

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

Request for Comments of the Interpretation of	)	
The TCPA in Light of <i>ACA Int'l v. FCC</i>	)	WC Docket No. 18-152 & 02-278
	)	FCC DA 18-493
	)	
	)	

**REPLY COMMENTS OF NOBLE SYSTEMS CORPORATION**

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Karl Koster  
Chief Intellectual and Regulatory Counsel  
Noble Systems Corporation  
1200 Ashwood Parkway  
Atlanta, GA 30338

## **SUMMARY**

Noble Systems, a provider of contact center premise-based software and cloud-based contact center solutions, submits these reply comments in response to comments submitted to the Commission’s Public Notice of Comments On Interpretation of the Telephone Consumer Protection Act (“Public Notice”) in light of the D.C. Circuit’s ruling in *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (“*ACA Int’l*”).

Various commentators have advocated a narrow interpretation of an automatic telephone dialing system (“ATDS”) by adhering to the statutory language. Specifically, many commentators advocate a “present capacity” interpretation of the statute, namely that the equipment has to presently incorporate the functions of a random/sequential number generator, which is used to generate a telephone number that is dialed. Many also advocate that these functions have to be used when making a call in order for that call to be considered as originating from an ATDS. Doing so comports with the plain language of the statute and adopting such an interpretation is not an abuse of discretion.

Many of these same commentators also advocate some form of “automatic” or “human intervention” aspect. However, the Commission should be cautious in adopting such a requirement in any regulation that interprets the definition of an ATDS. Either the interpretation of the ATDS definition will be unduly narrowed or unduly broadened, resulting in a clear deviation from the statutory language. As discussed herein, there is no persuasive justification for doing so in either case. Adopting such a requirement will likely be viewed as exceeding the Commission’s authority and would render the regulation susceptible to being overruled upon appeal.

Despite requests from some commentators to issue a broad definition of an ATDS, the Commission should recognize that any interpretation of the ATDS must be defensible as a reasoned agency decision capable of withstanding a *Chevron* challenge. Extending the statutory definition of an ATDS to achieve the goal of regulating equipment that would otherwise be outside the definition of the TCPA is not appropriate. As cautioned by the court in *ACA Int’l*, “Congress need not be presumed to have intended the term “automatic telephone dialing system” to maintain

its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time.”<sup>1</sup>

The Commission should also recognize that new technologies and tools are being developed, or that are presently available, that offer called parties additional solutions to address illegal or unwanted calls. The Commission should focus on encouraging deployment of these tools as they are more effective in addressing problems of unwanted calls than expanding the scope of the definition of an ATDS.

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<sup>1</sup> *ACA Int’l*, slip op. at 20.

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## **I. THE “HUMAN INTERVENTION” DILEMMA**

### **a. “Automatic” and “Human Intervention” – Two Sides of the Same Coin**

A number of commentators have advocated incorporating aspects of “automatic” and/or “human intervention” into the definition of an ATDS. A plausible definition of “automatic” means “without human intervention.” Thus, various comments either characterize an ATDS as having an “automatic” characteristic with respect to originating calls, or stated otherwise, characterize equipment as not being an ATDS if it requires “human intervention” to originate a call. These are seen as functionally similar; i.e., they are two sides of the same coin. As such, both raise the dilemma of how to incorporate the corresponding aspect into the definition of an ATDS. There are different ways how each concept can be incorporated into the definition of an ATDS.

### **b. The Basis for Incorporating “Automatic” is Questionable**

It should be noted that the arguments for incorporating these aspects into the ATDS definition are questionable. The arguments originate mainly from two primary sources. First, the word “automatic” in “automatic telephone dialing system” is presumed to imply certain characteristics of the defined equipment. This justification is weakened because Congress provided an explicit definition of an ATDS that did not include the word “automatic.” Presumably, the definition was carefully worded so that if Congress wanted to include this fundamental aspect in the definition of an ATDS, it would have done so. No one is arguing, nor would seriously contend, that aspects of “telephone” and “dialing” should also be implied in the definition of an ATDS because those words are also in the phrase being defined. Recall that when the TCPA statute was passed, present day voice over IP (“VoIP”) computer devices originating calls using session initiation protocol (“SIP”) signaling did not exist and would not have been considered a “telephone” that performed “dialing.” Thus, incorporating characteristics of “telephone” and “dialing” would exclude much of present day technology. As will be seen below, incorporating “automatic” into the definition winds up effectively rewriting the statute in a manner that is highly inconsistent with the policy goals of the TCPA.

The second basis for incorporating “automatic” is based on the language from *ACA Intn’l*. The Court said in that ruling:

For instance, the ruling states that the “basic function” of an autodialer is the ability to “dial numbers without human intervention.” 2015 Declaratory Ruling, 30 FCC Rcd. at 7973 ¶ 14; *id.* at 7975 ¶ 17. Prior orders had said the same. 2003 Order, 18 FCC Rcd. at 14,092 ¶ 132; 2008 Declaratory Ruling, 23 FCC Rcd. at 566 ¶ 13. That makes sense given that “auto” in autodialer—or, equivalently, “automatic” in “automatic telephone dialing system,” 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers.<sup>2</sup>

But, the context of this statement is important. The sentence immediately preceding this paragraph states “[t]he ruling is also unclear about whether certain other referenced capabilities are necessary for a dialer to qualify as an ATDS.”

Thus, starting this paragraph with “For instance” signals that the “basic function” of dialing numbers without human intervention was intended by the Court to illustrate one of the referenced capabilities that the ruling was unclear about. The Court next discusses the Commission’s stance when it “declined a request to clarify that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention.” In other words, the Court was citing examples of why the Commission’s Orders were unclear because the Commission was taking inconsistent positions on this aspect. The Court’s statement was not an endorsement that either position or interpretation was correct, just that they were inconsistent with each other. The fact the Court stated “...would seem to envision...” signals that the attribute of manual dialing should not be construed as a rigorous analysis on the issue of whether human intervention was intended or not in the definition of an ATDS.

As shown below, incorporating “automatic” or “human intervention” into the definition of an ATDS raises a number of fundamental questions as to why the Commission should incorporate them into the definition of an ATDS.

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<sup>2</sup> *ACA Int’l*, slip op. at 28.

**c. How Would the Statute be Rewritten if “Automatic” Were Incorporated?**

One proposal is that “automatic” should reflect how the equipment dials numbers. For example, this would reflect itself in the following rewrite of the definition shown below:

**Option 1:**

The term “automatic telephone dialing system” means 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 automatically dial such numbers.

Another option is to apply “automatic” to the first limitation as well, producing Option 2.

**Option 2:**

The term “automatic telephone dialing system” means equipment which has the capacity—

**(A)** to automatically store or produce telephone numbers to be called, using a random or sequential number generator; and

**(B)** to automatically dial such numbers.

Another option, not shown, is to incorporate “automatically” only in the first instance for “to store or produce,” but not the second instance for “to dial.” Since no one appears to be advocating for this interpretation, so it is not considered.

**d. Either Rewrite Results In Unduly Narrowing the Scope of an ATDS**

Many of the commentators advocating “automatic” or “human intervention” also advocate that an ATDS must presently have the statutorily defined functions of 1) a random or sequential number generator to store or produce telephone numbers, and 2) dial such numbers. It is generally accepted that this results in a comparatively narrow interpretation of the statutory definition of an ATDS. Many comments further advocate that these functions in an ATDS would have to be used when originating a call, in order for that call to have been considered as originating from an ATDS.

A result of this interpretation of the TCPA (i.e., without incorporating the word “automatic” in some form) is that the definition of an ATDS effectively addresses the problem of indiscriminately dialed calls. It does not matter whether the random or sequential number generator manually or automatically generates the number to be called. Further, it does not matter whether the equipment automatically or manually dials the number once it is generated. All calls from such equipment dialing telephone numbers generated using a random or sequential number generator are prohibited, regardless of the level of human intervention in generating the number or dialing the number.

Either rewrite of the ATDS definition (Option 1 or Option 2) results in further narrowing the scope of an ATDS. In the case of Option 1, the result is that equipment can be used that manually dials calls to random or sequentially generated numbers (because it does not “automatically dial” the numbers). So, should we conclude that equipment requiring a human “click of a mouse” to dial a random wireless number, hospital, police station, etc. is perfectly allowable? That makes no sense. That does not comport with the problem Congress intended to address with the TCPA. Why would Congress allow any equipment (whether manually or automatically dialed) call indiscriminate numbers such as police stations, hospitals, or wireless numbers? From a policy perspective, there is no compelling reason to adopt an interpretation that further narrows the existing ATDS definition.

Those advocating an interpretation that an ATDS must have the statutorily defined functions have not explained why this definition of an ATDS needs to be further narrowed. It is not very persuasive to argue that “it must have been intended to be narrowed” because of the phrase being defined includes the word “automatic.” Especially when no one is advocating applying this same rationale to further narrow the definition based on other words in the phrase being defined, such as “telephone” or “dialing.”

If Option 1 or Option 2 is adopted by the Commission, the Commission would likely have a difficult time justifying why the definition of an ATDS should be further narrowed. Doing so reads in a word into the definition that is not there, and doing so does not further the policies behind the TCPA. There is no compelling reason to further narrow the definition by adding “automatically” as identified in Option 1 or Option 2.



**e. Additional Interpretations**

When the word “automatic” is analyzed as written into the ATDS definition as shown in Option 1 and Option 2, it becomes apparent that the result may not be what was intended by the advocates of a “human intervention” test. Many advocates desire a clear test as to what is an ATDS, and the “human intervention” test is viewed as essentially an alternative, simpler, negative test of an ATDS. That is, equipment which requires human intervention to originate a call is not an ATDS. This could be argued as an alternative (and preferred) way of incorporating the impact of the word “automatic.”

This entails a different rewrite to the statutory definition of an ATDS. But before reviewing how these new definitions would read, the question must be asked about the statutorily defined functions (i.e., random/sequential number generator and dialing such numbers): Is equipment defined as an ATDS required to have a “present capacity” consisting of the two statutorily defined functions? Analyzing each case individually leads to some unusual results.

**i. Yes – an ATDS still must have the statutorily defined functions.**

In this case, it is presumed equipment that incorporates the two statutorily defined functions is an ATDS. This corresponds to the “present capacity” interpretation of the definition. Now, consider a dialer of some type, but which does not have the statutorily defined functions (i.e., equipment which does not have a random/sequential number generator to store/produce numbers, and/or the ability to dial them). According to the assumption above, such equipment is not an ATDS. If equipment does not have the required statutory functions, then that is the end of the analysis.

Next, we ask whether such equipment, which is not an ATDS, but which originates calls automatically, is somehow transformed into an ATDS because of how it originates calls? It should not be changed into an ATDS. According to the assumption, such equipment is not an ATDS, and automatically originating calls does not convert the equipment into an ATDS. (If so, then our starting assumption is incorrect, and that is addressed in the next case below.)

So, in this case, the human intervention test appears to be superseded by the definition of an ATDS – e.g., whether equipment has the statutorily defined functions. It is puzzling why an additional test is required to be added to the existing definition, if the additional test is not dispositive. The following rewritten definition of an ATDS is intended to cover this case, referred to as Option 3:

Option 3

The term “automatic telephone dialing system” means 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, **regardless of whether such equipment dials such numbers automatically or with human intervention.**

In other words, once a position is taken that equipment having the statutorily defined functions is an ATDS, then the question of whether the equipment is an ATDS is answered. So, the amended text in the statute is superfluous. Perhaps those advocating a “human intervention” aspect did not presume that an ATDS must have the statutorily defined functions? If so, then consider Option 4 below.

**ii. No – an ATDS is not require to have the statutorily defined functions.**

In this case, it is presumed equipment that incorporates the two statutorily defined functions is not necessarily an ATDS. In this case, consider a dialer which does not have the statutorily defined functions. With this assumption, the mere fact that equipment does not have these functions is not dispositive – the equipment still could be an ATDS.<sup>3</sup> So presumably, the test of whether the equipment is an ATDS is some other type of test, i.e., whether human intervention is involved or not in originating a call. This has the result of rewriting the definition as shown below, in Option 4

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<sup>3</sup> This raises the question of how to interpret the word “capacity” in the statute. Obviously, “present capacity” cannot be adopted, since the assumption is that the statutorily defined functions don’t have to be present. So, the only alternative this leaves is to adopt a “potential capacity” interpretation.

Option 4

The term “automatic telephone dialing system” means equipment which ~~has the~~ **may or may not have 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,

**but regardless of the presence of the above functions, equipment that originates calls automatically is an ATDS.**

It doesn’t matter whether the equipment has the functions or not, the only test is whether the equipment originates calls automatically. This definition essentially renders superfluous the text defining the statutorily defined functions. The implication is that the presence of human intervention is relevant to determining whether call originates from an ATDS; the presence of the statutorily defined functions is not relevant.

The result of either interpretation is a drastic rewrite of the statutory definition leading to an arbitrary result. In Option 3, once equipment is determined to be an ATDS, then it should not matter whether human intervention is involved or not. There is no reason to add superfluous text describing a human intervention test. Adding such text to the definition serves no purpose and is arbitrary.

In Option 4, the requirement of a human intervention test is not superfluous, but the existing text regarding the existing statutory functions is rendered superfluous. In fact, the added text “may or may not have the capacity” essentially equates to saying “a potential capacity.” So, advocating for a “human intervention” test is either superfluous (Option 3) or is accepting the “potential capacity” interpretation (Option 4).

Options 3 and 4 have the same problem as Options 1 and 2 in that the Commission is significantly rewriting the statutory definition, and must justify why doing so does not exceed its authority. While an agency has discretion in interpreting words of the statute, in the case of a definition, there is a distinction between interpreting the existing words and adding new phrases or rewriting the definition. When analyzing the various options in this light, i.e., in terms of

modifying the statutory definition, it becomes very clear what the scope of the changes involve by adopting a “human intervention” or “automatic” aspect.

In the past, the Commission adopted various functions and characteristics alongside the existing ATDS definition. This only could be supported by adopting a “potential capacity” interpretation of the language. Should the Commission adopt any further functional changes to the definition of an ATDS, it too would require implicitly adopting a “potential capacity” interpretation. In other words, accepting a “present capacity” interpretation precludes the ability to adopt these “human intervention” test corresponding to Options 3-4.

**f. There is a Solution in Interpreting the ATDS Definition**

The solution is clear – adopt a strict interpretation of an ATDS as written by adopting a “present capacity” interpretation. Essentially, Options 1-4 are not adopted, but rather the existing language of the definition is adopted. There is no need for the Commission to adopt a controversial modification of the statutory definition based on “human intervention” or “automatic.” By adopting a strict interpretation of an ATDS, there is little risk of exceeding the statutory authority given to the Commission in the TCPA. The Commission can hardly be charged with an abuse of discretion by adopting the plain meaning of the language as written. On the other hand, extending the written definition of the ATDS is rife with risks and will likely be seen as an abuse of discretion.

**II. The Impact of New Tools Available to the Called Party**

Some commentators advocate a broad definition of an ATDS in order so that the Commission can regulate all types of calls for automated equipment. As recognized in *ACA Int’l*, some predictive dialers do not incorporate a random or sequential number generator for generating and dialing telephone numbers. Presuming a “present capacity” interpretation is adopted for the ATDS statutory language, equipment lacking the statutorily defined functions would not meet the definition of an ATDS. Consequently, calls from these types of predictive dialers would not be viewed as calls originating from an ATDS. Some comments predict an explosion of unwanted calls if this occurs.

Past experience has shown that an overly broad regulatory definition of an ATDS in the TCPA has not stemmed the growth in illegal calls. There are more effective solutions available or being developed by industry to combat unwanted and illegal calls. First, the Commission authorized carriers to block certain types of calls in its 2015 Order<sup>4</sup>. The Commission authorized service providers to block certain types of calls to subscribers, based on the subscriber “opting-in” to the provider’s call blocking service. These services are now being deployed and are purportedly blocking many unwanted or illegal calls. Carriers have conveyed that such call services will be refined and expanded. Thus, carriers are developing innovating approaches to allow called parties to screen such calls. This has placed more control in the called party to define which calls they receive.

Second, independent of the Commission’s order allowing calls to be blocked, wireless and wireline carriers are deploying call labeling services that label calls to provide greater control to the called party as to whether they want to receive the call or not. These services can purportedly quickly identify calls from scammers or telemarketers. Called parties can select from a wide number of mobile applications to further screen such calls. Based on encouragement and regulatory action by the Commission, industry has responded and developed further tools to address the issue of unwanted or illegal calls.

The prediction of an explosion of calls to wireless numbers ignores the development and application of these new tools. Wireless users today, most of which have smart phones, can subscribe to a wireless network service or download one of the over 500 mobile applications to address unwanted calls. Most of these applications have been made available only in the last two or three years.

Third, as commonly acknowledged, scammers hide by “spoofing” someone else’s telephone number. Essentially, scammers and illegal telemarketers can remain anonymous by falsifying the calling party telephone number. By remaining anonymous, callers can ignore the do-not-call list with impunity and originate scams. These scammers can only operate because of the relative difficulty in tracking them down when they use a false calling party number. Legitimate call originators only use calling party numbers they are authorized to use. However,

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<sup>4</sup>Declaratory Ruling and Order, FCC 15-72, released July 10, 2015 (“2015 Order”).

even legitimate businesses are unfairly accused of originating scam or illegal calls when their numbers are illegally spoofed by scammers. The solution to this problem is not addressed by broadening the definition of an ATDS; it is addressed by a technology known as SHAKEN and STIR. This technology was designed to attest to the authenticity of the calling party number and to address the problem of illegal spoofing.

SHAKEN and STIR technology was designed to address a root issue surrounding so many illegal and unwanted calls – the caller can effectively remain anonymous because of illegal spoofing. SHAKEN and STIR will spur further service development by carriers and analytics companies. Called parties can be expected to be offered additional services that will block or label unattested calls. Those who are illegally spoofing telephone numbers will be readily identified to regulators, called parties, and law enforcement. This will be more effective at reducing unwanted or illegal robocalls than broadening the scope of the definition of an ATDS. As noted in other proceedings, there has been general support by the industry in deploying SHAKEN and STIR technology. The Commission should encourage development of this tool that was designed to address the problem of illegal calls, rather than focusing on tweaking the TCPA regulations, which cannot effectively address that problem.

The Commission has stated publicly at a Congressional hearing that it does not need further authority to prosecute bad actors in light of the *ACA Int'l* decision. Ms. Harold, Chief of the Commission's enforcement activities, responded to a question from Senator Thune as to whether additional legal authorities were required by the Commission to combat robocalls in light of the *ACA International* decision and responded by stating: "We have two good grounds to do that. Almost all such robocallers use pre-recorded messages, which is part of the TCPA and was not affected by the recent court decision. They also spoof, and that's a complete different statute."<sup>5</sup>

The time has come for the Commission to narrowly interpret the definition of an ATDS in the TCPA, and move forward on development of other, more appropriate tools to address problems of unwanted or illegal calls.

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<sup>5</sup> See, e.g., <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=E0EB17D2-A895-40B4-B385-F94EA2716957> at approximately 1:56:30.

### III. CONCLUSION

The Commission should adopt a strict statutory based interpretation of an ATDS as defined in the TCPA statute based on a “present capacity” interpretation. This means that equipment is considered an ATDS only if has the statutorily defined functions of a random or sequential number generator capable of generating a telephone number and the ability to dial that number. No further functions or requirements should be incorporated into the definition of an ATDS.

Attempting to incorporate aspects of “automatic” or “human intervention” will wind up unnecessarily broadening or narrowing the scope of an ATDS. Further, any such modification of the definition to incorporate a “human intervention” test will likely not pass scrutiny should the order be appealed.

While a result of adopting a strict statutory interpretation of an ATDS means there are some calls which will not be regulated under the TCPA by the Commission (just as there were some calls prior to *ACA Int'l* that were not regulated under the TCPA), the development of various call blocking and call screening solutions will mitigate such unwanted, but legal calls. Further, the development of SHAKEN and STIR technologies will prove to be a more effective tool for addressing the problem of illegal calls which proliferate because of call spoofing. The Commission should focus on the development of such tools as opposed to attempting to expand the scope of an ATDS under the TCPA.

Respectfully submitted on June 27, 2018,

/Karl Koster/

Karl Koster,  
Chief IP and Regulatory Counsel  
Noble Systems Corporation  
1200 Ashwood Parkway  
Atlanta, GA 30338  
(404) 851-1331 (x1397)