

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

In the Matter of)
) **CG Docket No. 02-278**
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

**Professional Association for Customer Engagement's
Petition for Reconsideration**

Filed July 11, 2012

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I. Introduction and Summary

The Professional Association for Customer Engagement (PACE), formerly the American Teleservices Association (ATA), is the only non-profit trade organization dedicated exclusively to the advancement of companies that utilize contact centers as an integral channel of operations. PACE members include companies with inbound or outbound contact centers, users of teleservices, trainers, consultants, and equipment suppliers who initiate, facilitate, and generate telephone, Internet, and e-mail sales, chat service, and support.

Founded in 1983, PACE represents more than 4,000 contact centers that account for over 1.8 million professionals worldwide. Contact centers offer traditional and interactive services that support the e-commerce revolution, provide specialized customer service for Fortune 500 companies, and generate annual sales of more than \$900 billion.

Pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 553(e), and the Federal Communications Commission's (FCC's or Commission's) Rules of Practice and Procedure, 47 C.F.R. § 1.3, PACE files this Petition for Reconsideration (Petition). Through this Petition, PACE respectfully requests the Commission to modify its final Telephone Consumer Protection Act (TCPA)¹ regulation amendments published in the Federal Register on June 11, 2012² as follows: (1) delete the requirement for sellers to provide an automated, interactive opt-out mechanism during abandoned call messages (Abandoned Call Opt-Out Provision),³ which was not included in the proposed rule and/or subject to public commentary; (2) narrow and/or qualify its previous holding that a predictive dialer unequivocally constitutes an automatic telephone dialing system (ATDS) by acknowledging that a predictive dialer only constitutes an ATDS if it

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified* at 47 U.S.C. §227.

² 77 Fed. Reg. 34233.

³ *See Id.* at 34247, which re-designates 47 C.F.R. § 64.1200(a)(6) as 47 C.F.R. §64.1200(a)(7) and adds the automated opt-out mechanism requirement.

has the capacity to store or produce telephone numbers to be called using a "random or sequential number generator" (RSNG); and (4) providing a definition for the term RSNG.⁴

II. Adoption of the Abandoned Call Opt-Out Provision Violates the APA and is Against Public Policy

The Abandoned Call Opt-Out Provision should be revoked because its adoption violates the procedural requirements outlined in the APA and the Commission's rules, hinders the Commission's goal of harmonizing its regulations with the Federal Trade Commission's (FTC's) Telemarketing Sales Rule (TSR), unduly burdens commerce, negatively impacts jobs and the industry's job creation efforts and provides little to no consumer protection benefits while deterring current business practices that protect consumers and business alike.

A. The Commission Did Not Provide Notice of or an Opportunity to Comment on the Abandoned Call Opt-Out Provision

The adoption of the Abandoned Call Opt-Out Provision without providing notice of the Commission's intent to include this requirement in its amended TCPA regulations and/or providing persons with an opportunity to comment on the same violates the APA and the Commission's own Rules of Practice and Procedure.⁵ On March 22, 2010, the Commission issued a notice of proposed rulemaking (NPRM) and solicited "comment on proposed revisions to its rules under the [TCPA] that would harmonize those rules with the Federal Trade Commission's (FTC's) recently amended Telemarketing Sales Rule."⁶ Proposed changes included the following requirements: (1) must obtain prior express written consent before making calls to emergency and/or cellular telephone numbers using an ATDS or a prerecorded message; (2) must obtain prior express written consent before making calls to residential numbers using a prerecorded message; (3) must provide an automated opt-out mechanism for

⁴ See definitions of ATDS in 47 U.S.C. § 227(a)(1) and 47 C.F.R. § 64.1200(f)(1), which contain the term RSNG.

⁵ See 5 U.S.C. §§553(b)-(c); 47 C.F.R. §§1.412(a), 1.415(a).

⁶ 75 Fed. Reg. at 13471.

prerecorded *telemarketing* messages; and (4) must measure call abandonment rates over a 30-day period, per marketing campaign.⁷ Notably absent from the proposed rules is a requirement to provide an automated opt-out mechanism during abandoned call messages.⁸

The APA requires federal agencies to publish notice of proposed rulemaking in the Federal Register and provide "interested persons an opportunity to participate in the rule making through submission of [comments]."⁹ Similarly, the Commission's Rules of Practice and Procedure require it to provide "prior notice of proposed rulemaking" and "afford interested persons an opportunity to participate in the rulemaking proceeding through submission of [comments]."¹⁰ The Commission did not meet these requirements when it adopted the Abandoned Call Opt-Out Provision because the NPRM did not include this requirement and no other notice regarding the provision was provided prior to the Commission's approval of the Rule amendments in its February 15, 2012 Report and Order (2012 Order).¹¹ Because interested persons were not provided an opportunity to comment on the provision's requirements and/or effects, the Abandoned Call Opt-Out Provision is invalid and must be revoked.

B. The Abandoned Call Opt-Out Provision Impairs the Commission's Goal of Harmonizing its Rules with FTC Rules

In addition to the issues of procedural non-compliance discussed above, the Call Abandonment Opt-Out Provision should be revoked because it conflicts with provisions of the FTC's TSR. The Commission expressly stated that the purpose of the amendments made in the 2012 Order was to harmonize such rules with the TSR in accordance with the Do-Not-Call Implementation Act (DNCIA), which requires the Commission to consult and coordinate with

⁷ *Id.* at 13481-82, amending 47 C.F.R. §§ 64.1200(a)(1)-(2), (a)(6) and (b).

⁸ *Id.*

⁹ 5 U.S.C. §§ 553(b)-(c).

¹⁰ 47 C.F.R. §§ 1.412(a), 1.415(a).

¹¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 12-21 (2012).

the FTC to maximize consistency between the agencies' regulations.¹² Although the TSR requires persons that send prerecorded messages for *telemarketing or charitable solicitation purposes* to provide an automated opt-out mechanism,¹³ it does not require an automated opt-out mechanism to be provided when an abandoned call message is played.¹⁴ Rather, abandoned call messages must merely state the name and telephone number of the seller on whose behalf the call was placed.¹⁵ Consumers may opt-out of receiving future calls simply by calling the number provided during the message and making a do not call (DNC) request. The requirement to provide an automated opt-out mechanism during abandoned call messages; therefore, defeats the Commission's stated goal of harmonizing FCC and FTC regulations.

C. The Abandoned Call Opt-Out Provision is Unduly Burdensome

By adopting the Abandoned Call Opt-Out Provision without providing an opportunity for industry commentary, the Commission unknowingly imposed requirements that unduly burden commerce. In its 2012 Order, the Commission cited the FTC's Statement of Basis and Purpose (SBP) for the propositions that implementation of the opt-out mechanism would not be "especially burdensome or pose extraordinary technical issues" and "industry comments uniformly represent that interactive technology is affordable and widely available."¹⁶ While this may or may not be true with respect to automated opt-out mechanisms provided during prerecorded telemarketing messages, it is certainly not true with respect to the provision of

¹² See Fed. Reg. at 13481 ("In this document, the Commission invites comment on proposed revisions to its rules under the [TCPA] that would harmonize those rules with the [FTC's] recently amended [TSR]."); 2012 Report and Order, FCC 12-21, at ¶ 1 ("The protections we adopt will protect consumers from unwanted autodialed or prerecorded telemarketing calls, also known as 'telemarketing robo calls,' and maximize consistency with the [FTC's] analogous [TSR], as contemplated by the Do-Not-Call Implementation Act (DNCIA)").

¹³ 16 C.F.R. §310.4(b)(1)(v)(B)(ii)(A)

¹⁴ *Id.* at §310.4(b)(4).

¹⁵ *Id.* at §310.4(b)(4)(iii).

¹⁶ 2012 Report and Order, FCC 12-21, at 28-29, Para. 66, 69 (citing the FTC's Statement of Basis and Purpose, 73 Fed. Reg. at 51185, which provides as follows "The requirement that sellers and telemarketers provide an automated voice and/or keypress-activated interactive opt-out mechanism is consistent with industry comments representing that interactive technology is now affordable and in widespread use.").

automated opt-out mechanisms during abandoned calls. Indeed, the implementation of automated opt-out mechanism for abandoned call messages is cost prohibitive for numerous entities. A recent survey of PACE members indicates that the majority of companies' dialers, as currently configured, do not have the capability to provide an automated opt-out mechanism for abandoned call messages. For these companies, implementation expenses involved with providing an automated opt-out mechanism for abandoned calls will include additional costs associated with new equipment, telecommunications service, data configuration, data processing and/or routing scheme creation. Implementation costs were estimated at approximately \$85,000 for the initial purchase and configuration at approximately \$15,000 to \$20,000 per year in ongoing costs. Under the Commission's amended Rules, as currently interpreted by the Commission, these costs must be incurred by all entities that utilize a predictive dialer, not just entities that utilize prerecorded messages. For many small businesses, these costs are prohibitive and will effectively prevent them from using a predictive dialer. The Commission could not have properly considered these issues because, as described above, the industry was not provided with notice or an opportunity to comment on the unintended consequences associated with adoption of the Abandoned Call Opt-Out Provision.

The distinction between a prerecorded telemarketing message and an abandoned call message highlights another problem with the Commission's final Rule amendments: the Commission did not specifically address the implementation date for the Abandoned Call Opt-Out Provision. In Paragraph 49, the Commission states that a 90 day implementation period applies to the opt-out requirements for (prerecorded) *telemarketing* calls and a 30 day implementation period applies to the "revised abandoned call rule."¹⁷ The Abandoned Call Opt-Out Provision is part of the revised abandoned call rule; therefore, the 30 day implementation

¹⁷ 77 Fed. Reg. 34233, 34241 at Para. 49.

period arguably applies to this provision.¹⁸ The discussion of the 30 day implementation period in Paragraph 49, however, is limited specifically to the abandonment rate measurement rules.¹⁹ Furthermore, although abandoned call messages may be left in connection with a telemarketing campaign, they do not contain any solicitations. As such, it is unclear if the 90 day implementation period applicable to "telemarketing calls" applies to the Abandoned Call Opt-Out Provision. For purposes of this Petition, PACE assumes that the 90 day implementation period applies. This timeframe, however, is unworkable because the overwhelming majority of companies do not currently have the equipment and/or technology necessary to provide an automated opt-out mechanism during abandoned calls, and many of these companies do not have the necessary resources to obtain and implement such equipment/technology. The provision is, therefore, unduly burdensome.

D. The Abandoned Call Opt-Out Provision will Negatively Impact Existing Jobs and the Job Creation Efforts of the Jobs4america Coalition

Jobs4america (JFA) is a coalition of forward-looking business leaders committed to creating jobs in America by generating thousands of contact center jobs across the United States. The efforts of the coalition and its members, including PACE, have already made a significant impact, as over 60,000 contact center jobs have been created in the United States over the past year. Indeed, the contact center industry is responsible for a significant percentage of all new jobs created in the United States during this period.

These job opportunities have been created, in large part, due to advancements in technology that allow businesses to communicate with consumers more efficiently while, at the same time, respecting consumers' privacy rights. A perfect example is the modern predictive dialer. The term "predictive dialer" often carries negative connotations based on abuses of the

¹⁸ See *Id.* at 34247, revising and redesignating 47 C.F.R. § 64.1200(a)(6) as 47 C.F.R. § 64.1200(a)(7).

¹⁹ *Id.* at 34241 at Para. 49.

technology prior to implementation of regulations that restrict prerecorded messages and limit the number of abandoned calls. Today's predictive dialers, however, utilize highly sophisticated dialing technologies that allow businesses to connect live operators with consumers in a quick and efficient manner while minimizing the number of abandoned calls and providing additional consumer protection benefits.²⁰ In fact, the use of predictive dialers comports with Chairman Genachowski's stated goal of "harnessing the power of communications technology to grow our economy, create jobs, enhance U.S. competitiveness, empower consumers, and unleash broad opportunity and a higher quality of life for all Americans."²¹

As discussed above, the technology required to provide an automated opt-out mechanism during abandoned call messages will cost a significant amount of money, making it cost prohibitive for many companies (especially small businesses) to continue to use a predictive dialer. This will limit businesses' efficiency and profits, thereby requiring them to cut jobs and/or prevent them from offering new job opportunities in the future. These unintended consequences are contrary to the job creation goals shared by the Commission, JFA, PACE and all members of both JFA and PACE.

E. The Abandoned Call Opt-Out Provision will Negatively Impact Consumers

In addition to being contrary to the FTC's rules, unduly burdensome on commerce, and having unintended employment consequences, the Abandoned Call Opt-Out Provision provides very few additional consumer protection benefits while curtailing certain consumer protection mechanisms already in place.

The Abandoned Call Opt-Out Provision was presumably adopted to make it easier for consumers who receive abandoned calls to make DNC requests. It is important to keep in mind,

²⁰ The specific consumer protection benefits are discussed, in greater detail, in Section III below.

²¹ Remarks of FCC Chairman Julius Genachowski, Georgetown Center for Business and Public Policy, Georgetown University, Washington, DC, 1 (Nov. 7, 2011).

however, that federal regulations and advancements in predictive dialing technology ensure that very few calls are actually abandoned today.²² The number of consumers that could take advantage of this convenience factor is, therefore, significantly limited. For the overwhelming majority of consumers, who are connected to a live operator within two seconds, implementation of the Abandoned Call Opt-Out Provision will not provide any benefit.

The Abandoned Call Opt-Out Provision will, however, prevent many entities from utilizing a predictive dialer, thereby eliminating the consumer protection benefits provided by the technology. Such consumer protection benefits include, but are not limited to, the following: (1) mechanisms to prevent calls from being placed to consumers on applicable federal or state DNC lists or the entity's internal DNC list; (2) mechanisms to prevent calls from being placed outside of permissible calling hours; (3) mechanisms to prevent calls from being placed on impermissible days; (4) procedures used to limit the number of times a given phone number is called; and (5) procedures used to ensure a minimum amount of time has passed since the consumer's number was last called. The loss of these benefits will make it more difficult for businesses to comply with federal and state consumer protection regulations, thereby harming consumers' privacy interests and increasing businesses' exposure to the significant liabilities associated with noncompliance with federal and state laws and regulations.

Furthermore, the federal regulations severely limit the amount of information that can be provided to the consumer during an abandoned call message.²³ Unlike consumers that receive prerecorded telemarketing calls, consumers receiving abandoned call messages do not know the

²² See 47 C.F.R. § 64.1200(a)(6), 16 C.F.R. §§310.4(b)(1)(iv), (4) (imposing liability on entities that abandon more than 3% of all calls).

²³ See 47 C.F.R. §64.1200(a)(6) (limiting the information on an abandoned call message to only the name and telephone number of the business entity or individual on whose behalf the call was placed and that the call was for telemarketing purposes); see also 16 C.F.R. § 310.4(b)(4) (containing the FTC's abandoned call message requirements) and 16 C.F.R. § 310.4(b)(1)(v) (restricting the types of prerecorded messages that may be sent).

specific reason for the call and cannot make informed opt-out decisions. Pursuant to requests by the Commission, FTC and other federal and state agencies, businesses have invested a significant amount of money developing and implementing consumer friendly preference management systems that allow consumers to manage the form and content of the communications they would like to receive.²⁴ These systems allow consumers to opt-in and/or opt-out of being contacted by certain methods (e.g. text message, telephone call, e-mail, etc.) or receiving certain types of communications (e.g. account updates, sales promotions, service promotions for goods previously purchased, customer service, etc.). Despite the menu of options, consumers are able to make a universal DNC and/or do not e-mail request to opt-out of all types of solicitation calls and/or commercial e-mails in accordance with the TCPA, TSR and CAN-SPAM Act. The Abandoned Call Opt-Out Provision prevents consumers from taking advantage of these preference management systems. As a result, consumers are likely to make uninformed opt-out decisions that prevent them from receiving calls they actually want. By contrast, the Commission's current rules and the FTC's TSR, which require abandoned call messages to include the seller's telephone number (that must be answered during normal business hours), provide consumers adequate means to make a DNC request while also allowing businesses to provide consumers with enough information to make informed opt-out decisions.

Given the significant burdens the Abandoned Call Opt-Out Provision will have on commerce and/or jobs, the small number of consumers affected by abandoned calls, and the net loss of consumer protection benefits, the Commission should revoke the provision and maintain consistency with the FTC's call abandonment provisions.

²⁴ See, e.g., PossibleNow's MyPreference management tool at http://www.possiblenow.com/sub_prefmng.asp.

III. The FCC's Prior Holding that a Predictive Dialer is an ATDS is Overly Broad and Should be Narrowed Through Clarification and by Defining the Term RSNG

In the Report and Order that accompanied its 2003 rule amendments (2003 Order), the Commission cited the statutory definition of ATDS, the legislative history behind the TCPA and then-current industry practices and technologies to support its holdings that a predictive dialer falls within the definition of an ATDS.²⁵ In 2008, the Commission cited the same rationales and reaffirmed its holding in a declaratory ruling issued in response to a petition filed by ACA International (2008 Declaratory Ruling).²⁶ For the reasons stated below, these holdings were overly broad, constitute a significant threat to businesses once the Commission's final Rule amendments take effect and must be narrowed to comport with the plain language of the TCPA.

A. The Commission's Holding that a Predictive Dialer Constitutes an ATDS Conflicts with the Plain Language of the TCPA

The TCPA defines the term ATDS as "equipment which has the capacity-- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."²⁷ Citing this language, the Commission held that "equipment need only have the 'capacity to store or produce telephone numbers'" to constitute an ATDS and that predictive dialers fall within the definition of ATDS because, "when paired with certain software," they have this capacity.²⁸ The Commission's holding is flawed for at least two reasons.

First, the Commission applied the incorrect standard when it stated that "the equipment need only have the capacity to store or produce telephone numbers." The Commission is correct that the relevant inquiry revolves around the "capacity" of the equipment; however, the

²⁵ 2003 Report and Order, 18 FCC Rcd, 14014 at 14092-93, Para. 133.

²⁶ 2008 Declaratory Ruling, FCC 07-232 at 8, Para. 12.

²⁷ 47 U.S.C. § 227(a)(1).

²⁸ 2003 Report and Order at 14091-92, Para. 131-132.

applicable standard is not only the capacity "to store or produce telephone numbers," it is the capacity "to store or produce telephone numbers...*using a random or sequential number generator*."²⁹ The statutory construction, including but not limited to the comma between the words "called" and "using," makes it abundantly clear that the phrase "using a random or sequential number generator" modifies both the verb "store" and the verb "produce." Thus, to qualify as an ATDS, equipment must either have the capacity to: (a) store telephone numbers to be called using a RSNG; or (b) produce telephone numbers to be called using a RSNG. If the equipment does not have either of these capabilities, it cannot meet the statutory definition of ATDS. The equipment must also have the capacity to dial the randomly or sequentially generated telephone numbers.

Second, the Commission incorrectly applied the standard in its analysis of predictive dialing equipment. In the 2003 Report, the Commission discussed the use of predictive dialers and acknowledged that "in most cases, telemarketers program the numbers to be called into the equipment" and that "[t]he principal feature of predictive dialing software is a timing function, not number storage or generation."³⁰ The Commission, however, focused on the equipment's capacity, "*when paired with certain software*," to store or produce numbers and to dial those numbers when holding that "a predictive dialer constitutes an [ATDS]."³¹ To the extent that the equipment is paired with such software *at the time a call is made*, this inquiry is logical and relevant to the determination of whether the equipment constitutes an ATDS. The Commission, however, appears to insinuate that a predictive dialer is an ATDS because it could *potentially* be paired with software that gives it the capability to randomly or sequentially generate telephone numbers, regardless of the equipment's capacity at the time the call is made. Under this

²⁹ 47 U.S.C. § 227(a)(1) (emphasis added).

³⁰ 2003 Report and Order at 14091, Para. 131 (emphasis added).

³¹ *Id.* at 14091, Para. 131 (emphasis added).

interpretation, *virtually any* modern telephone, including one used to "manually dial" numbers, constitutes an ATDS because it could conceivably be connected to additional equipment and/or software that provides the capability to randomly or sequentially generate numbers. This interpretation leads to an absurd result and is clearly contrary to the intent of both Congress and the Commission. The relevant inquiry, therefore, *must* focus on the capacity of the equipment at the *time the call is made*.

While it is certainly possible that a specific type of predictive dialer may have the capacity to use a RSNG to store or produce numbers, many types of predictive dialing equipment used today do not have this capacity. The Commission's unequivocal assertion that "a predictive dialer constitutes an [ATDS]" is, therefore, overly broad and contrary to the plain language of the TCPA.³²

B. The Legislative History Does Not Demonstrate that All Predictive Dialers Meet the Definition of an ATDS and Public Policy Weighs Against Such a Holding

The Commission also cites the TCPA's legislative history to support its holding that a predictive dialer unequivocally constitutes an ATDS. According to the Commission, a contrary holding would frustrate Congressional intent by permitting calls to emergency numbers, healthcare facilities and cell phones "when the dialing equipment is paired with predictive dialing software and a database of numbers, but [prohibit such calls] when the equipment operates independently of such lists and software packages."³³ Citing the "capacity" language in the definition of ATDS, the Commission goes on to state that "it is clear from the statutory

³² 2008 Order at Para. 12.

³³ 2003 Order at 14092-93, Para. 133.

language and the legislative history that Congress anticipated the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies."³⁴

Again, the Commission is correct in its assessment that the capacity of the equipment must be taken into account; however, the Commission's extrapolation misses the point because, once again, the focus must be on the capacity of the equipment to store or produce numbers *using a RSNG*. Congress did not intend to prohibit the use of equipment, whether in existence at the time the TCPA was enacted or otherwise, which does not have the capacity to randomly or sequentially generate telephone numbers to be called. The legislative history, therefore, does not preclude the Commission's acknowledgment that predictive dialers *that do not have the capacity to randomly or sequentially generate numbers to be called* do not meet the definition of ATDS.

An analysis of public policy considerations further supports the notion that a Congress' intent is not frustrated by clarification from the Commission that a predictive dialer, which does not have the capacity to randomly or sequentially generate numbers to be called, does not fall within the definition of ATDS.

With respect to emergency numbers and healthcare facilities, Congress cited public safety concerns associated with these lines being tied up by autodialers.³⁵ When the TCPA was enacted in 1991, this was a significant concern due to the prevalence of autodialers, which were used to call numbers randomly or by sequentially increasing the digits (e.g. 555-555-5555, 555-555-5556, 555-555-5557, etc.) and the lack of regulations (e.g. no DNC Registry) to prevent persons from engaging in this practice. By their very nature, these types of dialing practices resulted in calls being placed to emergency telephone numbers and/or healthcare facilities, as such numbers

³⁴ 2003 Order at 14092, Para. 132.

³⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 at Sec. 2(5) (1991) (stating that "unrestricted telemarketing...can be...when an emergency or medical assistance telephone line is seized, a risk to public safety").

could not be excluded. By contrast, a predictive dialer that does not have the capacity to randomly or sequentially generate numbers to be called cannot call these numbers unless the numbers are included as part of the calling list. Calling lists used in today's regulatory and business climate are narrowly tailored and consist primarily of business' existing and/or previous customers. These lists do not include emergency or healthcare numbers; therefore, the aforementioned public safety threat no longer exists. Moreover, the Commission's impending creation of a DNC Registry for "public safety answering points" provides an additional layer of protection to prevent calls from being placed to such numbers.

Congress' primary concern with the use of an ATDS to call cellular telephones appears to have been the costs incurred by consumers when receiving such calls.³⁶ These concerns are especially understandable given the prevalence of random and/or sequential dialing, consumers' inability to prevent telemarketing calls (no DNC Registry existed at the time), the high costs associated with receiving cellular telephone calls, and businesses' ability to contact consumers on their landlines rather than calling them on their cell phones. Notably, however, Congress did not ban all calls to cell phones. Calls made to consumers without the use of an ATDS are permitted under the TCPA, regardless of the costs associated with such calls. Congress, therefore, was merely concerned with protecting consumers from incurring *unreasonable* costs associated with calls to cell phones, not preventing them from incurring *any* costs.

Congress' concerns, however, are not an issue with respect to use of predictive dialers that do not have the capacity to randomly or sequentially generate telephone numbers in today's regulatory and business climate. For example, DNC regulations and technological advancements have effectively eliminated the practice of randomly and/or sequentially dialing telephone numbers and provide consumers with adequate opportunities to limit the number of calls they

³⁶ See 2003 Order at 14092, Para. 133 citing S. REP. NO. 102-178 at 5.

receive. Additionally, charges associated with the use of cell phones are a fraction of what they were in 1991; therefore, the actual costs incurred by consumers in connection with a limited number of calls being made to their cell phone is minimal. In fact, with the advent of modern cellular calling packages, the financial impact to many consumers is zero.

Furthermore, unlike in 1991, a significant number of consumers use cell phones as their only personal telephone. The Commission acknowledged this fact in its 15th Mobile Wireless Competition Report, where it cited the January-June 2010 National Health Interview Survey (NHIS) conducted by the Center for Disease Control and Prevention (CDC), which showed that 24.9% of adults lived in households with wireless only telephones.³⁷ As noted by the Commission, this was up from 21.3% during the same period in 2009.³⁸ *According to the CDC's January-June 2011 NHIS, the percentage of adults living in wireless only households has soared to 30.2%.³⁹ Even more staggering is that 58.1% of adults aged 25-29 live in households with only wireless phones.⁴⁰* This trend shows no signs of slowing down and, in fact, given the demographics (younger generations are less likely to have a landline) and the advent of services such as Verizon Wireless' "Home Connect" and AT&T's "Wireless Home Phone," traditional landline telephones may soon be obsolete. Home Connect and Wireless Home Phone are services offered by wireless carriers that allow consumers to connect existing cordless or corded telephones to a wireless box (similar to a wireless router) to make and receive calls over the provider's wireless network.⁴¹ In essence, the services replace home landlines with home phones that operate over a wireless network. These products truly break the traditional

³⁷ FCC 11-103 at 21, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1.pdf.

³⁸ *Id.*

³⁹ Stephen J. Blumberg, Ph.D. & Julian V. Lake, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2011*, (Center for Disease Control and Prevention, December 21, 2011), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201112.pdf>.

⁴⁰ *Id.*

⁴¹ See Verizon Wireless website at: <http://www.verizonwireless.com/home-phone-connect.shtml> and AT&T website at: <http://www.att.com/esupport/article.jsp?sid=KB413140#fbid=LXHwbICr27T>.

molds of "home phone" and "cell phone" by blending the two into one product. Given these technological advancements and demographic shifts, it is vital that the Commission avoid unintended consequences for both businesses and consumers by not placing unreasonable restrictions on business' ability to contact customers via the cell phone numbers they provide as a contact number. As described in Section II(D), above, business' inability to use a predictive dialer will result in many campaigns and/or jobs being eliminated due to lack of profitability. This harms businesses in the form of lost profits and consumers in the form of a decreased marketplace and lost consumer protection benefits. Moreover, the decrease in consumer spending and business profits hampers an already tenuous economy and will result in lost jobs and/or impede the industry's current job creation efforts.

By way of example, one PACE member indicates that approximately 2.7 million of its customers have provided a cell phone number as their only contact number. This company estimates that the inability to efficiently call its customers (using a predictive dialer) *on the cell phone numbers they provided to the company as a means of contact*, puts approximately \$2.4 million of recurring revenue at risk each year. Smaller companies indicated that the inability to use a predictive dialer to call customers' cell phones threatened their business' very existence. The magnitude of these types of unintended financial consequences will only increase in the future as more Americans continue to abandon traditional landlines for cell phones and/or home phone numbers that utilize wireless networks.

C. The Commission's Authority to Interpret the TCPA is Limited by the Plain Language of the Statute

Although the Commission has been given significant authority to adopt and enforce regulations implementing the TCPA, this authority is not unlimited. The Supreme Court of the

United States has issued the following statement pertaining to an administrative agency's ability to interpret a statute it is charged with enforcing:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question *whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.*⁴²

Congress directly spoke to the issue of what constitutes an ATDS because the statute expressly defines the term.⁴³ The plain language of the TCPA dictates that equipment which does not have the capacity to store or produce telephone numbers to be called, *using a RSNG* does not fall within the definition of ATDS. The Commission's overly broad holding that a predictive dialer unequivocally constitutes an ATDS, regardless of its capacity to randomly or sequentially generate numbers, is, therefore, contrary to the statute and invalid.

D. The Commission Can Harmonize its Prior Rulings with the Plain Language of the TCPA by Clarifying the Rulings and Defining the Term RSNG

By focusing on only a portion of the statutory definition of ATDS, the Commission's 2003 Order and 2008 Declaratory Ruling effectively removed the phrase "using a random or sequential number generator" from the definition of ATDS. For the reasons stated above, this interpretation conflicts with the plain language of the statute, is contrary to Congress' intent, weighs against public policy considerations, and exceeds the Commission's authority to enforce the TCPA. The Commission does, however, have the authority to clarify the definition as long as such clarification comports with the plain language of the TCPA. The Commission can best accomplish this by narrowing its prior holdings in the manner discussed above (i.e. that a predictive dialer constitutes an ATDS only if it has the capacity to store or produce numbers to be called *using a RSNG*) and by defining the term RSNG, which is not defined in the statute.

⁴² Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-844 (U.S. 1984).

⁴³ See 47 U.S.C. § 227(a)(1).

The lack of an express definition for RSNG creates uncertainty and confusion regarding what equipment meets the definition of ATDS. This uncertainty and confusion was further compounded by the predictive dialer holdings in the Commission's 2003 Order and 2008 Declaratory Ruling. As a result, legitimate businesses have been inundated with lawsuits, including a proliferation of class action suits in recent years, alleging violations of the TCPA stemming from the alleged use of an ATDS to call cell phones. By adopting a definition for RSNG, the Commission can provide much needed clarity and certainty regarding what equipment constitutes an ATDS.

To further Congress' intent, the Commission should define RSNG in a manner that, *along with existing regulations*, will: (1) prevent businesses from placing an unlimited number of calls to consumers' cell phones; (2) prevent calls from being made to emergency numbers and/or healthcare facilities; (3) prevent consumers from incurring *unreasonable* costs associated with receiving calls that they cannot stop; (4) prevent businesses from incurring unreasonable and potentially devastating litigation costs associated with defending class action TCPA suits stemming from the confusion surrounding the definition of ATDS; (5) allow businesses to contact their customers (using live operators) for customer service or other informational purposes; and (6) allow businesses to contact their customers at cell phone numbers provided by such customers to make timely offers (unless the consumer has requested not to be contacted at that number).

All of these goals can be accomplished by limiting the definition of RSNG to equipment and/or software that generates telephone numbers to be called by: (a) randomly selecting the ten digits that comprise the telephone number; and/or (b) sequentially increasing or decreasing the digits of a telephone number (111-111-1111 to 111-111-1112, etc.). Indeed, at least one federal

court has interpreted the term RSNG in this manner.⁴⁴ By prohibiting the use of equipment that has the capacity to generate numbers in one of these manners, the TCPA's ATDS provision will effectively prevent calls from being made to emergency or healthcare numbers and, combined with other provisions of the TCPA (e.g. DNC provisions), limit the type and amount of calls that consumers may receive on their cell phones, thereby minimizing costs incurred by consumers in connection with such calls.⁴⁵ The definition also provides necessary clarity to businesses that are contacting their customers for legitimate reasons and avoids unintended consequences and outrageous litigation expenses that will undoubtedly be passed on to consumers in the long run.

Pursuant to the foregoing discussion, PACE recommends that the Commission adopt the following definition for RSNG: "The term random or sequential number generator means equipment or software that produces telephone numbers by creating random sequences of 10 digit numbers or by successively increasing or decreasing one or more of a telephone number's digits."

IV. The Adopted Definition of "Prior Express Written Consent" is Unduly Burdensome on Businesses and Likely to Cause Consumer Confusion Regarding the Method that will be Used to Contact Them

The definition of the term "prior express written consent" adopted by the Commission is problematic for businesses and consumers alike, especially in the context of the Commission's prior holding that a predictive dialer constitutes an ATDS. Specifically, the requirement to disclose that the company will use an ATDS to contact the consumer will generate a significant amount of confusion because average consumers do not know what a predictive dialer or an

⁴⁴ See *Griffith v. Consumer Portfolio Serv.*, 2011 U.S. Dist. LEXIS 91231 (N.D. Ill. Aug. 16, 2011) (stating that "the phrase 'random or sequential number generator' is not defined. As we understand these terms, 'random number generation' means random sequences of 10 digits, and 'sequential number generation' means (for example) (111) 111-1111, (111) 111-1112, and so on." The court, however, ultimately held that the Defendant's equipment constituted an ATDS because, pursuant to the Hobbs Act, it was obligated to defer to the FCC's prior holding regarding predictive dialers).

⁴⁵ These costs would be incurred by the consumer regardless of whether a predictive dialer is used to make the call or the calls are manually dialed.

ATDS are. Consumers asked to provide consent to be contacted on their cell phones by an "automatic telephone dialing system" will likely interpret that to mean they are consenting to receive prerecorded messages. For the vast majority of business, which use live operators in conjunction with predictive dialers, such is not the case. Consumers' lack of understanding of what constitutes an ATDS will result in consumers declining to provide the requested consent even though they may have provided such consent if they understood that they would be contacted by a *live person*, not a prerecorded message. This misunderstanding will result in decreased business revenue and prevent consumers from receiving offers and discounts they would have otherwise been interested in.

Additionally, despite the Commission's stated goal of harmonizing its regulations with those adopted by the FTC, the requirement to disclose that calls will be made using an ATDS goes beyond what is required under FTC regulations. The Commission should maintain compliance with FTC regulations by defining the term "prior express written consent" in a manner that requires businesses to disclose if they will contact consumers via prerecorded message (before obtaining consent) while allowing them to obtain consent to make live operator calls without unnecessarily confusing the consumer by stating that an ATDS will be used to make the call.

V. Conclusion

Pursuant to the Commission's failure to comply with the APA and its own procedural rules, the Abandoned Call Opt-Out Provision is invalid and must be revoked. In addition to procedural issues surrounding the adoption of the provision, it impairs the Commission's goal of harmonizing its rules with those adopted by the FTC, imposes unreasonably burdensome costs on businesses, threatens existing jobs and the industry's recent job creation efforts spearheaded

by JFA, and will result in a net loss of consumer protection benefits. Additionally, the Commission's prior holding that a predictive dialer unequivocally constitutes an ATDS is contrary to the plain language of the statute and, in conjunction with the requirements imposed by the Commission's amended Rules, unreasonably prevents businesses from contacting customers that provided their cell phone numbers as a point of contact. These new barriers pose a significant threat to commerce and jobs while providing little benefit to consumers that are already protected by numerous other requirements, including the Commission's DNC and internal DNC rules. Finally, the adopted definition of "prior express written consent" is unduly burdensome and likely to result in consumer confusion regarding the method that will be used to contact them. PACE, therefore, respectfully requests that the Commission: (1) permanently revoke the Abandoned Call Opt-Out Provision; (2) clarify that a predictive dialer constitutes an ATDS only if it has the capacity to store or produce telephone numbers to be called using an RSNG; (3) provide a definitive and workable definition for the term RSNG; and (4) modify the definition of "prior express written consent."

Respectfully submitted,

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