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**Before the  
Federal Communications Commission  
Washington DC 20544**

<b>In the matter of</b>	<b>CG Docket No. 02-278</b>
<b>Professional Association for Customer Engagement's Petition</b>	<b>Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</b>
	<b>DA 13-2220 November 19, 2013</b>

**Gerald Roylance's Comments re Professional Association for Customer Engagement 's Petition**

**I. Introduction**

In DA 13-2220,<sup>1</sup> the FCC seeks comment about the Professional Association for Customer Engagement's (PACE) October 18, 2013 Petition.<sup>2</sup> Generally, PACE wants clarification or change to the FCC's interpretation of the TCPA's *automatic telephone dialing system* (ATDS).

The FCC seeks comment on two items. The first item, "PACE seeks clarification through an Expedited Declaratory Ruling that a dialing system is not an automatic telephone dialing system for purposes of the Telephone Consumer Protection Act (TCPA) unless it has the capacity to dial numbers without human intervention, regardless of whether a call is initiated by entering ten digits of a telephone number or by a one-click dialing method", is an incomprehensible summary of PACE's request. The basic

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<sup>1</sup> FCC, 19 November 2013, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking from the Professional Association for Customer Engagement*, <http://apps.fcc.gov/ecfs/document/view?id=7520958856>,

<sup>2</sup> Professional Association for Customer Engagement, October 18, 2013, *Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, <http://apps.fcc.gov/ecfs/document/view?id=7520947489>.

issue appears to be whether speed dialing or preview dialing are ATDS functions. The simple use of speed dialing or preview dialing should not fall under the ATDS moniker and it should be permissible under the TCPA. However, that issue seems to be moot. The issue appeared in *Nelson v Santander Consumer USA, Inc.*,<sup>3</sup> but it seems to have been resolved correctly. The defendant apparently used both predictive dialing and preview dialing, and the court did not distinguish the two but rather labeled both as ATDS.<sup>4</sup> The opinion, however, has been vacated by stipulation of the parties, and it is not clear that the opinion is anything other than a simple mistake. Also, the *Nelson* Defendant is not a sympathetic debt collector: after Nelson gave written notice on 13 April 2010 to stop calling her cellular telephone, Defendant called that cellular telephone 1026 times and left 116 prerecorded messages.<sup>5</sup>

The second item is a shopworn “capacity” argument. This argument already exists in several undecided petitions before the FCC.<sup>6</sup> The term is used in the TCPA but not defined. PACE wants “capacity” to be restricted to “the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered”. The request should be rejected. It is part and parcel with poor statutory language about random or sequential number generators, and it would essentially permit anyone to dial a database of numbers and avoid the ATDS label. The FCC should decide the earlier petitions where there were extensive arguments. If the FCC persists with this item, it should incorporate all the comments on the previous petitions.

## II. Preview Dialing

Not only is the FCC restatement confusing, but also the Petition section III, pages 7 through 10, is a tortured mess. It disagrees with the FCC’s findings by claiming the 1991 statement “either stores or produces numbers” is an “oversimplification” and claims that the FCC’s 1991 statements about speed dialing and call forwarding are inconsistent. PACE’s statements seem to involve studied ignorance. Furthermore, a blanket exemption based on “without human intervention” invites monkey dialers.

The “smart phone” argument has been raised before, but PACE does not provide any examples of where there are problems with interpreting the FCC’s ATDS guidance with respect to smart phones. PACE offers no guidance of its own about how the FCC’s findings are leading anyone astray. Smart phones have the capacity to be ATDS. Smart phones are computers, and they could be programmed to issue a series of calls without human intervention. If somebody uses a smart phone to dial a database of numbers, then that smart phone should fall under the prohibitions of the TCPA. It does not make sense to exempt all smart phones. However, PACE is not telling us that the courts or even

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<sup>3</sup> Opinion, <http://www.wiwd.uscourts.gov/opinions/pdfs/11-C-307-C-03-08-13.PDF>

<sup>4</sup> Opinion, 18-19. Court found that the system had the capacity, so even preview dialed numbers were violations.

<sup>5</sup> Opinion, 19.

<sup>6</sup> Petition, page 10, stating, “PACE agrees with the positions outlined in other petitions filed with the Commission” and then lists the Communications Innovators and GroupMe petitions.

advertisers are genuinely confused about when a smart phone is an ATDS and when it is not. In fact, the smart phone example is usually pulled out because it is typically not used as an ATDS. No body is going to make the mistake that PACE allegedly fears. Where are the defendants being prosecuted for TCPA violations when they manually dial a 10-digit telephone number from their iPhone? Similarly, Microsoft Outlook can deliver faxes to a list of numbers; it is an ATDS. If somebody uses Outlook to broadcast a slew of faxes containing unsolicited advertisements, then that violates the TCPA. If somebody uses Outlook to send a single fax to someone, then there is human intervention and the practice does not violate the TCPA. When people use their smart phones or Outlook as a speed dialer to dial just one telephone number, are they being sued for TCPA violations? Plaintiffs and the courts have a lot of common sense; let them use it.

To put it another way, *Nelson* is gone; what other cases are there? Don't make this a purely academic exercise. Yes, there are many TCPA lawsuits, but lets talk about particular lawsuits and particular details.

If a debt collection application displays a debtor screen, that's fine. If the debt collector can press a key or click a button to dial the debtor's telephone number while the debt collector is on the line, then that is a speed dialing or preview dialing function. The FCC has told us that speed dialing is not something that Congress intended to prohibit. Yes, it would be absurd to require the debt collector to manually dial the 10 digits. The speed dialing function also has the advantage of accuracy – it eliminates the chance of the agent accidentally misdialing the number. The agent is on the telephone when the number is dialed. There is no risk that the call will be abandoned because an agent is not available. If the subscriber wants to vent at the caller (something that Congress felt was important when it passed the TCPA), the subscriber may do so. Compare that scenario to a predictive dialer: an agent may not be available. Predictive dialers may also make mistakes with false positives on answering machine detection, so subscribers may get a dead-air call, no abandonment message message plays, and the predictive dialer statistics look kosher even though the call was abandoned. And the subscriber cannot yell at anybody.

The PACE Petition describes compliant companies using preview dialing to call cellular telephones without triggering the ATDS prohibitions. It is clear that those companies adequately understood the FCC's guidance. It is also clear that the Defendant in *Nelson* did not understand the rules. A debt collector ignoring an FDCPA written notice is a death knell. The Defendant also made many poor arguments to the court,<sup>7</sup> and

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<sup>7</sup> Reading the opinion suggests the judge was exasperated with the Defense arguments. Well settled that Defendant is a debt collector under the FDCPA. (Page 7) Defendant did not raise consent in its answer. Defendant asked the Court to ignore Hobbs Act: "This argument comes perilously close to violating Fed. R. Civ. P. 11." Court believed Defendant knew about *CE Design* and buried it because Defendant cited to *Griffith*. Defendant would therefore ignore a duty disclose adverse decisions. Defendant argued the witness it supplied as knowledgeable about the Aspect dialer was not a competent witness. "Defendant's argument about Nightengale's testimony also borders on the frivolous."

that may have caused its good argument about preview dialing get lost in the noise of its other arguments.

Having said that, I'm leery of modifying the guidance so that any human intervention takes a system outside of the definition of ATDS. About a year ago I saw a business description of a monkey dialer operation. The plan was to exploit the "human intervention" guideline by hiring a small army of minimum wage employees ("monkeys"). The business would essentially run a predictive dialer operation in Florida for its clients throughout the United States. The dialing system would select telephone numbers, throw them up on a screen, and the minimum wage employee would click OK to make the call. The employee/monkey wouldn't have to think about the call and was not exercising any discretion. If the call completed and the client was available, then the system would immediately transfer the call to the client; the monkey would not talk to the person he just "called"/speed dialed/preview dialed. If the client weren't available (i.e., it's a call that an ordinary predictive dialer would abandon), then the call is transferred to the monkey. It's not clear that the monkey can help much at all, but he serves as "human intervention". At least, that is how the system was portrayed. I suspect some corners might be cut to make it more efficient. To me, the mere introduction of "human intervention" to satisfy the letter of FCC's guidance should not take the monkey dialer out of the definition of an ATDS. Adding additional elements to the guidance will probably backfire: more complicated definitions offer more opportunities for gamesmanship. The business plan was also a little sketchy; it was going to employ answering machine detection (AMD); a machine – not a person – was going to make the decision about hanging up.

Here's an even worse consequence. The TCPA at 47 U.S.C. § 227(b)(1)(A)(iii) prohibits using an ATDS to call a cellular telephone or deliver a message using a prerecorded or artificial voice. A text message does not use an artificial or prerecorded voice. Consequently, a text message may be delivered to a cellular telephone as long as an ATDS is not used. Under PACE's interpretation, any human intervention would take an automatic dialer outside the realm of ATDS. Consequently, "monkey texting" would be permitted. The TCPA does not prohibit texting unsolicited advertisements. Compare the restriction on faxes.

In monkey texting, a company would prepare a text message and a list of recipients. It would then display the recipient on a computer screen, a minimum wage employee would mindlessly click OK, and the text would be sent. The next recipient would be displayed, and everything would repeat. The employee might be able to do 10,000 messages per hour. Some broadcasters might cut corners and have the monkey OK ten messages at a time. Others might hire some monkeys to sit and click but actually blast messages out even without a monkey's approval. The monkeys would just be for show. A plaintiff would have a tough time suing because it would look like the monkey was intervening.

I think any such system should be viewed as an ATDS despite human intervention. The monkeys are just window dressing that tries to satisfy the letter of a

technical definition. If the monkey is not really needed, then the courts should feel free to ignore the monkey and view how the system is being used.

The FCC should reaffirm that speed dialers are not ATDS. The FCC can say that applications that mimic speed dialing are not ATDS, but there should be some common sense there. The FCC should make clear that the human doing the intervention (pressing the speed dialer button) must be the principal of the call.

### **III. Capacity**

The capacity argument is addressed in other undecided petitions, and it seems pointless to continue going over old ground.

The danger is that most modern predictive dialers are not typically used to dial generated telephone numbers. Instead, there is a database of selected numbers, and those are the numbers that are dialed. Redefining “capacity” is an attempt to take all current automated dialers out of the definition of ATDS. If capacity is narrowly defined, then the ambiguity with sequential or random number generators comes front and center. If the definition of ATDS requires sequential or random number generators, then database dialing is not prohibited. That does not make sense.

Consider the monkey texting example above. I think Congress intended to prohibit automatic texting to cellular telephones, and I think the addition of a monkey to a textblaster does not nix that intention. Using the FCC’s “capacity” argument gives the court the flexibility of ignoring that monkey. The system could be altered to avoid using the monkey, and that altered system would clearly be an ATDS. I don’t get the same result with a speed dialer. If I remove the human element from the speed dialer, then there isn’t anyone who wants to make the call. We don’t have the same element of automation.

If the PACE definition of capacity is adopted, then monkey texting is legal. The courts could not delete the monkey (the court would have to take the software as written), and therefore the in-name-only human intervention keeps the system from being labeled an ATDS.

I am not convinced that courts have a difficult time recognizing an ATDS. I am convinced that a lot of aggressive companies want to avoid the ATDS label by using narrow definitions.

Furthermore, I believe the TCPA definition of ATDS does not require the use of a number generator; it is sufficient that the ATDS dial stored numbers. In comments about previous petitions, I’ve explained that using a number generator modifies the production of numbers to dial; it does not modify the storing of numbers. I surveyed state statutes, and those statutes separate the ideas of storing numbers from producing numbers.

Even if a system only dialed from a database of numbers, nothing prevents such a system from being loaded with a database of numbers that were generated with a random

number generator. Without modifying the dialing system, it would then dial random numbers. Consequently, it would have the present capacity to dial random numbers.

#### **IV. Conclusion**

To the extent PACE wants to exclude speed dialing and preview dialing from the definition of ATDS, the FCC has already announced that Congress never intended a speed dialing function to be an ATDS. Reaffirming that view has little downside. Companies should be able to use speed dialing and preview dialing without running afoul of the TCPA. That is a reasonable position.

However, modifying interpretations or definitions of ATDS has a tremendous downside. In that respect, what PACE wants is a disaster. Allowing a trivial insertion of human intervention or restricting the definition to some form of present capacity would open the flood gates.