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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 Expedited Declaratory Ruling and/or Expedited Rulemaking

Filed October 18, 2013

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PETITION FOR EXPEDITED DECLARATORY RULING OR, IN THE ALTERNATIVE, PETITION FOR EXPEDITED RULEMAKING

Pursuant to 47 CFR 1.2, the Professional Association for Customer Engagement (PACE) hereby respectfully requests the Federal Communications Commission (Commission) to issue an Expedited Declaratory Ruling to clarify that: (1) a system is not an automatic telephone dialing system (ATDS) unless it has the capacity to, *inter alia*, dial numbers ***without human intervention***; and (2) a system's "capacity" is limited to what it is capable of doing, without further modification, ***at the time the call is placed.*** In the alternative, PACE respectfully petitions the Commission for a Rulemaking proceeding pursuant to 47 CFR 1.401 to: (1) define the term "capacity," as used in the Telephone Consumer Protection Act (TCPA) and the Commission's TCPA regulations, as "the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered;" and (2) modify the definition of ATDS in 47 CFR 64.1200(f)(2) by adding the phrase "without human intervention" to the end of the definition. PACE respectfully makes these requests in addition to, rather than in lieu of, the requests made in its Petition for Reconsideration, which is currently pending before the Commission.

I. Introduction and Summary

PACE 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 and 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.

The TCPA prohibits the use of an ATDS to call cell phones unless the call recipient has provided prior express consent to receive such calls.[1] Due to several recent developments, including the Commission's adoption of amended TCPA regulations (which require ***written*** consent for telemarketing calls made to cell phones using an ATDS),[2] the explosion of class action TCPA litigation and problematic court rulings related to this restriction, this TCPA provision poses a significant and unnecessary threat to legitimate businesses. The threat is exacerbated by the lack of clarity regarding what type of equipment does not constitute an ATDS. The Commission should, therefore, clarify that: (1) a system is not an ATDS unless it has the capacity to, *inter alia*, dial numbers ***without human intervention*** (regardless of whether the call is initiated by entering all ten digits of a telephone number or via a one-click dialing method); and (2) a system's "capacity" is limited to what it is capable of doing, without further modification, ***at the time the call is placed.*** Such a ruling will provide much needed clarity to

[1] 47 U.S.C. § 227(b)(1)(A)(iii).
[2] 47 CFR 64.1200(a)(2).

compliance minded businesses and represents sound public policy, as a contrary ruling would result in significant unintended consequences.

II. Businesses Desperately Need Clarification from the Commission Regarding What Type of Equipment Does Not Constitute an ATDS

Since its inception, the TCPA has prohibited the use of an ATDS to call cell phones without the call recipient's prior express consent.[3] In a 1992 Report and Order and a 2008 Declaratory Ruling, however, the Commission held that, subject to a few restrictions, a person who provides a telemarketer and/or creditor with their telephone number has provided "prior express consent" to be contacted at that number absent instructions to the contrary.[4] These Rulings and courts' historical deference to the FCC on this issue provided a relatively workable, if not ideal, regulatory landscape within which businesses could contact their existing customers in an efficient manner. Several recent developments, however, significantly threaten the ability of businesses to call their customers' cell phones (for both solicitation and non-solicitation purposes), thereby threatening the viability of many of these businesses and third party contact centers that make calls on their behalf.

First, the Commission's amended TCPA regulations prohibit the use of an ATDS to make telemarketing or advertising calls to cell phones without the call recipient's "prior express ***written*** consent."[5] The consumer's provision of his telephone number no longer constitutes sufficient consent for a business to use an ATDS to call his cell phone for solicitation purposes. A business that wishes to contact a customer on his cell phone in compliance with the TCPA, therefore, has two options: (1) obtain prior express written consent to call the customer's cell

[3] 47 U.S.C. § 227(b)(1)(A)(iii).
[4] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752 at ¶ 31 (1992); *Rules and Regulations Implementing the Telephone Consumer Protection Act of* 1991, Declaratory Ruling 23 FCC Rcd 559 at ¶¶ 9-10 (2008).
[5] 47 CFR 64.1200(a)(2).

phone; or (2) call the customer using equipment that does not constitute an ATDS. Although many businesses are diligently working to get written consent to call their customers' cell phones, this is not a viable option for all businesses, especially those with millions of customers. Such businesses have no choice but to initiate calls using equipment that is not an ATDS, and need clarity on what type of equipment qualifies as such.

Second, as the Commission is aware, the number of class action TCPA cases filed against sellers and teleservices providers alike has skyrocketed in recent years, subjecting these businesses to staggering litigation costs and settlement amounts.[6] These class actions pose a significant threat to the viability of many businesses while providing little net tangible benefit to anyone other than plaintiffs' counsel. The collective financial benefit consumers receive as part of these class action settlements is likely dissipated by increased prices for consumer goods and services, which naturally flows from the increased risk these class actions pose on legitimate businesses. This leaves plaintiffs' counsel as the primary benefactors of TCPA litigation, which is likely to increase further now that the Commission's written consent rules are effective.

Finally, recent court decisions have created even more uncertainty regarding the applicability of the TCPA to campaigns involving calls to cell phones. For example, the Southern District of Florida recently held that the Commission's Ruling on what constitutes "prior express consent" under the TCPA is contrary to the plain language of the TCPA and, therefore, invalid.[7] The decision is contrary to every other court opinion on this issue and is currently being appealed; however, it demonstrates that there is some risk associated with

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[6] *See e.g.*, *Communication Innovators Petition for Declaratory Ruling*, at pp. 14-15 (filed June 7, 2012) (estimating a 592% increase in the number of TCPA class actions involving autodialers and an 800% increase in the number of TCPA class actions involving predictive dialers over the last few years).

[7] Mais v. Gulf Coast Collection Bureau, Inc., 2013 U.S. Dist. LEXIS 65603 (S.D. Fla. May 8, 2013).

reliance on the Commission's Ruling.[8] Businesses that want to take a conservative approach may wish to dial telephone numbers without the use of an ATDS. These businesses, however, lack clarity on what type of equipment does not constitute an ATDS. A recent opinion issued by the Western District of Wisconsin, in *Nelson v. Santander Consumer USA, Inc.*,[9] illustrates this issue. In *Nelson*, the Court held that calls made using "preview mode" on a dialer were made with an ATDS because the dialer also had the capacity to dial in a predictive mode.[10] The Court described preview mode as follows: "In preview dialing, an employee chooses a telephone number by clicking on a computer screen and the system calls it. Defendant's employees never called plaintiff by pressing numbers on a keypad."[11] Although the Court's opinion was based on the ***uncontested*** fact that the equipment had the "capacity" to dial numbers automatically, not the fact that calls were initiated using a one-click dialing method, it nonetheless created industry wide confusion as to whether the use of a one-click dialing process is *per se* prohibited. Moreover, even though this decision was vacated pursuant to a joint stipulation of the parties, businesses are still concerned that courts will reach the same conclusion as part of future lawsuits, and want assurances that equipment is not an ATDS merely because it is capable of dialing numbers at the click of a single button.

III. The Definition of ATDS Does Not Include Equipment that Lacks the Capacity to, *Inter Alia*, Dial Telephone Numbers Without Human Intervention

ATDS is defined 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

[8] The "prior express consent" standard remains the valid standard for non-telemarketing calls; therefore, this decision has a significant impact on these types of campaigns.
[9] Nelson v. Santander Consumer USA, Inc., 2013 U.S. Dist. LEXIS 40799 (W.D. Wis. Mar. 8, 2013).
[10] *Id.*
[11] *Id.* at 8.

such numbers."[12] The Commission has provided little guidance on the scope of this term outside its 2003 Report and Order and a 2008 Declaratory Ruling, which both addressed a specific type of predictive dialing solution that involved pairing predictive software with an autodialer.[13] Specifically, the Commission affirmed that pairing such software with autodialer equipment would not make the autodialer equipment suddenly exempt from the autodialer restriction because of the software's ability to dial from a calling list.[14]

A. The Second Prong in the Definition of ATDS Implies that the Equipment Must Have the Capacity to, *Inter Alia*, Dial Without Human Intervention

Although the term "human intervention" does not appear in the definition of ATDS, the second prong of the definition (the capacity to dial telephone numbers) presupposes that the equipment has the capability of, *inter alia*, ***automatically*** dialing telephone numbers rather than being capable of dialing the numbers only after being prompted to do so by a human. Indeed, the Commission has stated that "the statutory definition contemplates ***autodialing equipment*** that either stores or produces numbers."[15] Although PACE believes the "either stores or produces numbers" language is an oversimplification of the first prong of the definition (it would mean that the Commission has effectively removed the "using a random or sequential number generator" language from the statutory definition, contrary to the TCPA), this demonstrates the Commission's tacit acknowledgment the capacity to dial ***without human intervention*** is a prerequisite to the second prong of the definition.

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[12] 47 U.S.C. § 227(a)(1); *see also* 47 CFR 64.1200(f).

[13] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 131 (2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling 23 FCC Rcd 559 at ¶ 12 (2008).

[14] *Id.* Although not germane to this Petition, PACE reiterates the position outlined in its Petition for Reconsideration and several other petitions filed before the Commission, that a predictive dialer is not an ATDS unless it has the capacity to store or produce numbers ***using a random or sequential generator***.

[15] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 132 (2003).

This distinction becomes even more critical when you consider the impact of the Commission's oversimplification of the first prong. If equipment is an ATDS merely because it has the capacity to: (a) store or produce numbers to be called; and (b) dial such numbers after being prompted by a human, virtually every modern telephone (including smart phones and any phone with speed dial functionality) is an ATDS because they have the capacity to both store numbers and dial them upon command. Under this interpretation, no calls can be made from one cell phone to another without the called party's prior express (written) consent, regardless of the parties involved or the purpose of the call. This is an absurd interpretation that contravenes both Congressional intent and sound public policy. It also conflicts with the Commission's previous holding that the TCPA's ATDS restrictions "clearly do not apply to functions like 'speed dialing,' [or] 'call forwarding,'...because the numbers called are not generated in a random or sequential fashion."[16] The only logical interpretation is that the second prong requires the equipment to have the capacity to dial telephone numbers ***without human intervention***.

B. The Use of a One-Click Dialing Method is Irrelevant to the Determination of Whether an ATDS was Used to Initiate the Call

The decision in *Nelson* has created industry wide confusion regarding the legality of using a one-click dialing method to initiate calls. Whether calls are initiated by entering all ten digits of the phone number or via a one-click process, however, is irrelevant to the determination of whether an ATDS was used to make the call. As indicated above, the statutory definition of ATDS inherently requires the equipment to have the capacity to, *inter alia*, dial numbers without human intervention to be an ATDS. Both dialing methods (entering all ten digits and one-click dialing) involve human intervention for each and every call. There is nothing in the TCPA, the Commission's regulations or any Commission Rulings or Orders that indicates all ten digits of a

[16] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752 at ¶ 47 (1992).

telephone number must be entered for equipment to be outside the definition of an ATDS. Conversely, public policy and common sense dictate that, for purposes of the TCPA, there is no distinction between the two dialing methods. If equipment meets the definition of an ATDS merely because it can dial multi-digit telephone numbers at the touch of a single button, virtually every modern telephone (including cell phones and all phones with speed dial functionality) constitutes an ATDS. As discussed above, this interpretation is manifestly against Congressional intent, prior Commission holdings and sound public policy.

IV. A System's "Capacity" is Limited to What it is Capable of Doing, Without Further Modification, at the Time the Call is Made

As noted above, in the 2003 Report and Order, there is an important discussion regarding the capacity of equipment to make calls "when paired with certain software."[17] The Commission did not specify whether it was contemplating the capacity of the equipment when paired with the software ***at the time the call is made*** or its theoretical capacity (i.e. its capacity if the software were installed in the future). PACE agrees with the positions outlined in other petitions filed with the Commission,[18] that the equipment's "capacity" must be limited to what it is capable of doing ***at the time the call is placed*** rather than taking into account what the "capacity" of the equipment would be if it were modified or altered in some way.

The term "capacity" is not defined in the TCPA or the Commission's regulations. When a statute does not define a term, the everyday meaning of the term governs.[19] Relevant dictionary definitions for the term capacity (and example sentences provided in these dictionaries) include the following:

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[17] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 131 (2003).

[18] *See, e.g., Communication Innovators Petition for Declaratory Ruling*, at 16-18 (filed June 7, 2012); *GroupMe, Inc. Petition for Expedited Declaratory Ruling and Clarification*, at 9-14 (filed March 1, 2012).

[19] *See e.g.*, Watson v. United States, 128 S. Ct. 579, 583 (U.S. 2007); United States v. Hildenbrand, 527 F.3d 466, 476 (5th Cir. Tex. 2008).

Dictionary Definition	Example Sentences in the Dictionary
"The ability to do something."[20]	"Her poor health limits her earning capacity."
"The facility or power to produce, perform, or deploy."[21]	"A plan to double the factory's capacity."
"Actual or potential ability to perform, yield, or withstand."[22]	"The capacity of the oil well was 150 barrels a day."
"The ability to do or produce."[23]	"The factory's output was not at capacity."

As demonstrated by the examples provided in these dictionaries, each definition pertains to the ***current*** capacity of a person, organization or object. For example, the capacity of the factory in the second example above is measured based on its current limitations. Once the factory is modified, its capacity changes (doubling in this case). The clear takeaway from these definitions is that, although the capacity of an object is not necessarily limited to the manner in which it is currently being used, it is limited to its current capabilities. The Commission should, therefore, clarify that, in accordance with the everyday meaning of the term capacity, a system's "capacity" is limited to what it is capable of doing, without further modification, ***at the time the call is placed.***

This interpretation is not only required by principles of statutory construction, it is also sound public policy. If the term capacity encompasses an object's theoretical capacity, the object would have a virtually infinite capacity. Relevant to the TCPA, this interpretation would mean that all computers and cell phones constitute ATDSs because they can be paired with software that allows them to autodial telephone numbers.[24] As discussed above, such an interpretation is contrary to Congressional intent, prior Commission holdings and sound public policy.

[20] Macmillan Dictionary, available at: http://www.macmillandictionary.com/us/dictionary/american/capacity.
[21] Merriam-Webster Dictionary, available at: http://www.merriam-webster.com/dictionary/capacity.
[22] Dictionary.com, available at: http://dictionary.reference.com/browse/capacity.
[23] WordReference.com, available at: http://www.wordreference.com/definition/capacity.
[24] *See, e.g., GroupMe, Inc. Petition for Expedited Declaratory Ruling and Clarification*, at 10-11 (filed March 1, 2012).

Moreover, PACE's request and the underlying rationale for the same comports with the recent decision issued by the Northern District of Alabama, in *Hunt v. 21st Mortg. Corp.*, which held that "to meet the TCPA definition of [ATDS], a system must have a **present** capacity, at the time the calls were made, to store or produce and call numbers from a number generator."[25] According to the Court, a defendant cannot be held liable "if substantial modification or alteration of the system would be required to achieve that capability."[26] Similar to PACE's contentions here, the Court noted that a broader interpretation of the term "capacity" would sweep consumer devices such as iPhones within the definition of ATDS.[27]

V. The Commission Can Provide the Requested Clarifications via a Declaratory Ruling

PACE is mindful that the Commission cannot make a rule change via a Declaratory Ruling. PACE's requests, however, do not necessitate a rule change. PACE merely seeks ***clarification*** on the ***existing*** definition of ATDS as follows: (1) that the second prong of the definition requires that equipment have the capacity to, *inter alia*, dial numbers ***without human intervention*** to constitute an ATDS; and (2) that, pursuant to the everyday meaning of the term capacity, a system's "capacity" is limited to what it is capable of doing, without further modification, ***at the time the call is placed***. These requests are consistent with the language in the TCPA, the FCC's TCPA regulations, and prior Commission Rulings; therefore, no rule change is necessary.

In the event that the Commission disagrees with this position, PACE respectfully petitions the Commission for an Expedited Rulemaking pursuant to 47 CFR 1.401 to: (1) define the term "capacity," as used in the TCPA and Commission's rules, as "the current ability to operate or perform an action, when placing a call, without first being modified or technologically

[25] Hunt v. 21st Mortg. Corp., 2013 U.S. Dist. LEXIS 132574 at 11 (N.D. Ala. Sept. 17, 2013).
[26] *Id.*
[27] *Id.*

altered;" and (2) modify the definition of "automatic telephone dialing system" in 47 CFR 64.1200(f)(2) by adding the phrase "without human intervention" to the end of the definition.

VI. Conclusion

For the foregoing reasons, the Commission should clarify that (1) a system is not an ATDS unless it has the capacity to, *inter alia*, dial numbers ***without human intervention***; and (2) a system's "capacity" is limited to what it is capable of doing, without further modification, ***at the time the call is placed***. Alternatively, the Commission should initiate an Expedited Rulemaking to: (1) define the term "capacity," as used in the TCPA and Commission's rules, as "the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered;" and (2) modify the definition of "automatic telephone dialing system" in 47 CFR 64.1200(f)(2) by adding the phrase "without human intervention" to the end of the definition.

Respectfully submitted,

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