

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. CG 02-278
Telephone Consumer Protection Act of 1991)
)
Petition for Expedited Declaratory Ruling and/or)
Expedited Rulemaking of the Professional)
Association for Customer Engagement (PACE))

To: The Commission

COMMENTS OF ACA INTERNATIONAL

ACA International (“ACA”), an international trade association of collection professionals and related companies representing approximately 5,000 members, submits these comments in support of the Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking of the Professional Association for Customer Engagement (“PACE”) in the above referenced proceeding.¹ Specifically, ACA respectfully urges the Commission to exercise its discretion and expeditiously clarify that “capacity” as related to the definition of an automatic telephone dialing system (“ATDS”), under the Telephone Consumer Protection Act (“TCPA”)² can only mean the present

¹ Professional Association for Customer Engagement, *Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, CG Docket No. 02-278 (filed Oct. 18, 2013) (“PACE Petition”); *see also*, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking from the Professional Association for Customer Engagement*, Public Notice, CG Docket No. 02-278, DA 13-2220 (rel. Nov. 19, 2013) (“Public Notice”).

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (“TCPA”); *see also* 47 C.F.R. § 64.1200 *et seq.*

ability of such a system to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers, at the time the call is made.³

I. BACKGROUND ON ACA INTERNATIONAL

ACA International (“ACA”) is an international trade association of debt collection and related companies that provide a wide variety of accounts receivable management services. With offices in Minneapolis, Minnesota and Washington, D.C., ACA represents approximately 5,000 company members ranging from collection agencies to attorneys, credit grantors, and vendor affiliates that together employ in excess of 350,000 workers. Myriad federal, state, and local laws and regulations regarding debt collection govern ACA’s company-members, along with the organization’s own standards and guidelines.⁴ Indeed, the accounts receivable management industry is unique if only because it is one of the few in which Congress has enacted a specific statute governing all manner of communications with consumers when such businesses seek to recover payments.⁵

³ ACA recognizes that PACE also seeks confirmation that a dialing system is not an ATDS under the TCPA unless it has the capacity to dial numbers without human intervention. Although ACA supports this aspect of the Petition, it does not provide comment on this issue at this time.

⁴ For example, the collection activity of ACA members is governed by the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; and numerous state-specific collections laws. *See also*, ACA’s Code of Ethics and Code of Operations, available at <http://www.acainternational.org/about-ethics-code-of-conduct-12909.aspx>, of which all members are required to uphold as a condition of membership.

⁵ The FDCPA defines “communications” subject to the statute broadly to include “the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. §1692a(2).

ACA members contact consumers exclusively for *non-telemarketing reasons*. The calls do not involve advertising or soliciting the sale of products or services. The purpose of these telephone communications is strictly to facilitate the recovery of payment for services rendered, goods that have been received, or loans that have been given, and to explain available options to the consumer. The calls made by collection professionals are neither random nor sequential; indeed, such calls would be contrary to ACA members' business objectives and an obvious waste of time for them. To summarize, collection professionals make calls to specific, named individuals for the sole purpose of completing a transaction in which a customer has received a product, service, loan, or other thing of value, and payment has not yet been received. *This single fact distinguishes ACA members' communications from those of telemarketers subject to the TCPA.*

Finally, one general commonality among the otherwise diverse ACA membership is their use of technology to facilitate efficient, accurate, and compliant consumer communications. In this environment, dialing systems confer unique benefits to both consumers and collections professionals. For example, technology supports precision and prevents dialing errors – which is particularly important when calls involve often sensitive collection matters. Technology also facilitates compliance with the numerous laws that govern debt collection, such as restricting calls to designated area codes within the calling times prescribed by federal and state laws. Using technology effectively is crucial to the continued operations and economic success of ACA members.

II. THE COMMISSION SHOULD CLARIFY THAT “CAPACITY” UNDER THE TCPA IS THE “PRESENT ABILITY” OF A DIALING SYSTEM.

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

such numbers.”⁶ Critically, “capacity” is not defined in either the statute or the regulations. The Commission should explicitly clarify that “capacity” for TCPA purposes means the present ability at the time the call is made of a dialing system to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers. Otherwise, given today’s technology, any smart phone, personal computer equipped with a modem, or host of other devices with the ability to dial a telephone number could be encompassed under such an expansive interpretation.

This definition is consistent with the TCPA’s plain language, the Commission’s prior TCPA rulemakings, the everyday meaning of the term, and legislative history. It is a longstanding principle of statutory construction that when Congress chooses not to define a term, its ordinary meaning typically applies.⁷ First, the definition in the statute begins with the present tense – “*has* the capacity” – reflecting that the statute is intended to apply only to equipment with current or present capacity.⁸ Second, as set forth in detail in the PACE Petition, dictionary definitions support the ordinary meaning of “capacity” as a dialing system’s “present ability” or current

⁶ 47 U.S.C. § 227(a)(1); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 ¶ 132 (2003).

⁷ See, e.g., *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (U.S. 2011) (citing *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

⁸ 47 U.S.C. § 227(a)(1) (emphasis supplied). By contrast, in a different portion of the TCPA describing protection of subscriber privacy rights, Congress uses the future tense in describing the Commission’s requirement to initiate a rulemaking involving, in part, an evaluation of the capacity for certain entities to establish certain processes. See 47 U.S.C. § 227(c)(1)(B) (“The proceeding shall... evaluate the categories of public and private entities that *would have the capacity* to establish and administer such methods and procedures)(emphasis supplied).

capabilities.⁹ Of particular relevance, the Merriam-Webster Dictionary defines “capacity” as “the facility or power to produce, perform, or deploy.”¹⁰ A dialing system that otherwise meets the criteria for an ATDS does not carry such a “facility” or “power” if it cannot perform such functions in its current form without significant modification.

Recently, one federal court grappled with just this issue and rightly determined that “capacity” under the TCPA must mean “present” ability:

“[T]o meet the TCPA definition of an ‘automatic telephone dialing system,’ **a system must have a present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator.** While a defendant can be liable under §227(b)(1)(A) whenever it has such a system, even if it does not make use of the automatic dialing capability, **it cannot be held liable if substantial modification or alteration of the system would be required to achieve that capability.**”¹¹

In *Hunt*, the court reasoned that the dialing system at issue was incapable of automatic dialing “in its present state.”¹² Further, in rejecting plaintiff’s argument that “certain software” could be installed to make automatic dialing possible, the court analogized the situation to the creation of software such as an iPhone app and questioned the seemingly necessary, logical conclusion that

⁹ PACE Petition at pp. 10-11.

¹⁰ *Id.*; *see also*, Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/capacity> (last accessed Dec. 11, 2013).

¹¹ *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at *11 (D. Ala. Sept. 17, 2013) (emphasis added); *see also*, Communication Innovators, *Ex Parte Letter*, CG Docket No. 02-278, (filed Oct. 29, 2013)(apprising the Commission of the *Hunt* court’s decision).

¹² *Id.*

would make “roughly 20 million American iPhone users” subject to the TCPA’s mandates.¹³

Common sense dictates that the *Hunt* court interpretation is correct, and that “capacity” cannot mean hypothetical future ability. However, despite the helpful outcome of the *Hunt* case, without specific FCC guidance regarding the definition of “capacity,” nuisance lawsuits will likely continue to be filed on the basis that the TCPA’s scope extends to any device that could theoretically perform the statutorily required functions, even if the device completely lacks any current ability to do so without significant modification.¹⁴

ACA members use technology, including dialing systems, to accurately and efficiently contact specific consumers, related to a particular debt. Those systems typically do not have the *present ability* to store or produce and call numbers randomly or sequentially from a number generator. Further, the use of such systems to contact specific consumers, for debt collection purposes, does not violate the consumer privacy interests or public safety concerns that Congress voiced when it acted to thwart overly aggressive telemarketing practices through the TCPA.¹⁵

And, this reading is also consistent with the Commission’s expectation that it may need to consider changes as these technologies evolve.¹⁶

¹³ *Id.*

¹⁴ See U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, at 7 (October 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

¹⁵ For example, the Commission has agreed that “calls solely for the purpose of debt collection are not telephone solicitations and do not constitute telemarketing.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559 at ¶ 11 (2008).

¹⁶ *Id.* at ¶ 13.

For reasons similar to those presented in the PACE Petition and herein by ACA, a variety of other petitioners also support the urgent need for the Commission to define “capacity” as the “present ability” of a system.¹⁷ The U.S. Chamber of Commerce has emphasized that “American companies need certainty to communicate with their customers” to avoid the result of “less satisfied customers and less competitive American businesses.”¹⁸ This diverse community of interest further demonstrates that clarification from the Commission is urgently required.

ACA joins this broad call and urges the Commission to act expeditiously by explicitly defining “capacity” for TCPA purposes as the present ability, at the time the call is made, of a dialing system to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers.

III. A DECLARATORY RULING IS THE PROPER AVENUE FOR CLARIFYING THE DEFINITION OF CAPACITY WITH RESPECT TO AN ATDS; HOWEVER, ACA WOULD ALSO SUPPORT A RULEMAKING PROCESS FOR CLARIFICATION.

The *clarification* sought through the PACE Petition and supported by ACA is properly addressed through a declaratory ruling, as there is no “change” to any rule. However, ACA also supports a clarification through a rulemaking proceeding if the Commission believes such a

¹⁷ See, e.g., PACE Petition at pp. 7-12; *Petition of Glide Talk, Ltd. for Expedited Declaratory Ruling*, CG Docket No. 02-278, at pp. 9-13 (filed Oct. 28, 2013) (“Glide Talk Petition”); YouMail, Inc., *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, at p. 11 (filed April 19, 2013) (“YouMail Petition”); Communication Innovators, *Petition for Declaratory Ruling*, CG Docket No. 02-278, at p. 15 (filed June 7, 2012) at pp. 5-10; *GroupMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278, at p. 14 (filed March 1, 2012) (“GroupMe Petition”).

¹⁸ Comments of the U.S. Chamber of Commerce, *Communication Innovators Petition for Declaratory Ruling*, CG Docket No. 02-278, at p. 8 (filed Nov. 15, 2012).

process is more appropriate. Currently (and critically), “capacity” is not defined in either the TCPA or the Commission’s regulations. ACA supports any procedural vehicle that will result in a definitive clarification that “capacity” regarding an ATDS is a system’s present ability, at the time the call is made. This definition is consistent with the TCPA’s plain language, the Commission’s prior TCPA rulemakings, the everyday dictionary meaning of the term, and common sense.

IV. CONCLUSION.

Without the requested clarification of “capacity,” businesses that use technology to make legitimate, non-telemarketing calls efficiently and accurately will continue to be subjected to exploitive class action litigation and left with no choice but to utilize inefficient, manual calling methods in an effort to manage risk. By their nature, such manual methods are inevitably more error-prone and so may hamper the consumer privacy interests that the Commission has so diligently sought to protect. ACA respectfully urges the Commission to exercise its discretion and expeditiously issue a declaratory ruling clarifying that the “capacity” of an ATDS is the present ability of such a system to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers.

Respectfully submitted,



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