

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

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

**Professional Association for Customer Engagement's Reply
to Gerald Roylance's Opposition of its Petition for Reconsideration**

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Phillip J. Grudzinski
Professional Association for Customer
Engagement
8500 Keystone Crossing, Suite 480
Indianapolis, IN 46240

*President and CEO of Professional
Association for Customer Engagement*

Michele A. Shuster, Esq.
Nicholas R. Whisler, Esq.
Mac Murray, Petersen & Shuster LLP
6530 West Campus Oval, Suite 210
New Albany, OH 43054

*Counsel for Professional Association
for Customer Engagement*

I. Introduction

On July 11, 2012, the Professional Association for Customer Engagement (PACE) filed a Petition for Reconsideration (Petition) with the Federal Communications Commission (Commission or FCC) respectfully requesting the Commission to reconsider the Telephone Consumer Protection Act (TCPA) regulation amendments published in the Federal Register on June 11, 2012. The Petition requests that the Commission: (1) delete the requirement for sellers to provide an automated, interactive opt-out mechanism during abandoned call messages (Abandoned Call Opt-Out Provision); (2) narrow 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 has the capacity to store or produce telephone numbers to be called using a "random or sequential number generator" (RSNG); (3) provide a definitive and workable definition for the term RSNG; and (4) modify and/or clarify the adopted definition of "prior express written consent." On September 24, 2012, the Commission published notice of PACE's Petition. Interested parties had until October 18, 2012 to file an opposition to the Petition. On October 1, 2012, Gerald Roylance filed an Opposition to PACE's Petition. Mr. Roylance's was the only person to file an Opposition with the Commission. PACE files this Reply to address several misstatements in Mr. Roylance's Opposition.

II. Abandoned Call Opt-Out Provision

As outlined in PACE's Petition, the adoption of the Abandoned Call Opt-Out Provision without providing notice or an opportunity to comment violates the Administrative Procedures Act (APA) and the Commission's own Rules of Practice and Procedure.¹ Mr. Roylance apparently contends that implied notice was provided because the 2010 Notice of Proposed Rulemaking (NPRM) "included a topic about an automated opt-out mechanism for prerecorded

¹ See 5 U.S.C. §§ 553(b)-(c); 47 C.F.R. §§ 1.412(a), 1.415(a).

calls as currently required by the FTC" and/or the Commission's 2012 Report and Order² discussed the automated opt-out mechanism.³ Neither of these documents provided an adequate opportunity for interested parties to comment.

The NPRM set forth proposed amendments to 47 C.F.R. § 64.1200(b) that required an automated opt-out mechanism for "artificial or prerecorded telephone messages delivered to residential telephone subscribers for telemarketing purposes."⁴ Abandoned call messages are entirely informational and left for the sole purpose of complying with federal regulations. The initial calls may be made for telemarketing purposes; however, the abandoned call message is not delivered for telemarketing purposes. The Commission's own regulations acknowledge the difference by referring to an abandoned call message as a "prerecorded identification message."⁵ Notably absent from the NRPM was any indication that an abandoned call message would require an automated opt-out mechanism. The proposed amendments to the text of 47 C.F.R. § 64.1200(a)(6),⁶ which includes the Commission's abandoned call requirements, was limited to changes surrounding the measurement of call abandonment rates.⁷ The proposed rules outlined in the NPRM did not contain the Abandoned Call Opt-Out Provision; therefore, the NRPM did not provide notice of the same or an opportunity to comment.

The 2012 Report and Order set forth rules *adopted* by the Commission rather than *proposed* rules. This does not meet the requirements in the APA and/or the Commission's Rules of Practice and Procedure, which mandate an opportunity for interested parties to submit comments *prior to* the adoption of new rules and/or rule amendments.⁸

² FCC 12-21.

³ Roylance Opposition at 2.

⁴ 75 Fed. Reg. 13471, 13482.

⁵ 47 C.F.R. § 64.1200(a)(6), as effective at the time of the 2010 notice of proposed rulemaking.

⁶ 47 C.F.R. § 64.1200(a)(7) under the amended regulations.

⁷ 5 Fed. Reg. 13471, 13482.

⁸ See 5 U.S.C. §§ 553(b)-(c); 47 C.F.R. §§ 1.412(a), 1.415(a).

Mr. Roylance also argues in favor of the Abandoned Call Opt-Out Provision by stating that the Commission is not required to harmonize its rules with the FTC's. The Commission, however, *expressly stated* that the purpose of the amendments was to harmonize its TCPA regulations with the TSR.⁹ The entire discussion in the NPRM related to automated opt-out requirements was a comparison of FCC and FTC opt-out rules and a request for comment on "whether [the Commission] should revise its opt-out requirements to make them more consistent with the FTC's."¹⁰ Moreover, the text of the proposed opt-out requirements (and the language ultimately adopted in 47 C.F.R. §64.1200(b)) is almost identical to the language adopted by the FTC in 2008.¹¹ The FTC does not require an automated opt-out mechanism for abandoned call messages, nor was there any indication prior to the 2012 Report and Order that the Commission would impose such a requirement. For the reasons set forth in PACE's Petition and this Reply, the Commission should permanently revoke the Abandoned Call Opt-Out Provision and maintain consistency with FTC regulations.

III. Definition of ATDS and Proposed Definition of RSNG

PACE's Petition requests the Commission to narrow its broad holding that a predictive dialer unequivocally constitutes an ATDS by clarifying the holding and adopting a workable definition for the term RSNG.¹² Mr. Roylance contests PACE's interpretation of the term ATDS and states that the Commission cannot rewrite the statutory definition of ATDS.

PACE agrees that the Commission does not have the authority to *rewrite* the TCPA.

Contrary to Mr. Roylance's assertion, however, PACE does not request the Commission to

⁹ 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 (DNCA)").

¹⁰ 75 Fed. Reg. 13471, 13477 ¶¶ 24-30.

¹¹ 75 Fed. Reg. at 13471, 13482; 16 C.F.R. § 310.4(b)(1)(v)(B)(ii).

¹² PACE Petition for Reconsideration at 12-21.

rewrite the definition of ATDS. Rather, PACE requests that the Commission *give effect to the plain language of the statute*.¹³ Moreover, PACE's request that the Commission adopt a workable definition for the term RSNG falls squarely within the Commission's authority under 47 U.S.C. § 227(b)(2) to adopt regulations to implement the TCPA.

Mr. Roylance argues that an ATDS is any equipment that has the capacity to either: (a) store numbers in a database (and dial them); or (b) produce numbers with a generator (and dial them).¹⁴ This reading is contrary to the plain language of the statute, which defines ATDS, in relevant part, as equipment that has the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator."¹⁵ The comma after "called" makes it clear that the phrase RSNG modifies both the verb "store" and the verb "produce." If the term ATDS includes any equipment that has the capacity to store numbers in a database and dial such numbers, virtually every modern telephone qualifies as an ATDS. For example, any phone that has a speed dial function and every cellular telephone would qualify as an ATDS. This interpretation is contrary to the plain language of the statute and Congressional intent.

In his discussion of the definition of ATDS, Mr. Roylance also incorrectly states: (a) that the TCPA prohibits consumers from incurring "any cost" in conjunction with receiving calls on their cell phones; and (b) that PACE is asking the FCC to rewrite the TCPA to prohibit consumers from incurring "unreasonable costs" rather than "any costs."¹⁶ As a preliminary matter, 47 U.S.C. § 227(b)(1)(A)(iii) does not contain a reference to "any costs" or otherwise prohibit consumers from incurring "any costs." For purposes of this Reply, PACE assumes that Mr. Roylance is referring to the phrase "or any service for which the called party is charged for

¹³ *Id.*

¹⁴ Roylance Opposition at 4.

¹⁵ 47 U.S.C. § 227(a)(1).

¹⁶ Roylance Opposition at 4.

the call."¹⁷ This reference is merely a "catchall" provision that describes the types of numbers to which the ATDS prohibition applies. The TCPA does not prohibit calls to cell phones unless an ATDS is used; therefore, it does not prohibit consumers from incurring "any cost" in conjunction with receiving calls on their cell phones. PACE's Petition does not request the Commission to rewrite any portion of the TCPA. PACE merely demonstrates that, while Congress was obviously concerned that consumers would incur costs associated with calls to their cell phones, it did not prohibit persons from making all commercial and/or telemarketing calls to consumers' cell phones.¹⁸ Rather, it sought to prevent consumers from incurring what it deemed to be unreasonable costs associated with calls made using an ATDS.¹⁹ For the reasons set forth in PACE's Petition, the use of a predictive dialer that falls outside the statutory definition of ATDS does not impose unreasonable costs on consumers.

IV. Definition of "Prior Express Written Consent"

Mr. Roylance also misconstrues PACE's request surrounding the definition of "prior express written consent" under the Commission's amended regulations. The Petition does not ask the Commission to eliminate its prior express written consent requirements. Rather, PACE believes the specific definition adopted by the Commission is unduly burdensome to the extent that it requires an affirmative disclosure that an ATDS will be used to contact the consumer.²⁰ For the reasons set forth in the Petition, PACE requests modification of the Rule and/or clarification by the Commission that the written agreement need not state that an "automatic telephone dialing system" will be used to place *live operator* calls to consumers.

¹⁷ See 47 U.S.C. § 227(b)(1)(A)(iii).

¹⁸ PACE Petition for Reconsideration at 16-17.

¹⁹ *Id.*

²⁰ *Id.* at 21-22.

V. **Conclusion**

Mr. Roylance's Opposition contains numerous misstatements of law and misconstrues several of the positions set forth in PACE's Petition. The Commission should afford Mr. Roylance's Opposition little weight when considering the issues outlined in the Petition. For the reasons outlined in the Petition and this Reply, PACE respectfully requests the Commission to: (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 and/or clarify the definition of "prior express written consent."

Respectfully submitted,

/s/ Michele A. Shuster

Michele A. Shuster, Esq.

Nicholas R. Whisler, Esq.

Mac Murray, Petersen & Shuster LLP

6530 West Campus Oval, Suite 210

New Albany, OH 43054

Telephone: (614) 939-9955

Facsimile: (614) 939-9954

***Counsel for Professional Association
for Customer Engagement***