

**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)

Comments of **DialAmerica Marketing, Inc.** in Support of the Petition Filed by the
Professional Association of Customer Experience (PACE) for Expedited Declaratory
ruling and/or Expedited Rulemaking
**Including a proposed new definition of Automatic Telephone Dialing System
(ATDS)**

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1. Introduction

DialAmerica has been in the teleservices business for over 50 years, longer than any other teleservices company in business today. DialAmerica provides outbound, inbound, and interactive teleservices for over 100 of the nation's most respected brands. We have 23 dedicated contact centers in major markets across the US and process approximately 100 million phone calls annually from about 2,900 workstations. We have over 5,000 employees including approximately 3,800 agents who carry on millions of conversations on behalf of our clients each week.

2. Summary

DialAmerica supports the PACE petition for an expedited declaratory ruling and/or expedited rulemaking to clarify that: (1) a system is not an automated telephone dialing system (ATDS) unless it has the capacity to 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*.

While DialAmerica supports the PACE petition, we believe that the current definition of automatic telephone dialing system (ATDS) is overly broad and encompasses many of the devices used to place calls today. Based on this definition, it is almost impossible to place a call today that is not from an ATDS. We also believe that the intention of the law was to prevent abusive calling practices, regardless of the equipment used. Based on this belief, the commission should amend the TCPA regulations to focus on the process used to place the call by replacing the definition of ATDS with a new definition outlining an automatic telephone dialing process (ATDP). We propose the following definition:

- (1) The term "automatic telephone dialing process" means—

- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
- (B) to dial such numbers without human intervention required to dial each number; and
- (C) to dial such numbers in a way that may result in an abandoned call which is defined as a call that is not transferred to a live sales agent within two (2) seconds of the recipient's completed greeting (FCC Report & Order 537).

This new definition of automatic telephone dialing platform will replace automatic telephone dialing system throughout the remainder of the TCPA. Furthermore, we believe that issuing a declaratory ruling is the most appropriate way for the FCC to respond to this issue.

3. Issues and Concerns

We believe that the goal of the TCPA regulations should be to protect and preserve the best interests of the consumer. The technology in common use today is vastly different than the technology that existed when the TCPA rules were implemented in 1991. Hence, the interpretation of the rules must always reflect the reality of the current business and technology environment. Otherwise, perverse and unintended consequences will be the end result. The following items are of concern to us at DialAmerica, and we believe they should be items of concern for the FCC as well.

- In 1991 an ATDS was an advanced, sophisticated technology that existed only within a call center environment. Today, most phones have integrated computer

and database functions, and are capable of storing, retrieving and dialing a phone number with just one touch or command by the user. In effect almost every phone regardless of whether it's in your pocket or on a desk is an ATDS if the FCC allows the current rule to stand without further clarification.

- In 1991 almost every consumer had a landline phone even if they also had a cell phone. Today, millions of consumers have given up their landlines and their cell phones are their only phones.
- It is a certain fact that the deployment of the Federal Do Not Call Registry (DNCR) is a very popular public policy. The DNCR is widely used and any consumer who desires not to be called can register their phone number, regardless of whether it is connected to a cell phone or a land line, and receive the benefit of having their phone number suppressed from calling lists.
- **The issue at hand is not the equipment being used, but *how* the equipment is being used.** That is why it is more important to define the process of placing the calls rather than the equipment that is used to place the calls. This will also eliminate the inherent issue that almost all calls are placed using equipment that is considered an ATDS under the current definition.
- Another issue at hand is that the current definition of the ATDS restricts the use of computers since any computer has the ability to store and dial a phone number in today's world. Without the use of computers, telemarketers lose the ability to track and manage the dialing of phone numbers, which could lead to abusive practices on an individual agent basis. With a definition that focuses on the process of dialing, telemarketers can utilize computer technology to insure that a

number is being called in the appropriate timeframe, how long the call must ring before disconnecting, and to track all of the necessary call details associated with the other customer information.

- Class action lawsuits are extremely costly to defend, and with confusion over the definition of an ATDS, the rules will be interpreted differently from one jurisdiction to the next. We as a company and as an industry are highly at risk if the FCC allows the current rule to continue to focus on the “equipment” versus the “process”. This serves no one’s interest other than the plaintiffs’ attorneys.

One recent example occurred On September 17, 2013 where a federal court in Alabama Issued a decision interpreting the term. *Hunt v. 21st Century Mortgage Corp.* (N.D. Ala. September 17, 2013). In that case, an individual alleged that a debt collector called him in violation of the TCPA. The plaintiff argued that he was contacted on his cell phone in violation of the ATDS restriction, while the Defendant argued that it used manual dialing for all communications with the Plaintiff.

The court reviewed other decisions on the topic and concluded that the equipment falls within the definition if it has the “capacity” to be altered to dial predictively, even if that capacity is temporarily disabled. In this case, however, the plaintiff argued that the equipment could dial predictively with a software modification. *Id.* at *11.

The court said, however, that “the problem with this reasoning is that, in today’s world, the possibilities in modification and alteration are virtually limitless”. For example, it is virtually certain that software could be written, without much trouble that would allow iPhones’ to store produced numbers to call using a random or sequential number

generator, and to call them.” *Id.* at *11. The court held, therefore, to meet the TCPA definition “a system must have a present capacity” to act predictively or without human intervention. Just because it could become a dialer with software modification did not make it presently a dialer.

4. Conclusion

As we stated earlier, we believe that the goal of the TCPA regulations should always be to protect and preserve the best interests of the consumer. The technology in common use today is vastly different than the technology that existed when the TCPA rules were initially implemented in 1991. Hence, the interpretation of the rules must adjust to reflect the reality of the current business and technology environment. Otherwise, perverse and unintended consequences will be the end result, and that would serve neither the industry nor the consumers. The commission should make an Expedited Declaratory ruling and/or Expedited Rulemaking to define the automatic telephone dialing process in place of the definition of the automatic telephone dialing system.