

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

PACE Petition for Expedited Declaratory
Ruling and/or Expedited Rulemaking

CG Docket No. CG 02-278

COMMENTS OF NICOR ENERGY SERVICES COMPANY

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SUMMARY

The past few years have seen an explosion in cases in state and federal courts brought by class action plaintiffs seeking multi-million dollar payouts under the Telephone Consumer Protection Act of 1991 (the “TCPA”). Rather than targeting those who engage in abusive telemarketing practices, plaintiffs now frequently sue legitimate businesses providing services that consumers want, relying upon legal theories based on provisions in the TCPA that are ambiguous, confusing and impractical. Ultimately, consumers pay the price, because companies are forced to choose between raising the price of services to reflect the risk of shakedown lawsuits and discontinuing services – or failing to introduce new services – despite consumer demand, which is not the result intended by Congress, or the FCC, for the TCPA.

For this reason, Nicor respectfully urges the FCC to grant the Petition filed by the Professional Association for Customer Engagement (PACE) and clarify acceptable practices under its rules implementing the TCPA. Specifically, the FCC should clarify that equipment which is not configured to, and thus is not being used to, select and dial a telephone number without human intervention does not constitute an “automatic telephone dialing system” under the TCPA, even if the equipment subsequently could be configured to do so. Similarly, the FCC should clarify that technologies which require human interaction to initiate a call (including “one-click” dialing) do not constitute “automatic telephone dialing systems,” even if the equipment subsequently could be configured or upgraded to permit dialing without human interaction. Prompt action by the FCC is necessary to clarify that the mere availability of basic speed-dialing functions on a phone – which nearly every phone has – does not mean that the phone is an “automatic telephone dialing system.” The FCC should ensure that businesses can take advantage of new technologies and forms of communications with consumers without becoming subject to onerous consent requirements that are not necessary to protect consumers.

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Nicor Energy Services Company (“Nicor Services”) submits these comments in support of the Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking filed by the Professional Association for Customer Engagement (“PACE”) in the above-referenced docket.¹ Nicor Services respectfully urges the Federal Communications Commission (“FCC” or “Commission”) to grant the PACE Petition. In granting the PACE Petition, the Commission should also clarify, or as necessary open a new proceeding to amend, its rules (the “Rules”) implementing the Telephone Consumer Protection Act (“TCPA”) so that they better protect consumers without impeding legitimate business communications and practices. Specifically, the FCC should clarify, or amend, the Rules to:

- reduce ambiguities that expose businesses to vexatious lawsuits without protecting consumers;
- reflect a narrower interpretation of the TCPA’s statutory definition of an “automatic telephone dialing system”; and
- permit businesses to take advantage of new technologies and forms of communications without facing unnecessary legal risks.

¹ *PACE Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, CG Docket No. 02-278 (filed Oct. 18, 2013) (“PACE Petition”).

About Nicor Energy Services Company

Nicor Energy Services Company (“Nicor Services”) is a subsidiary of AGL Resources formed in 1992 to provide energy-related products and services with a home warranty focus. Nicor Services manages relationships with more than 835,000 customers on behalf of utility partners through its call center and offers a broad selection of products and services created especially for the homeowner.

Nicor Services include a wide range of warranty repair and service plans that provide value and peace of mind for utility customers. Its warranty plans provide repair coverage for heating and cooling equipment, kitchen and laundry appliances and the electrical, plumbing and gas services within the home. In addition, Nicor Services provides heating, air conditioning, insulation and indoor air quality services through its locally operated companies – D.M. Dykstra, Hawthorn Heating & Air Conditioning, and Tradewinds Heating & Air Conditioning.

Nicor Services relies upon informational outbound phone calls that the Commission recently found to be “highly valuable” to consumers. Using an integrated telephony and customer relationship management system, Nicor Services places outbound phone calls to customers to notify them of changes in service appointments, outstanding entitlements, or program and billing changes. Nicor Services files these comments to respectfully urge the Commission to reconsider aspects of the current rules that inadvertently inhibit efficient and valuable technologies and practices when seeking to end certain consumer abuses.

I. Ambiguities in the FCC’s Rules Harm Consumers by Increasing Costs and Encouraging Wasteful Lawsuits

Congress passed the TCPA to prevent telemarketers from engaging in uninvited, disruptive autodialing practices that annoy or harass consumers. As part of its efforts, Congress identified the use of automatic telephone dialing systems (“ATDSs”) and prerecorded voice

messages by telemarketers as particularly problematic, and took steps to limit the use of those devices as such devices may be used to call and seize consumer telephone lines – preventing consumers from using the telephone.² However, as the Commission has previously noted, Congress also found that “legitimate” business practices should be permitted and protected.³

In administering the TCPA, the Commission is required to balance these two interests. Unfortunately, absent clarification, the Commission’s TCPA rules will continue to expose businesses using modern telecommunications platforms to unnecessary regulatory and litigation risks without any corresponding benefit for consumers. Nicor respectfully urges the Commission to clarify its interpretation of the term ATDS to make clear that businesses may use advanced telecommunications technologies to reach consumers for legitimate purposes while still preventing abuses.

The fundamental problem with the current TCPA Rules is that the Rules seem to focus unreasonably on the technologies used to send messages (*e.g.*, ATDS, prerecorded voice, *etc.*) without differentiating between legitimate and abusive practices. For example, Section 64.1200(a)(2) prohibits an entity from “initiat[ing] . . . any telephone call [to a mobile number] that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice . . . other than a call made with the prior express written consent of the called party.” From the perspective of a consumer, the language limiting the use of an “ATDS” or “prerecorded message” is largely pointless. To the extent a consumer receives a call to which he or she consents, there is no harm to that consumer

² See H.R. Rep. No. 102-317 at 11 (1991) (describing abusive telemarketing practices); S. Rep. No. 102-178 at n.5 (1991) (same).

³ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No 02-278, 27 FCC Rcd 1830, ¶ 24 (2012) (“*2012 TCPA Order*”).

and no reason for regulation by the Commission based on the technology used to make the call. Likewise, to the extent a consumer does not consent to receive a call from a business, the technology that the business uses to call the consumer is irrelevant. By focusing on consumer consent to receive communications from a specific party, the Commission can serve consumer interests without interfering with legitimate business communications or the ability of businesses to take advantage of the efficiencies offered by new technologies.

Meanwhile, additional confusion and uncertainty arises from the fact that the term ATDS is defined ambiguously in both the statute and the FCC's Rules, which can lead to absurdly overbroad interpretations of the term. Specifically, the TCPA and the FCC's rules define an ATDS as follows:

The term "automatic telephone dialing system" means 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.⁴

The problem, as noted in the PACE Petition, is that the word "capacity" can be read to mean either (1) the capability of the equipment *at the time the call is made* to store or produce numbers and call them -- which is the more natural reading, or (2) the theoretical capability of the equipment, *if the equipment is modified*, to make such calls -- a forced reading advocated by some plaintiffs' attorneys.⁵ As noted in the PACE Petition, the Commission has provided little guidance to the industry or the courts on how this term should be interpreted.⁶ Indeed, outside of addressing the use of predictive dialers (a specific type of ATDS) in its *2003 Report & Order*

⁴ 47 U.S.C. § 227(a)(1) (emphasis added); 47 C.F.R. 64.1200(f)(2).

⁵ PACE Petition at 10.

⁶ PACE Petition at 8.

and a 2008 *Declaratory Ruling*, the Commission has thus far declined to clarify how the Rules apply to new technologies – including smart phones and advanced telecommunications platforms.⁷

These harms are compounded by the private right of action available to consumers under the TCPA, which inadvertently creates incentives for unscrupulous class action lawyers to exploit ambiguity in the Rules for their own profit.⁸ The problem was recently illustrated in *Hunt v. 21 Mortgage Corp.*⁹ In *Hunt*, the U.S. District Court for the Northern District of Alabama considered and rejected a plaintiff’s argument that the defendant’s telephone system was an ATDS simply because “software **could have been** installed onto defendant’s system which would have made autodialing possible.”¹⁰ In reaching the decision, the court highlighted the fundamental problem with the current ATDS definition:

[I]n today’s world, the possibilities of 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 or produce telephone numbers to be called, using a random or sequential number generator, and to call them.” Are the roughly 20 million American iPhone users subject to the mandates of § 227(b)(1)(A) of the TCPA? More likely, only iPhone users who were to download this hypothetical “app” would be at risk.

The court therefore holds that, to meet the TCPA definition of an “automatic telephone dialing system,” a system must have a

⁷ *Rules and Regulations Implementing the TCPA of 1991*, CC Docket No. 02-278, Report & Order, 18 FCC Rcd 14014 (2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559 (2008).

⁸ See *Meyer v. Portfolio Recovery Associates, LLC*, No. 11-56600, 2012 WL 4840814 (9th Cir. Oct. 12, 2012).

⁹ *Hunt v. 21st Mortgage Corp.*, No. 12-cv-2697, 2013 WL 5230061 (N.D. Al. 2013).

¹⁰ *Id.* at *4.

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

While the Alabama court reached the correct outcome in *Hunt*, the decision is not binding outside that district. Further, the defendant in that case was required to bear the cost of litigating the case -- a major cost for all but the largest companies.

The FCC should take action to ensure that other businesses do not find themselves in the same position by clarifying the ambiguity in the current definition of ATDS. As evidence of the potential for abuse and the need for clarity for both businesses and consumers, new class action lawsuits involving autodialed calls (including text messages) increased 592% between 2008 and 2011.¹² Prompt action to eliminate ambiguity in the current regulations is necessary so that legitimate businesses can communicate effectively with consumers without the fear of frivolous litigation.

II. The Commission Should Clarify That Its Rules Reflect a Narrow Interpretation of the TCPA’s Limitations on “Using any Automatic Telephone Dialing System”

A. A narrow interpretation of the term ATDS is consistent with canons of statutory construction, the language of the statute, and congressional intent.

To reduce the risk of vexatious litigation and abuse of the private right of action in the TCPA, the Commission should clarify that only devices with the present-“capacity” to dial telephone numbers without human intervention constitute an ATDS. As the court in *Hunt*

¹¹ *Id.*

¹² *See Communications Innovators Petition or Declaratory Ruling, CG Docket No. 02-278, at 14-15 (filed June 7, 2012) (“CI Petition”) (providing data on class action rates).*

explained, the mere fact that equipment could be modified to have the “capacity” to call numbers using a random or sequential number generator does not mean the device constitutes an ATDS. Rather, the “capacity” to make such calls must be present at the time the call is made. Rules restricting the use of equipment that merely has the *potential* to be paired with additional hardware or software giving it the capability to generate random or sequential numbers for calling are inconsistent with the plain language of the statute and the intent of Congress. This interpretation also leads to absurd results: virtually any modern telephone, modem, or computer connected to the Internet could conceivably be connected to additional equipment and/or software that would give it the capability to randomly or sequentially generate numbers and dial them. The relevant inquiry, therefore, must focus on the capacity of the equipment *at the time the call is made*.

A narrow interpretation of the term is also consistent with canons of statutory construction. In the TCPA’s definition of ATDS, the phrase “using a random or sequential number generator” modifies the phrase “to store or produce telephone numbers to be called,” and limits the scope of equipment covered by the term to that equipment which uses “a random or sequential number generator.”¹³ Additional support for interpreting the term ATDS to only cover communications equipment that has the capacity to dial “randomly or sequentially generated” telephone numbers is found in the inclusion of the phrase “to dial such numbers” in part (B) of the ATDS definition. This phrase clearly refers to telephone numbers that have been generated “using a random or sequential number generator” as described in part (A) of the definition, and the sentence should be given its natural meaning.

¹³ 47 U.S.C. § 227(a)(1)(defining an ATDS).

Accordingly, under the TCPA, a caller's equipment does not meet the statutory definition of ATDS, and thus use of the equipment is not restricted, unless the equipment (1) stores or produces telephone numbers, (2) randomly or sequentially generates those numbers, and (3) then dials the numbers generated by the equipment without further instruction or human interaction. This combination of abilities is what makes the dialing system "automatic" – *i.e.*, a machine "that works by itself under fixed conditions, with little or no direct human control."¹⁴ This interpretation also comports with the most logical definition of "capacity" in this context (discussed above), which requires that the device have the capability to store or produce telephone numbers to be called, using a random or sequential number generator, *at the time of use*.

B. The Commission should clarify that "preview" or "one-click" dialing does not constitute use of an ATDS.

As discussed above, the appropriate statutory definition of the term ATDS requires that an ATDS have the present capacity to dial numbers without human intervention. Recently though, plaintiffs' attorneys have brought cases against businesses using telecommunications platforms where calls are initiated by an operator using a computer interface to select and call a consumer with only one or two mouse clicks – rather than manually entering all ten digits – on the grounds that such calls are made using an ATDS.¹⁵ However, this distinction is irrelevant to determining whether such a system is an ATDS under an appropriate interpretation of the TCPA.

¹⁴ "automatic, adj. and n." OED Online. December 2013. Oxford University Press. <http://www.oed.com/view/Entry/13464?redirectedFrom=automatic> (accessed December 11, 2013).

¹⁵ *See Nelson v. Santander Consumer USA, Inc.*, 931 F.Supp.2d 919 (W.D. Wis. 2013) (vacated June 7, 2013).

Rather, as the PACE Petition explained, both dialing methods involve human intervention for each and every call, and there is no basis for distinguishing between the two.¹⁶

Further, a contrary interpretation would run headlong into the issues identified by the Northern District of Alabama in *Hunt*.¹⁷ Specifically, if equipment meets the definition of an ATDS merely because it can dial multi-digit telephone numbers at the touch of a button, nearly every modern telephone (including every phone with even basic speed-dial functionality) would constitute an ATDS. Nicor agrees with PACE that such an interpretation “is manifestly against Congressional intent, prior Commission holdings, and sound public policy,” and urges the Commission to provide clarity both to the court and to industry as soon as possible.¹⁸

III. The FCC Can Protect Consumers without Limiting the Ability of Businesses to Deploy and Use New Technologies

A. The TCPA Rules should encourage, not discourage, responsible use of new technologies.

Consumers today increasingly make use a wide variety of technologies to communicate with each other and with the businesses they patronize, including traditional telephone calls, text messaging, and Internet-based message services like e-mail, Twitter, and Facebook. Not surprisingly, consumers want and expect businesses to utilize the same technologies to communicate with them. Indeed, for the approximately 56% of Americans that currently own and use smartphones, these means of communications are all available on their smartphones and can all be used interchangeably depending upon the user’s preferences at the moment.

In order to provide the best possible customer service as efficiently as possible, businesses increasingly rely on a variety of technologies, including autodialed calls (with live

¹⁶ PACE Petition at 9.

¹⁷ *Hunt*, 2013 WL 5230061 at *4.

¹⁸ PACE Petition at 10.

operators, pre-recorded introductions, or pre-recorded messages), text messages, and call back services to improve customer service. These technologies allow businesses to reduce response time, update customers as to their products and services, schedule and confirm appointments, and provide notifications about delays in a convenient, efficient, and cost effective manner.

Autodialed calls, text messages, callback services, and other electronic methods of communications are often used interchangeably by businesses, with consumers selecting the most convenient method for a business to contact them based on preference and circumstance.

Unfortunately, the FCC's modifications to the Rules do not reflect how businesses best make use of these technologies. Specifically, the Rules adopted by the FCC in February 2012 prevent businesses from communicating with consumers efficiently by unnecessarily regulating the technology that businesses use to initiate calls to consumers, rather than prohibiting the abusive calls themselves. For example, by applying different rules and consent standards based upon whether a business manually dials a consumer or uses an "automatic telephone dialing system" or a "prerecorded voice," the Commission unnecessarily regulates the technologies available to businesses engaged in legitimate practices like those described in the PACE Petition, while doing little to curb the abusive marketing tactics that Congress sought to address in the TCPA.¹⁹

Even businesses that make good faith efforts to comply with the Rules have become increasingly vulnerable to TCPA violations and lawsuits because of wireless substitution and the fact that calls to mobile numbers are more heavily restricted than calls to wireline numbers -- even when the calling party does not know that the number provided by the consumer is a mobile phone. When Congress passed the TCPA in 1991, mobile phones were a new technology with

¹⁹ See 47 C.F.R. § 64.1200(a)(2).

extremely high per-minute charges and a relatively low adoption rate. In this environment, it made sense for Congress to look to protect consumers from unwanted calls on those expensive lines. Today, however, more than 88% of households have wireless phones, and more than 38% have only wireless phones.²⁰ These consumers frequently give out wireless numbers to businesses without even identifying them as such, and the cost per minute of wireless airtime has dropped dramatically. For this reason, the Commission should refuse to be handcuffed by the expansive interpretation of the TCPA urged by class-action attorneys, which would have the Commission ignore these changes in the marketplace, and instead impose a strict liability fine on businesses that make calls to customer's mobile numbers from almost any modern telephone platform absent a byzantine and exacting form of prior consent.

The best way to address the problems with the current Rules is for the Commission to narrowly interpret the TCPA so as to focus its Rules on whether the consumer consents to receiving communications from a business, rather than upon the technology used to communicate or the type of number dialed. At a minimum, this would involve narrowing the definition of an ATDS so that the use of a specific technology is no longer an element of a violation. Instead, the Commission should focus on issues of consumer consent, and the purpose underlying the call.

B. The TCPA Rules should avoid discouraging businesses from sending purely informational messages.

The Commission should also take this opportunity to clarify the Rules regarding the use of new communications technologies and platforms by businesses to make informational (*i.e.*, non-telemarketing) calls. Many businesses rely on purely informational calls to provide

²⁰ Stephen Blumberg and Julian Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2012*, CDC (rel. June 2013).

reminders about appointments, for scheduling purposes, or to provide emergency information. These informational calls are intended to provide current, useful information to consumers, without attempting to encourage additional sales.

Under the current Rules, informational calls to mobile numbers may be made with an ATDS with “prior express consent.” However, this term is undefined, and confusion and regulatory uncertainty regarding this term is one of the reasons TCPA class action claims against companies making use of an ATDS have skyrocketed. The Commission can best address this issue by declaring that any time a consumer provides their telephone number to a business as part of a transaction, that consumer has provided “prior express consent” to receive non-telemarketing messages at that number until such time as the consent is revoked. Further, the Commission should make explicit that this consent covers all non-telemarketing messages, regardless of the technology used to deliver the message.

These clarifications can be made without fear of encouraging abusive practices. Because non-telemarketing calls must necessarily exclude any sales, advertising, or telemarketing efforts, businesses are unlikely to engage in abusive practices when making such calls. In addition, consumers may always revoke consent to receiving non-telemarketing calls from a business in the future, further mitigating the potential for abuse. Further, both the Commission and consumers would still have the capability to prosecute abusive calling practices – for example, if a call includes a sales element, is made after consent has been revoked, or if the consumer never provided the number during a purchase, the FCC or the called party could still pursue an action under the TCPA. As such, consumers would retain nearly identical protections to those they currently enjoy, while providing calling parties with much greater certainty as to the acceptability of their calling practices.

IV. The FCC Can Resolve Most of the Ambiguities in Its Do-Not-Call Rules via Declaratory Ruling

The FCC should not wait for the explosion of TCPA cases around the country to be resolved by the courts. Not only does litigation come at the cost of significant judicial resources and cost to the litigants, but it also increases the likelihood of conflicting decisions and precedent. By issuing a declaratory rulemaking as requested in the Petition, the FCC will provide clear compliance guidance to businesses while reducing vexatious litigation.

Under the Administrative Procedures Act, the FCC has authority to issue declaratory rulings to “dispose of legal controversies within the necessity of any party acting at his peril upon his own view.”²¹ Pursuant to this authority, the FCC should clarify that only a device that has the present-capability to store numbers and to dial those numbers without any human intervention constitutes an ATDS. Such an interpretation is consistent with the language in the TCPA, Congress’ intent in passing the TCPA, and past Commission rulings. To the extent that the Commission cannot implement all of the requested modifications via declaratory ruling, the Commission should initiate a rulemaking proceeding on an expedited basis.²²

²¹ *Final Report of the Attorney’s General’s Committee on Administrative Procedure*, at 30 (1941).

²² See 47 C.F.R. § 1.401.

V. Conclusion

For the foregoing reasons, the Commission should grant the PACE Petition and clarify (or, to the extent necessary, amend) the Rules to (1) reduce ambiguities that expose businesses to vexatious lawsuits without protecting consumers; (2) reflect a more narrow interpretation of the TCPA’s statutory definition of an “automatic telephone dialing system”; and (3) permit businesses to take advantage of new technologies and forms of communications without facing unnecessary legal risks.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Todd D. Daubert', with a long horizontal flourish extending to the right.

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