

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the) **CG Docket No. 02-278**
)
Rules and Regulations Implementing)
)
the Telephone Consumer Protection)
)
Act of 1991)

**Comments of Joe Shields on the Petition of PACE for Declaratory Ruling and/or
Expedited Rulemaking**

I want to thank the Commission for providing the opportunity to comment on the Commission’s Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991. Specifically the Commission seeks comments on the Petition of PACE for a declaratory ruling and/or rulemaking which will provide a way to configure their member’s dialers to circumvent the definition of ATDS. This is not the 1st petition from the same petitioner seeking the same end result. It is impeccably clear that the petitioner seeks from the Commission a definition of ATDS that their members can use to reconfigure their automatic dialers so they can circumvent the prior express consent of the called party requirement of the TCPA.

This petition is no different than the assault on cell phone users privacy attempted by HR 3035. As pointed out by the National Consumer Law Center in its comments they did not get their way then and they should not get it now with the Commission.

The Petition Speaks For Itself

The petition is fatally flawed and shows the desperation of an industry that does not get it that they need to ask first before they set their automatic dialers lose on cell phones. PACE blatantly asks the Commission what their members can use to make calls

to cell numbers without the prior express consent of the called party: “Businesses **Desperately** Need Clarification from the Commission Regarding What Type of Equipment **Does Not** Constitute an ATDS” Pace Petition at II. This is a ruse by the petitioner to get a definition from the Commission of what is not an ATDS so their member’s dialers can be configured to that definition.

PACE members are intelligent enough to know that a device that requires manually dialing each number is not an ATDS. Since that is what PACE is asking for the Commission can give them that definition – manually pressing every digit of a phone number is not automatically dialing a phone number.

If a phone number is dialed by a device that automates the dialing process **in any way** (emphasis added) it is clearly an ATDS.

Why in heavens name are PACE and their members so hell bent on avoiding getting consent from the called party? PACE refuses to consider what will happen if their industry gets their way and they assault our cell phones with millions of automatically dialed calls every day if not every hour. The backlash of such an assault can easily make all calls made by a business without prior express consent no matter how they are dialed illegal. That should be the answer from the Commission to the petitioner – use a regular phone and manually dial the call if it is so damn important that it has to be made without prior express consent of the called party.

The Increased Litigation Fable

Litigation is not an excuse to neuter the TCPA. The real cause for the increase in TCPA litigation is the fact that those the petitioner represents refuse to accept that cell phones are not for their convenience. The TCPA is doing exactly what it was intended to

do – hold those accountable that cannot get it through their thick skulls that invading the privacy of a cell phone user without prior express consent has clear and severe consequences. Instead of complying with the TCPA to stop the rise of TCPA litigation they want the Commission to change the law to exempt every dialer in use today. That is petitioners answer to the rise in litigation – change the law instead of complying with it.

In light of this litigation fable one fact must be made clear here – an entire industry of law firms and lawyers have sprung up to defend against proper TCPA claims. This industry charges and gets tens of thousands of dollars for defending \$500.00 TCPA claims. This industry uses questionable tactics such as threatening and actively engaging in frivolous counterclaims, seeking lawyers’ fees where none can be awarded, producing perjured affidavits from company officials and creating falsified prior express consent.

As an example in a recent TCPA claim I filed styled as Joe Shields v. Sears, Roebuck and Company et al, Civil Action 4:13-cv-02426, US District Court for the Southern District of Texas, Houston Division one of the defendant’s claimed that their predictive dialer “dead air” call was not made by an automatic dialing device. In fact despite being fully aware that their call center employees had admitted in recorded phone calls that an automatic dialer was used to make the calls to my cell number the defendants denied the calls were even made. Additionally, the defendant’s attorneys demanded lawyer’s fees in their usual intimidation tactic knowing full well that even if they prevail they would never be awarded their fees.

In another example styled as Joe Shields v. Benjamin Lewis Hall III et al, Civil Action 4:13-cv-02872, US District Court for the Southern District of Texas, Houston Division the news media was told that the text blaster who had worked for the Obama

campaign in 2012 could produce evidence of my and my spouses prior express consent “...only not today.”¹ That was on October 1st, 2013 and to this day no such evidence has ever been produced.

“Current” Capacity is a Red Herring

What PACE is really saying is that the “current” definition of ATDS is unacceptable to PACE members. If the Commission says “X” is not an ATDS then PACE members will configure their dialers that way so they can evade the requirements of the TCPA. This “current” capacity is not only too restrictive an interpretation of the statute it is an attempt to rewrite the statute. PACE does not nor does the Commission have the authority to rewrite the TCPA. Consequently, it cannot be sound public policy as PACE contends. Their cited case is similarly flawed as a court cannot insert language into a statute. PACE conveniently failed to state in its petition that the decision in that case has been appealed and will most likely not pass muster in the appellate court.

“Without Human Intervention” is Also A Red herring

We have already seen how PACE members try to evade the TCPA. PACE members believe that clicking on a phone number is human intervention and therefore it is TCPA complaint even when a computer ultimately dials the number. That is the exact reason why PACE wants an ATDS definition that uses the terms without human intervention. PACE members believe as long as a human clicks on a button then the call was manually dialed. If any part of the dialing sequence is automated it is an automatically dialed call. It doesn't matter that a human clicked on a button. Yes the Santander decision was

¹ <http://www.myfoxfhouston.com/story/23584922/2013/10/01/mayoral-challenger-sued-over-text-messages>

withdrawn on request of the parties but then the monetary settlement to make that happen must have been astronomical.

Conclusion

The Commission should note that the PACE petition on limiting the definition of an ATDS to exempt all dialers in use today has already been addressed by the Commission in its 2003 Report and Order and 2008 Declaratory Ruling. There simply is no need to “pile on” yet another petition to limit the definition of ATDS to exempt all dialers in use today. What is truly a burden on everyone is this repeated filing of petitions with the same intent – to limit the definition of ATDS and neuter the privacy protections of the TCPA.

As previously commented on several occasions Congress meant the definition of ATDS to be broad:

“It should be noted that the bill's definition of an "automatic telephone dialing system" *is broad*, not only including equipment which is designed or intended to be used to deliver automatically-dialed prerecorded messages, but also including equipment which has the "capability" to be used in such manner. The Committee is aware of concerns that this broad definition could cover the mere ownership of office computers which are capable, perhaps when used in conjunction with other equipment, of delivering automated messages.”

H.R. Rep. No. 633, 101st Cong., 2nd Sess. 1990, 1990 WL 259268 (Leg.Hist.)

Once again the petitioner wants the Commission to abandon a common sense approach and use the petitioner’s limited definition of ATDS. Simply because more and more consumers are using cell phones or that cell phone calls have gotten cheaper is not a valid reason to limit the definition of ATDS and defeat the privacy protections of the TCPA.

The evil in automatic dialing is not the definition – it is the attempts to neuter the prior express consent requirement of the TCPA that is the evil. Obtaining prior express consent is not only easy to do it is the respectful thing to do. Trying to defeat prior express consent with these endless petitions that attempt to rewrite the TCPA is not the in the best interest of the public.

The Commission should be strengthening and enforcing the TCPA and should not be entertaining petitioners efforts to neuter the TCPA. The Commission should look to Congressional intent and **broadly** interpret the definition of ATDS.

Consumers do not want or need the exemption the petitioners are seeking. The petition must be denied.

Respectfully submitted.

_____/s/_____

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