nos. 86-1, p. 5; 93, p. 6]. The IVR Reyes received gave a message to the following effect: "If this is Jane Doe, press 1; 'if this is a wrong number,' press 2." [ECF Nos. 86-1, p. 6; 93, p. 6]. Reyes pressed two. [ECF Nos. 86-1, p. 4; 93, p. 6].

BCA Financial maintains and makes available to all employees a TCPA Participant Guide. [ECF Nos. 86-1, p. 6; 93, p. 7]. It also trains its employees and instructs its representatives on how to notate each account and operate FACS. [ECF Nos. 93, p. 1; 96, p. 4]. And it provides training compliance for various state and federal consumer-protection laws, including the TCPA. [ECF Nos. 93, p. 1; 96, p. 4].

II. Analysis

A. *As used by BCA Financial, the Noble predictive dialer is an ATDS.*

The TCPA contains the following prohibition on the use of automated telephone equipment:

> It shall be unlawful for any person within the United States . . . :
>
> > (A) 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 or an artificial or prerecorded voice--
> >
> > .....
> >
> > (iii) 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, unless such call is made solely to collect a debt owed to or guaranteed by the United States[.]

§ 227(b)(1)(A)(iii).

The TCPA defines an "automatic telephone dialing system" 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." § 227(a)(1)(A)–

(B).

Besides authorizing injunctive relief, the TCPA grants a private right of action "to recover for actual monetary loss from . . . a [TCPA] violation, or to receive $500 in damages for each such violation, whichever is greater[.]" § 227(b)(3)(B). But "[i]f the court finds that the defendant willfully or knowingly violated [the TCPA], the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount[.]" § 227(b)(3).

The TCPA also mandates that the FCC "prescribe regulations to implement the requirements" of the TCPA. § 227(b)(2). The FCC has done so through a "series of rulemakings and declaratory rulings addressing the Act's reach." *ACA Int'l*, 885 F.3d at 693.

Pertinent here, in 2003, the FCC issued an order finding, among other things, "that a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014, 14,093 (2003). The 2003 FCC order defined a predictive dialer as "an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call." *Id.* at 14143 n. 31.

In the 2003 FCC order, the agency explained that "[m]ost industry members that

commented on the issue of autodialed calls argue that predictive dialers do not fall within the statutory definition of 'automatic telephone dialing system,' primarily because, they contend, predictive dialers do not dial numbers 'randomly or sequentially.'" *Id.* at 14090. Instead, according to those opponents, "predictive dialers store pre-programmed numbers or receive numbers from a computer database and then dial those numbers in a manner that maximizes efficiencies for call centers." *Id.* But consumers and consumer groups, on the other hand, argued "that to distinguish technologies on the basis of whether they dial randomly or use a database of numbers would create a distinction without a difference." *Id.*

The FCC sided with the consumers, finding "that a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress." *Id.* at 14093. As the FCC explained:

> The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers. As commenters point out, in most cases, telemarketers program the numbers to be called into the equipment, and the dialer calls them at a rate to ensure that when a consumer answers the phone, a sales person is available to take the call. The principal feature of predictive dialing software is a timing function, not number storage or generation.

Id. at 14091 (internal citations omitted).

The FCC continued that, although "[i]n the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily," since then "the evolution of the teleservices industry has progressed to the point where using lists

of numbers is far more cost effective." 18 FCC Rcd. at 14092. And yet "[t]he basic function of such equipment . . . has not changed–the *capacity* to dial numbers without human intervention." *Id.* The FCC further reasoned that "to exclude from these restrictions equipment that use predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result." *Id.* at 14092.

In 2008, the FCC issued a declaratory judgment that "affirm[ed] that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 566 (2008). The petitioner under that ruling argued, among other things, that the FCC's "determination that predictive dialers fall within the meaning of the statutory definition of 'automated telephone dialing equipment' was incorrect and conflicts with the language of the TCPA." *Id.* at 563. The petitioner argued that the FCC erred because "debt collectors use predictive dialers to call specific numbers provided by established customers." *Id.* at 566. Therefore, according to the petitioner, "a predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists." *Id.*

The FCC disagreed. It summarized and reaffirmed the findings of its 2003 order. *Id.* at 566. And it then added that the petitioner "raises no new information about

predictive dialers that warrants reconsideration of these findings." *Id.* at 566–67.

And in yet another order issued in 2012, the FCC again reiterated that the TCPA's definition of an ATDS "covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 15391, 15399 (2012).

The Eleventh Circuit has unequivocally held that final FCC orders are binding on district courts and that district courts "may not determine the validity of FCC orders, including by refusing to enforce an FCC interpretation[.]" *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015) (citing *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1114 (11th Cir. 2014)). That is because "[t]he Communications Act, which the TCPA amended, provides that any 'proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] must be brought under the Hobbs Act." *Id.* at 1306 (quoting 47 U.S.C. § 402(a)). And "[t]he Hobbs Act provides the federal courts of appeals with 'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity' of FCC orders." *Id.* at 1306–07 (quoting 28 U.S.C. § 2342(1)). Therefore, "[i]f the Hobbs Act applies, a district court must afford FCC final orders deference and may only consider whether the alleged action violates FCC rules or regulations." *Id.* at 1307.

By way of example, in *Mais*, the Eleventh Circuit reversed a district court decision that refused to apply the 2008 FCC Order's interpretation of prior express consent. 768 F.3d at 1113. Similar to the present case, the plaintiff in *Mais* owed a debt to a medical provider, and when he did not pay, the provider's billing company forwarded the account to a third-party "debt collector that uses a predictive dialer to dial telephone numbers through automated technology." *Id.* at 1114. The debt collector then called the plaintiff's cellphone several times using the predictive dialer and placed similar calls to putative class members. *Id.*

Before the district court considered certifying the class, the defendants had moved for summary judgment on their affirmative defense of prior express consent, arguing that the plaintiff's wife gave such consent when she wrote his cellphone number on the hospital admission forms. *Id.* at 1115. The defendants relied on a portion of the 2008 FCC order which stated that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." *Id.* (quoting 23 FCC Rcd. at 564).

The district court sided with the plaintiff, finding that "the Federal Communication Commission's interpretation of 'prior express consent' embodied in its 2008 rule was not entitled to any deference because it conflicted with the clear meaning of the TCPA." *Id.* But the Eleventh Circuit reversed the ruling, holding that the district

court had "exceeded its jurisdiction by declaring the 2008 FCC Ruling to be inconsistent with the TCPA." *Id.* at 1119. As part of its reasoning, the Eleventh Circuit explained that, "[w]hichever way it is done, to ask the district court to decide whether the regulations are valid violates the statutory requirements [of the Hobbs Act]." *Id.* at 1120.

On the other side of the coin, in *Murphy*, the Eleventh Circuit *affirmed* a dismissal order where the district court "concluded that it lacked jurisdiction under the Hobbs Act to consider [the] argument that the [FCC] incorrectly interpreted 'prior express consent' in its initial rulemaking following the TCPA's passage." 797 F.3d at 1305. After discussing the 2008 FCC order, which reiterated a 1992 FCC order on the same issue, the Eleventh Circuit held that the "argument that prior express consent must be given its plain language meaning fails because it requires rejection of the FCC's interpretation of prior express consent in FCC orders." *Id.* at 1307–08; *see also Lawrence v. Bayview Loan Servicing, LLC*, 666 F. App'x. 875, 878 (11th Cir. 2016) (relying on *Murphy* and *Mais* when explaining: "The meaning of prior express consent has been further clarified both by our own precedent and by the FCC, whose rulings have the force of law.").

Based on the FCC's orders on predictive dialers, several Florida district courts have found that predictive dialers qualify as ATDSs as a matter of law, and one of those cases even involved the Noble predictive dialer at issue here. *See Strauss v. CBE Grp., Inc.*, 173 F. Supp. 3d 1302, 1309 (S.D. Fla. 2016) (citing the 2003 FCC order for the proposition that "[a] predictive dialer constitutes an ATDS within the meaning of the

TCPA" and then holding that, as to some calls, the debt collector defendant was liable as a matter of law due to its use of the Noble predictive dialer); *see also Patterson v. Ally Fin., Inc.*, No. 3:16-CV-1592-J-32JBT, 2018 WL 647438, at *2 (M.D. Fla. Jan. 31, 2018) (on summary judgment, rejecting defendant's argument that its predictive-dialing system did not qualify as an ATDS, because the FCC "has consistently held that predictive-dialing technologies are equivalent to ATDSs"); *c.f. Legg v. Voice Media Grp., Inc.*, 20 F. Supp. 3d 1370, 1374 (S.D. Fla. 2014) (explaining that "the FCC determined that a predictive dialer is an ATDS" and also collecting cases that have interpreted more broadly "the FCC's reasoning that the defining characteristic of an ATDS is the 'capacity to dial numbers without human intervention'").

Of those cases, *Strauss* warrants further discussion because it involved different uses of the Noble predictive dialer at issue here. In the first instance, the defendant simply "placed its first two calls to Plaintiff using a Noble Systems Predictive Dialer[.]" *Strauss*, 173 F. Supp. 3d at 1307. But then the defendant "placed the remaining 24 calls to Plaintiff using [its] Manual Clicker Application ('MCA')," which required an agent to "manually initiate the call by clicking a computer mouse or pressing a keyboard enter key," and the "MCA then use[d] a Noble Systems device to connect the call to a telephone carriers' network." *Id.*

Based on the 2003 FCC order, the *Strauss* Court readily entered summary judgment in the plaintiff's favor as to the first two calls, reasoning as follows:

> Plaintiff has proven all of the necessary elements for his TCPA claims against [the defendant] for the calls placed on April 14 and April 15, 2014. As noted above, [the defendant] does not contest that it used the Noble Systems Predictive Dialer to place its first two calls to Plaintiff's cell phone. A predictive dialer is clearly an ATDS within the meaning of the TCPA. 2003 FCC Order ¶ 133. And there is no evidence to suggest that the calls were made with Plaintiff's consent or for emergency purposes.

Id. at 1309.

But as to the remaining 24 calls, the *Strauss* Court granted summary judgment in the **defendant's** favor. *Id.* at 1310–11. The parties had agreed "that the MCA, by itself, lacks the capability to dial predictively." *Id.* at 1310. And the defendant also "presented substantial evidence that human intervention is essential at the point and time that the number is dialed using the MCA and that the Noble equipment used does not have the functionalities required to classify it as a predictive dialer." *Id.* at 1310–11. Therefore, the Court concluded that the defendant did not use an ATDS for those 24 calls. *Id.* at 1311.

In 2015, the FCC issued another declaratory ruling that again touched on predictive dialers. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015). Earlier this year, the D.C. Circuit struck down portions of that 2015 order. Pertinent here, there were two appellate issues related to ATDSs: (1) *when* does a device have to have the "capacity" to perform the two functions that define an ATDS -- i.e., "(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers" -- and (2) what functions are needed precisely. *ACA Int'l*, 885 F.3d at 695.

Concerning the first issue, in its 2015 order, the FCC "rejected the arguments of various parties that a device's capacity must be measured solely by reference to its 'present capacity' or its 'current configuration' without any modification," and "instead determined that the 'capacity' of calling equipment 'includes its potential functionalities' or 'future possibility,' not just its 'present ability.'" *Id.* The D.C. Circuit set aside that finding, reasoning that the FCC "adopted an expansive interpretation of 'capacity' having the apparent effect of embracing any and all smartphones" because "[i]t is undisputed that essentially any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS." *Id.* at 696. Thus, the D.C. Circuit concluded, "[t]hat interpretation of the statute . . . is an unreasonably, and impermissibly, expansive one." *Id.* at 700.

Concerning the second issue, the D.C. Circuit first addressed the FCC's threshold argument that the Court "lack[ed] jurisdiction to entertain petitioners' challenge concerning the functions a device must be able to perform" in light of "declaratory rulings in 2003 and 2008 concluding that the statutory definition of an ATDS includes 'predictive dialers[.]'" *Id.* at 701. The D.C. Circuit disagreed, holding that "[w]hile the Commission's latest ruling purports to reaffirm the prior orders, that does not shield the agency's pertinent pronouncements from review." *Id.* The D.C. Circuit reasoned that "[t]he agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform," doubts which the FCC sought to clarify,

and therefore the Court had jurisdiction to review those clarifications. *Id.*

After its review, the D.C. Circuit concluded that the 2015 FCC order "falls short of reasoned decisionmaking in 'offer[ing] no meaningful guidance' to affected parties" because it chose differing, contrary interpretations or no interpretations at all as to ATDS functionality. *Id.* For instance, on the question of "whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed" or can simply "call from a database of telephone numbers generated elsewhere," the FCC was "of two minds on the issue." *Id.* at 701.

Specifically, the D.C. Circuit explained that "[w]hile the 2015 ruling indicates in certain places that a device must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer, it also suggests a competing view: that equipment can meet the statutory definition even if it lacks that capacity." *Id.* at 702. On that issue, the FCC reaffirmed its 2003 order, in which it had "made clear that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS." *Id.* at 702.

The D.C. Circuit did not reject one view or the other. Rather, it recognized that *either* interpretation might be permissible but disapproved the FCC's Janus-like approach:

> So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it

> lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). **It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.**

Id. at 702–03 (emphasis added).

In a different example of improper rulemaking, the D.C. Circuit noted that although the FCC had consistently stated "that the 'basic function' of an autodialer is the ability to 'dial numbers without human intervention,'" it "nevertheless declined a request to 'clarify[ ] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention.'" *Id.* at 703 (quoting 30 FCC Rcd. at 7973, 7975–76). The D.C. Circuit concluded that "[t]hose side-by-side propositions are difficult to square" -- i.e., that a device may be an autodialer even if it dials numbers with human intervention even though the "basic function of an autodialer is to dial numbers without human intervention." *Id.* at 703.

Summarizing its decision, the D.C. Circuit succinctly concluded that:

> the Commission's ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking. The order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the "capacity" to perform the necessary functions. We must therefore set aside the Commission's treatment of those matters.

Id. at 703.

At least one district court has since relied on the D.C. Circuit's opinion to find

that a predictive dialer is not an ATDS. *Marshall v. CBE Grp., Inc.*, No. 216CV02406GMNNJK, 2018 WL 1567852, at **4–8 (D. Nev. Mar. 30, 2018). The *Marshall* case involved the **same defendant** that was sued in *Strauss*: CBE Group, Inc. That fact is important because, as it did in *Strauss*, the defendant in *Marshall* used a manual clicker application or "MCA" in conjunction with a predictive dialer. That use of the MCA was key in the *Marshall* decision, as it was in the *Strauss* decision, and thus key to our analysis here.

The *Marshall* first reasoned that, in light of the D.C. Circuit opinion, it would "not stray from the statute's language which mandates that the focus be on whether the equipment has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." *Id.* at *5 (internal quotations omitted). The *Marshall* Court then rejected the plaintiff's argument that the FCC's previous orders defined predictive dialers as ATDSs, reasoning that "the D.C. Circuit explicitly rejected this 'expansive' interpretation of the TCPA, particularly as that definition pertained to systems that may not, in fact, have the capacity to dial randomly or sequentially." *Id.* at *7.

The plaintiff then argued "that notwithstanding the *ACA Int'l* ruling, the 2015 FCC Order, as well as the 2003 FCC Order, remains binding on this Court." *Id.* The *Marshall* Court, however, skirted that argument, reasoning instead that "[e]ven assuming, *arguendo*, that Plaintiff is correct, these interpretations have repeatedly

emphasized the significance of the 'human intervention' element to the ATDS analysis." *Id.* And on that front, the *Marshall* Court found "that the overwhelming weight of authority applying this element hold that 'point-and-click' dialing systems, paired with a cloud-based pass-through services, do not constitute an ATDS as a matter of law in light of the clicker agent's human intervention." *Id.* (citing, *inter alia, Strauss,* 173 F. Supp. 3d at 1310–11).

Moving to the case at hand, it is fair to say that before the 2015 FCC Order and the *ACA International* ruling, the Noble predictive dialer, as used by BCA Financial, is an ATDS as a matter of law. The FCC has consistently held that predictive dialers constitute ATDSs, their basic function being that they can dial persons without human intervention regardless of whether called numbers are generated randomly or sequentially or from a set list. The Eleventh Circuit has held that final FCC orders are binding on this Court, thus barring me from "refusing to enforce an FCC interpretation." *Murphy,* 797 F.3d at 1307; *see also Mais,* 768 F.3d at 1114. Based on that binding authority, other judges have found that predictive dialers constitute ATDSs, including the Noble predictive dialer at issue here. *See, e.g., Strauss,* 173 F. Supp. 3d at 1309.

In this case, it is undisputed that the Noble dialing system is a "predictive dialer." [ECF Nos. 86-1, pp. 4, 5; 93, p. 6]. And it is also undisputed that, regardless of how the numbers it dials are teed up, the Noble predictive dialer, as BCA Financial uses

it, "automatically dials telephone numbers without human intervention." [ECF Nos. 86-1, p. 5; 93, p. 6]. Thus, binding authority would compel me to find that the Noble predictive dialer is an ATDS. And I would have to reach that conclusion regardless of whether I agree with the FCC interpretation of the TCPA's statutory language. *See Johnson v. Yahoo!, Inc.*, No. 14 CV 2028, 2014 WL 7005102, at *3 (N.D. Ill. Dec. 11, 2014) ("[I]f tasked with applying only the statute's language, I would conclude that Yahoo!'s system does not constitute an ATDS because the PC2SMS service does not use a random or sequential number generator. Nevertheless, the TCPA and Hobbs Act bind me to the FCC's interpretation.").

Indeed, BCA Financial's opposition response, filed while *ACA International* was still pending, was, for all practical purposes, resigned to that conclusion. Here is how it put it:

> Since the statute's [the TCPA's] passage in 1991, the FCC has issued regulations **expanding the statutory definition of an ATDS**, and **this Court is bound by those rulings under the Hobbs Act**. In 2003, the FCC was asked to determine whether predictive dialers fell within the scope of the TCPA's definition of automatic dialers and it concluded that **they did because they retained the same basic function—namely, "the capacity to dial numbers without human intervention." The FCC affirmed this decision in 2008**. In 2012, the FCC again revisited the definition of an ATDS and explained that the Commission has emphasized that the term ATDS "covers any equipment that has the specified capacity to generate numbers and dial them without human intervention **regardless of whether the numbers called are randomly or sequentially generated or come from calling lists**."

[ECF No. 92, pp. 6–7].

BCA Financial then argued that "[a]lthough it may be factually undisputed and determined that the Noble Dialer is a 'predictive dialer', the issue of whether a 'predictive dialer' satisfied the TCPA's definition of an ATDS has yet to be conclusively determined by the D.C. Circuit in the *ACA International* case." [ECF No. 92, p. 9]. Thus, BCA Financial continued, "[i]n the absence of demonstrating that, as a matter of law, a predictive dialer is the legal equivalent of an ATDS, Plaintiff's Motion of Summary Judgment should be denied." [ECF No. 92, p. 9].

So the *ACA International* case has given the Court considerable pause. But the Court finds that the prior FCC Orders are still binding. Therefore, the *ACA International* case does not change the Court's conclusion on the ATDS issue.

To be sure, the Court does not challenge the notion that *ACA International* is binding authority, even though it comes from the D.C. Circuit and even though there is a split of authority on this issue. *See, e.g., Zuluaga v. Ocwen Loan Servicing, LLC*, No. 617CV335ORL37GJK, 2017 WL 1684127, at *1 (M.D. Fla. May 3, 2017) (noting the split in authority without making a decision). But the Court here adopts the "binding" position because, as one Court succinctly put it, "[w]here several challenges to a final order arise across several jurisdictions, those are consolidated in one circuit, whose decision becomes binding on all circuits." *Jacobs v. Ocwen Loan Servicing, LLC*, No. 16-62318-CIV, 2017 WL 1733855, at *1 (S.D. Fla. Apr. 14, 2017) (citing *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008)). The *ACA International* appeal was a consolidated appeal

from several Circuits, so its decision is binding here. *Id.*

Still, BCA Financial reads too much into *ACA International* when it concludes that the prior FCC orders can no longer be relied upon. The Court rejects that argument for several reasons. First, nowhere in the D.C. Circuit's opinion are the prior FCC orders overruled. Indeed, that would have been impossible given that the time to appeal those orders had long passed. And when addressing those prior orders, the D.C. Circuit merely said that it had jurisdiction to address the recent pronouncements and clarifications issued in 2015, not whether the 2003 and 2008 orders remained valid.

Second, when the D.C. Circuit said that the FCC had provided too expansive an interpretation of the TCPA, the D.C. Circuit was not referring to the prior or recent rulings equating predictive dialers to ATDSs. Rather, the D.C. Circuit was referring to the FCC's interpretation of the TCPA as encompassing devices that have both the present and *future* capacity to acts as ATDSs. That future- or potential-capacity interpretation was problematic because it had "the apparent effect of embracing any and all smartphones" given that "essentially any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS." *ACA Int'l*, 885 F.3d at 696.

In this case, however, there is no issue concerning the Noble predictive dialer's present versus future capacity. Although BCA Financial disputes that the Noble predictive dialer is an ATDS, the issue is not whether BCA Financial may *later* convert it

into an ATDS. That is not Reyes' theory of liability. Rather, it is that the Noble predictive dialer *is* an ATDS as *currently* configured and utilized. Therefore, the 2015 FCC order concerning present versus future capacity would not have had an impact in this case anyway, let alone *ACA International's* decision concerning that issue.

Third, although *ACA International's* rulings concerning a device's ability to generate random or sequential numbers and the need for human intervention hit closer to home, they still do not warrant denial of summary judgment in this case. To understand why, one must focus on not just what *ACA International* did but on what it did **not** do.

Specifically, what *ACA International* did was to reject the FCC's have-your-cake-and-eat-it-too approach to the questions before it. The FCC was of "two minds on the issue" of whether "a device must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer," or whether "that equipment can meet the statutory definition even if it lacks that capacity." *Id.* at 701–02. The FCC answered "yes" and "yes," i.e., it *must have* that ability and it *may lack* that ability, two conflicting answers that the D.C. Circuit could not accept because it provided no meaningful guidance.

But what *ACA International* did **not** do is endorse one interpretation over the other, even implicitly. *ACA International* did not say that a predictive dialer, or any other type of device, must be able to generate and dial random or sequential numbers to meet

the TCPA's definition of an autodialer. Nor did it say that a predictive dialer, or any other type of device, may lack that capacity. In fact, the D.C. Circuit said that "[i]t might be permissible for the Commission to adopt **either interpretation.**" *ACA Int'l*, 885 F.3d at 703 (emphasis added). But what the FCC could not do was "espouse both competing interpretations in the same order." *Id.*

In this case, BCA Financial is essentially urging the Court to adopt the first interpretation -- i.e., that a predictive dialer must be able to generate and dial random or sequential numbers to be an ATDS -- based on *ACA International's* authority. But *ACA International* does not compel that conclusion because it did not adopt that interpretation. At best, *ACA International* arguably calls into doubt the FCC's previous broad statements that predictive dialers are ATDSs regardless of whether they call randomly or from a sequential list or a set list of numbers. But perhaps not, given that the D.C. Circuit did not adopt one interpretation over the other. In any event, as already explained, absent an express rejection of the prior FCC orders, the Court cannot deviate from them and impose my own interpretation of the TCPA.

Concerning the human-intervention issue, the D.C. Circuit's rulings on that issue are of even lesser consequence. BCA Financial does not dispute that its Noble predictive dialer "automatically dials telephone numbers *without* human intervention." [ECF Nos. 86-1, p. 5; 93, p. 6 (emphasis added)]. Therefore, it is of no moment in this case whether a device may still qualify as an ATDS "even if it cannot dial numbers without human

intervention," which is what the FCC refused to clarify. *ACA Int'l*, 885 F.3d at 703.

In addition, the Court does not find that *Marshall* warrants a different result. The *Marshall* Court did not squarely address whether the 2003 FCC Order remained binding. *See Marshall*, 2018 WL 1567852, at *7. Instead, it reasoned that, even if it remained binding, the plaintiff would still lose because "the overwhelming weight of authority" that looked at point-and-click systems **before** *ACA International* found "that 'point-and-click' dialing systems, paired with a cloud-based pass-through services, do not constitute an ATDS as a matter of law in light of the clicker agent's human intervention." *Id.* (citing, *inter alia*, Strauss, 173 F. Supp. 3d at 1310–11).

Other district courts have indeed refused to equate predictive dialers to ATDSs where there was human intervention present in the making of calls, particularly through the use of point-and-click systems. *See Manuel v. NRA Grp., LLC*, 200 F. Supp. 3d 495, 501–02 (M.D. Pa. 2016), *aff'd*, 2018 WL 388622 (3d Cir. Jan. 12, 2018) (explaining that "'[p]oint and click' systems requiring users to manually initiate each call uniformly necessitate human involvement," while "dialers with the capacity to initiate multifarious calls prospectively, before agents become available, fall within the ambit of the [TCPA]," and then holding that the predictive dialer at issue **was** an ATDS because "uncontroverted evidence establishes that [it] is capable of placing calls without human intervention"); *Estrella v. Ltd Fin. Servs., LP*, No. 8:14-CV-2624-T-27AEP, 2015 WL 6742062, at *3 (M.D. Fla. Nov. 2, 2015) (granting summary judgment in the defendant's

favor where there was "no evidence that Defendant used . . . predictive dialing systems to place calls to Plaintiff[']s cellular phone," but instead, "the evidence demonstrates, at most, that the calls were placed manually with the use of human intervention through a 'point and click function'"); *see also Wilcox v. Green Tree Servicing, LLC*, No. 8:14-CV-1681-T-24, 2015 WL 2092671, at *5 (M.D. Fla. May 5, 2015) (denying summary judgment seeking to hold predictive dialer as an ATDS because "[t]he evidence before the Court is somewhat vague regarding how the phone calls are initiated," explaining that "[i]f the agent selects the number to be called, then the call would be made as a result of human intervention, and the call would not be made using an ATDS.").

The human element present in *Marshall* readily distinguishes that case from the present case. Here, BCA Financial has presented no facts or evidence that it used a manual-clicker application or point-and-click function or similar human-intermediary utility before placing a call using the Noble predictive dialer. Quite the opposite, BCA Financial **admits** that "the Noble dialer, as Defendant uses it, automatically dials telephone numbers **without human intervention**." [ECF Nos. 86-1, p. 5; 93, p. 6 (emphasis added)].

In sum, the Court **grants** summary judgment in Reyes' favor on the ATDS issue, finding that the Noble predictive dialer, as used by BCA Financial, was an ATDS as a matter of law.