

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of |) | |
| |) | |
| Petition for Declaratory Ruling Regarding |) | |
| Non-Telemarketing Use of Predictive Dialers |) | CG Docket No. 02-278 |
| |) | |
| Rules and Regulations Implementing the |) | |
| Telephone Consumer Protection Act of 1991 |) | |

**COMMENTS OF NOBLE SYSTEMS CORPORATION
IN SUPPORT OF COMMUNICATION INNOVATORS
PETITION FOR DECLARATORY RULING**

Noble Systems Corporation (“NSC”)¹ hereby comments in support of the above-captioned Petition for Declaratory Ruling filed by Communication Innovators (“Petition” or “CI Petition”).² As the Petition explains, the Commission’s past characterizations of predictive dialers as automatic telephone dialing systems (“ATDS”) are inconsistent with the language and purpose of the Telephone Consumer Protection Act (“TCPA”)³ and fail to provide necessary clarity, thereby causing confusion and needless litigation. In addition, the Commission’s interpretation of the ATDS definition threatens substantial losses of American jobs. For these

¹ NSC is a leading provider of call center systems, equipment and management. Headquartered in Atlanta, Georgia, NSC employs more than 350 people and serves over 4,000 client sites around the world. NSC’s customers employ thousands of U.S. workers in call centers equipped by NSC.

² Communication Innovators Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012) (“CI Petition” or “Petition”); Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling from Communication Innovators, Public Notice, DA 12-1653, CG Docket No. 02-278 (CGB, rel. Oct. 16, 2012).

³ 47 U.S.C. § 227.

reasons, as discussed further herein, the Commission should issue a declaratory ruling clarifying that predictive dialers that do not have the current ability to generate and dial random or sequential numbers are not ATDSs.⁴

I. SUMMARY

The Commission's characterization of predictive dialers as ATDSs is not statutorily required and should be updated to reflect changes in technology and the actual usage and consumer benefits of predictive dialers.

There is nothing in the TCPA that requires the Commission's current construction of the ATDS definition, and the result of that construction has been to discourage the use of modern predictive dialers. When used in U.S. call centers staffed by live agents, predictive dialers streamline the calling process and make U.S. workers more efficient. In contrast, regulatory requirements that discourage predictive dialing reduce efficiency, increase costs and create incentives to "offshore" American call center jobs to countries in which labor costs are lower, to the detriment of U.S. workers and the U.S. economy.

Moreover, as the CI Petition explains, predictive dialers are not designed with the capacity to generate numbers randomly or in sequence, and therefore do not meet the TCPA's definition of an ATDS. The Commission should grant the CI Petition and end the ongoing confusion and needless litigation that are hindering the use of advanced technologies to automate the process of engaging in useful, legitimate communications with consumers. NSC urges the Commission to extend the requested relief to the use of predictive dialers for all lawful purposes, including telemarketing calls that comply with do-not-call requirements and other provisions of the TCPA.

⁴ NSC submits that CI's request for clarification can be addressed at the Bureau level under delegated authority.

II. TODAY'S PREDICTIVE DIALERS ARE CRITICAL TO EFFICIENT CALL CENTER OPERATIONS

As an early developer and leading provider of predictive dialing solutions, NSC can attest to the critical role predictive dialers play in facilitating contacts between businesses, nonprofit organizations and the persons they need to reach. If the Commission continues to discourage the use of these technologies, however, U.S. businesses and consumers will suffer and American jobs will be lost.

The efficiency advantages of predictive dialers can be demonstrated by comparing call center operations using predictive dialers to call centers that rely on manual operations. It takes about 30 seconds for a human agent to dial a telephone number manually and let the called party's telephone ring four times. If the number is misdialed or the call is not answered by a live person, the agent's dialing time is wasted. The cumulative effect of repeated acts of unproductive dialing is that an agent in a manual call center achieves only 15 to 20 productive minutes – that is, minutes spent in conversation with intended persons – each hour. In other words, *most* of the agent's time in a manual call center is wasted.

By upgrading the call center with a simple bulk dialing system, a call center operator might increase the average agent's productive time to 23 to 30 minutes per hour.⁵ Adding a modern predictive dialer, however, can double the average agent's productive time, when compared to manual dialing, to as much as *40 to 57 minutes* per hour.

The predictive dialer achieves these efficiencies by ensuring, with the best achievable degree of precision, that: (1) all outbound calls answered by live persons are transferred to live

⁵ A bulk dialer, or power dialer, automates the calling process but lacks the refinements of the true predictive dialer, such as the ability to predict when calls will be answered based upon average conversation time, number of agents, percentage of calls answered and other variables.

agents; (2) calls not answered by live persons do not reach live agents; and (3) call center agents spend a minimum of idle time between calls.

The key to this process, as the name “predictive dialer” implies, is for the system to *predict* when the next agent will be available and the next consumer will answer, and to adjust the pace of dialing accordingly. The correctness of these predictions depends upon the accuracy of several data inputs, including: (1) the average number of rings before a customer picks up the phone; (2) the percentage of dialed phone calls that are answered; (3) the average length of each conversation; (4) the number of agents available; and (5) the desired abandonment rate.⁶ A sophisticated predictive dialer not only will take all of these factors into account, but will update its predictions as these factors change. For example, if the average conversation length increases or fewer agents are on duty, the predictive dialer will increase the estimated time for agents to become available and will reduce the pace of dialing accordingly.

Besides making these calculations, the predictive dialer manages the calling process. The dialer first retrieves numbers to be called from a server. The numbers supplied by the server are not generated by an algorithm, but typically are contained in databases (often equipped with customer relationship management software) containing telephone numbers of persons who have been selected as appropriate recipients of calls. For example, debt collection calling lists will contain numbers of the called party’s debtors; payment card fraud alerts will be directed to

⁶ A call is abandoned when a live agent is not available at the time the call is answered. One advantage of a sophisticated predictive dialer is its ability to keep call abandonment rates within the limits established by this Commission’s regulations. 47 CFR § 64.1200(a)(7). Predictive dialers also reduce other errors, such as inadvertent dialing of persons whose numbers are on the do-not-call registry and with whom the caller does not have an established business relationship, that are more likely to occur when numbers are dialed manually. In these and other ways, predictive dialers have become important tools of regulatory compliance.

holders of accounts that have experienced suspicious activity; school closing alerts will be directed to students or parents; polling calls might be directed to registered voters; and telemarketing calls might be directed to existing customers or persons who have inquired about the caller's products or services.

As it dials numbers acquired from the server, the predictive dialer detects calls that are not answered, result in busy signals, terminate on fax machines and modems, or otherwise will not result in a live conversation. Only calls answered by a live person are transferred to call center agents. In order to make the agent's interaction with the called party more efficient and productive, the system may display relevant information about the called party, such as account data of a current customer, on the agent's computer monitor simultaneously with the transfer of the call.

As this description shows, the modern predictive dialer makes outbound calling more efficient, more convenient for businesses and consumers, and more compliant with statutory and regulatory requirements. As the technology evolves, businesses and customers will be even better served by more refined predictive dialing systems.

III. CONTINUED CLASSIFICATION OF PREDICTIVE DIALERS AS ATDSs WILL COST AMERICAN JOBS

As described above, call center operations that use live agents must accomplish two principal tasks. The first is the act of dialing and connecting with the called party, which can be accomplished by manual or automated means. The second is the conversation between the live agent and the called party.

The American economy benefits when the second task is performed by American workers. Additionally, no matter how well-trained foreign call agents might be, their familiarity

with American English and American culture is likely to fall below the level U.S. workers can provide. Accordingly, businesses, nonprofits and other organizations that need to reach U.S. persons have strong consumer-driven incentives to hire American labor.

The case for hiring American call center workers diminishes, however, when a substantial part of the worker's job consists of manual dialing rather than interacting with consumers. The operator of a manual call center, where more than half of workers' time is spent in the mechanical process of dialing, might decide that the cost of U.S. workers is too high relative to the productivity those workers can achieve in a manual environment. Offshoring of jobs in manual call centers is likely to be the more cost-efficient choice.

Unfortunately, as the CI Petition and other filings with this Commission point out, the Commission's inclusion of predictive dialers in the TCPA's ATDS category has created an environment of enormous legal risk for users of predictive dialers to contact mobile telephone users, which are a large and growing percentage of the persons organizations need to reach.⁷ The TCPA permits ATDS calls to mobile numbers only in emergencies or with the called party's prior express consent, and many valuable calls are made in circumstances in which the existence or legal sufficiency of prior consent is unclear.⁸ For example, as a petition pending before the Commission explains, there is ongoing confusion concerning the ability of courier services to notify recipients of package deliveries.⁹ Similarly, companies that send text alerts at customers'

⁷ CI Petition, p. 18. *See* GroupMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-27(March 1, 2012) ("GroupMe Petition"); SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Feb. 16, 2012) ("SoundBite Petition").

⁸ 47 U.S.C. § 227(b)(1)(A)(iii).

⁹ Cargo Airline Association Petition for Expedited Declaratory Ruling Regarding Non-Telemarketing Package Notifications, CG Docket No. 02-278 (Aug. 17, 2012).

request have been sued for sending confirming messages when participants opt out of receiving further messages, even though those messages are required as a best practice by the Mobile Marketing Association.¹⁰ Most recently, a decision in the United States Court of Appeals for the Ninth Circuit concludes that ATDS debt collection calls may only be placed to mobile numbers furnished at the start of a debtor-creditor relationship, even though the provision of a mobile number at other points in the relationship is an equally valid expression of a debtor's consent to be contacted at that number.¹¹ To the extent the Commission continues to classify predictive dialers as ATDSs, users of predictive dialing technology will continue to be subject to increasing confusion and legal risk.

In order to insulate themselves from the exponential increase in class action suits and other litigation related to predictive dialer use, operators can choose between two options: they can return to inefficient manual dialing, or they can simply abandon calling campaigns (including valuable informational calls) that do not justify the expense of manual dialing. Both alternatives will cost, and likely already have cost, American jobs. By clarifying the ATDS definition as not applying to predictive dialers, the Commission can help American business avoid both alternatives.

The Commission repeatedly has emphasized that its public-interest mandate includes the promotion of the interests of American workers and consumers, and the creation of regulatory conditions that favor the competitiveness of U.S. industries.¹² The CI Petition, along with

¹⁰ Petition of SoundBite Communications, Inc. for Expedited Declaratory Ruling, CG Docket No. 02-278 (Feb. 16, 2012).

¹¹ *Meyer v. Portfolio Recovery Associates, LLC*, No. 11-56600, D.C. No. 3:11-cv-01008-AJB-RBB (9th Cir. Oct. 12, 2012).

¹² Chairman Genachowski has emphasized the Commission's concern with "harnessing the power of communications technology to grow our economy, create jobs, enhance U.S.

pending requests for similar relief, presents an opportunity for the Commission to advance those goals by confirming, as the statutory ATDS definition requires, that predictive dialers are not ATDSs and may be used to place calls to mobile devices when those calls are otherwise lawful under the TCPA.¹³

IV. PREDICTIVE DIALERS LACK THE CAPACITY TO GENERATE NUMBERS RANDOMLY OR IN SEQUENCE

Predictive dialers do not fit the TCPA definition of an ATDS because they lack the capacity to generate numbers randomly or in sequence. The FCC’s authority to classify specific devices as ATDSs is constrained by the statutory definition, which states that an ATDS is “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers.”¹⁴ On the basis of this plain statutory language, dialing systems that do not use a “random or sequential number generator” to store, produce and dial numbers to be called are not ATDSs and thus may be used to dial telephone numbers – including mobile telephone numbers – in nonemergency situations without the prior express consent of the called party.

As discussed earlier, the predictive dialers used by NSC and its customers, and generally used throughout the industry, do not come equipped with random or sequential number generating software. Modern predictive dialers acquire numbers to be dialed from databases containing numbers of debtors, existing customers, registered voters or other categories of

competitiveness, empower consumers, and unleash broad opportunity and a higher quality of life for all Americans.” Remarks of Julius Genachowski, Georgetown Center for Business and Public Policy, Georgetown University (Nov. 7, 2011).

¹³ See GroupMe Petition, *supra*; SoundBite Petition, *supra*.

¹⁴ 47 U.S.C. § 227(a)(1).

appropriate persons that the caller wishes to contact. There is no random or sequential dialing “capacity” that users of predictive dialers can activate and employ.

On these facts, there should be no controversy concerning the classification of predictive dialers as ATDSs. However, the issue is clouded by the Commission’s 2003 order implementing the do-not-call provisions of the TCPA. There, the Commission stated that the “basic function” of an ATDS is the “capacity to dial numbers without human intervention.”¹⁵ This functionality, which is available on any smartphone with a speed dialing feature, is not mentioned anywhere in the TCPA and is unsupported by the statutory language or Congress’s purpose in enacting the TCPA.¹⁶ Nevertheless, on the basis of this inappropriate reading of the statutory definition of an ATDS, the FCC has stated on more than one occasion that a predictive dialer is an ATDS.¹⁷

As the CI Petition points out, the Commission’s classification of predictive dialers as ATDSs has permitted an increase of “a staggering 592% [in predictive dialer class action suits] in the last few years alone.”¹⁸ The cost of defending these actions ultimately is borne by consumers, and the uncertainty they create is discouraging the adoption of advanced calling technologies and threatening substantial losses of American jobs. The public interest requires the Commission to resolve this issue without further delay.

¹⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 131.

¹⁶ As the CI Petition points out, “Congress enacted the TCPA . . . to address the explosion of unwanted automated telephone advertising and solicitations made possible by automatic dialing machines that could generate and dial random or sequential telephone numbers and bombard parties with ‘computerized’ solicitations.” CI Petition, p. 6.

¹⁷ *Id.*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559 (2008).

¹⁸ CI Petition, p. 15.

V. CONCLUSION

For all of the reasons stated herein, NSC urges the Commission to grant the CI Petition to clarify that predictive dialing devices and systems are not ATDSs as defined in the TCPA. Specifically, the Commission should confirm that predictive dialers are not ATDSs when used for any lawful purpose, including telemarketing calls that comply with the TCPA and other applicable statutes and regulations.

Respectfully submitted,

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November 15, 2012