

**Before the
Federal Communications Commission
Washington, DC 20554**

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

COMMENTS OF COMMUNICATION INNOVATORS

I. INTRODUCTION

Communication Innovators (“CI”)¹ respectfully submits these comments in response to the November 19, 2013 Public Notice released by the Federal Communications Commission’s (the “FCC” or “Commission”) Consumer and Governmental Affairs Bureau in the above-captioned proceeding.² In the Public Notice, the Bureau seeks comment on the Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking filed by the Professional Association for Customer Engagement (“PACE”).³ The PACE Petition asks the Commission to, among other things, clarify or determine in a rulemaking that the “capacity” of a system for purposes of whether it is an automatic telephone dialing system (“autodialer”) under the

¹ CI is a 501(c)(4) organization that seeks to maximize the pace of telecommunications innovation and its benefit for American consumers and businesses. CI and its member technology companies strongly endorse efforts by the President, the Commission, and many in Congress to minimize the burden imposed on innovators and entrepreneurs by outdated, unnecessary, or inefficient regulations.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Public Notice, DA 13-2220 (Nov. 19, 2013) (“Public Notice”).

³ See *Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, Professional Association for Customer Engagement, CG Docket No. 02-278 (filed Oct. 18, 2013) (“PACE Petition”).

Telephone Consumer Protection Act (“TCPA”) and the Commission’s TCPA rules means what that system can do at the time the call is placed, without additional modification. As discussed below, CI urges the Commission to confirm that, to be considered an autodialer, equipment must have the “present capacity” or “current ability” to store or produce, and dial, random or sequential numbers. The Commission should address this issue via a declaratory ruling rather than a separate rulemaking, thereby providing clear guidance about how its existing TCPA rules apply today.

The Commission should also grant the separate CI Petition and confirm that predictive dialers and other new technologies are not autodialers under the TCPA and the Commission’s TCPA rules if they: (1) are not used for telemarketing purposes; and (2) do not have the present capacity or current ability to generate and dial random or sequential numbers.⁴ At a minimum, the Commission should issue a narrow declaratory ruling acknowledging that: (1) there are a variety of predictive dialing solutions available today; and (2) as noted above, to be considered an autodialer, any solution must have the “capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers.”⁵

As CI has explained, there continues to be significant confusion among plaintiffs’ attorneys and courts over the Commission’s prior TCPA decisions and the applicability of the TCPA to predictive dialers and other modern dialing solutions. For example, some courts have interpreted the FCC’s past statements to mean that any predictive dialing solution is an autodialer, regardless of whether it has the statutorily required “capacity to store or produce

⁴ *Petition for Declaratory Ruling*, Communication Innovators, CG Docket No. 02-278 (filed June 7, 2012) (“CI Petition”).

⁵ *Ex Parte* Letter from Communication Innovators, CG Docket No. 02-278 (filed Sept. 13, 2013) (“CI September *Ex Parte* Letter”).

numbers to be called, using a random or sequential number generator, and to dial such numbers.”⁶ Other courts have held that the Commission altered the statutory definition of autodialer such that now any equipment that has “the capacity to dial numbers without human intervention” is an autodialer.⁷ These rulings and the FCC’s orders have opened the door for virtually every type of telephone or computer equipment in existence to be deemed an autodialer. The Commission can resolve this uncertainty by confirming that predictive dialers and other modern dialing solutions that do not have the present capacity or current ability to store or produce, and dial, random or sequential numbers are not autodialers under the TCPA.

II. TO BE CONSIDERED AN AUTODIALER, EQUIPMENT MUST HAVE THE “PRESENT CAPACITY” OR “CURRENT ABILITY” TO STORE OR PRODUCE, AND DIAL, RANDOM OR SEQUENTIAL NUMBERS

Under the TCPA, the term “autodialer” includes only equipment that “*has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator.*”⁸ Congress’s choice of the present tense “has the capacity,” instead of the future tense “will have the capacity,” is informative. Thus, equipment and technologies only qualify as autodialers if, *at the time of use*, they can store or produce, and dial, random or sequential numbers without first being technologically altered. Equipment and technologies meeting this standard would have as a functioning feature the capability to store or produce, and

⁶ See, e.g., *Griffith v. Consumer Portfolio Services, Inc.*, 838 F. Supp. 2d 723 (2011); see also 47 U.S.C. § 227(a)(1).

⁷ See, e.g., *Gragg v. Orange Cab Co., Inc.*, 942 F.Supp.2d 1111, 1113 (W.D. Wash. 2013); *Buslepp v. Improv Miami*, 2012 WL 4932692 at *2 (S.D. Fla. Oct. 16, 2012).

⁸ 47 U.S.C. § 227(a)(1) (emphasis added).

dial, random or sequential numbers and the ability to use that functionality without the installation of new software or hardware or the modification of existing software or hardware.⁹

In addition, as PACE explains, the everyday meaning of “capacity” refers to current capabilities, rather than theoretical or future capabilities available only after additional modifications are made to the equipment.¹⁰ The plain English meaning of “capacity” is “ability,”¹¹ and many dialing technologies currently on the market have no number-generating abilities (sequential, random, or otherwise).

Moreover, as CI and others have explained, an overbroad interpretation of “capacity” would sweep in all kinds of electronics under the autodialer definition.¹² Millions of devices that do not implicate the TCPA’s goals, including mobile phones, smart phones, tablets, e-readers, and personal computers, could all theoretically be modified to store or produce, and dial, random or sequential telephone numbers. Businesses and consumers could be subject to TCPA litigation if they send a text message or even manually dial a voice call to a wrong number, as such calls would be viewed as having been made using an autodialer. In addition, an unbounded interpretation would prompt additional parties to seek declaratory rulings with the Commission on a case-by-case basis as they get sued, imposing an unnecessary administrative burden on Commission staff.

⁹ See PACE Petition at 11; *Ex Parte* Letter from Communication Innovators, CG Docket No. 02-278, 3 (filed Oct. 29, 2013).

¹⁰ PACE Petition at 13.

¹¹ Oxford English Dictionary (2012) (defining “capacity” as “[t]he power, ability, or faculty for anything in particular”); see also PACE Petition at 11 (comparing dictionary definitions of “capacity”).

¹² See, e.g., CI September *Ex Parte* Letter at 3; *Petition for Expedited Declaratory Ruling*, YouMail, Inc., CG Docket No. 02-278, 11 (filed Apr. 19, 2013) (“YouMail Petition”).

The Commission should interpret the TCPA in a way that gives effect to each word chosen by Congress.¹³ An overbroad view of capacity that “will come to encompass every type of telephonic device”¹⁴ makes the statutory term “capacity” superfluous. Furthermore, a consistent reading of the statute and its legislative history must also give meaning to the phrase “using a random or sequential number generator.”¹⁵ On the other hand, a reading that required “present capacity” or “current ability” to store or produce, and dial, random or sequential numbers would be consistent both with the plain language of the statute and with longstanding precedent that the autodialer restriction “clearly” does not apply to “functions like ‘speed dialing,’ ‘call forwarding,’” and other services “where numbers called are not generated in a random or sequential fashion.”¹⁶

Congress did not intend to curtail the use of preview dialing, predictive dialing, or similar solutions without random or sequential number generating capabilities because these technologies provide significant consumer benefits.¹⁷ For example, they can be programmed to protect consumers against improper calls and to comply with a variety of state and federal laws and regulations, including those regarding calling hours, the number of times and circumstances under which it is permissible to call consumers, and rules governing opt-out requests. Such

¹³ CI agrees that most equipment that lacks the capacity to dial telephone numbers “without human intervention” cannot be an autodialer but notes that the concept of “human intervention” does not appear in the TCPA. The ability to dial “without human intervention” is not itself the specific test for whether equipment is an autodialer.

¹⁴ YouMail Petition at 11.

¹⁵ See 47 U.S.C. § 227(a)(1).

¹⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992).

¹⁷ See Letter from Sen. Blunt to FCC Chairman Julius Genachowski, CG Docket No. 02-278 (dated June 28, 2011) (stating that “[t]he current generation of predictive dialers does not raise concerns about calling random numbers – the practice that Congress intended to prevent when it enacted the TCPA”).

solutions are also exponentially more efficient than manual dialing, thereby increasing productivity and lowering costs for consumers.

III. PACE’S PETITION SHOULD BE ADDRESSED BY A DECLARATORY RULING

The Commission may issue a declaratory ruling terminating a controversy or removing uncertainty.¹⁸ CI, PACE, and many other parties are negatively affected by the existing uncertainty and confusion over the autodialer definition and the meaning of “capacity.” As the Commission is aware, the TCPA imposes significant statutory damages for violations.¹⁹ The potential for large damage awards, particularly in light of the explosion in TCPA class action lawsuits,²⁰ creates a significant risk for businesses and organizations seeking to use preview dialing, predictive dialing, and similar modern dialing technologies.

The Commission can and should address the meaning of “capacity” via a declaratory ruling rather than a separate rulemaking, thereby providing clear guidance about how its existing TCPA rules apply today. A clarification is needed to help ensure that the Commission’s regulations are interpreted in a manner consistent with the TCPA’s plain language and Congress’s intent to restrict only the use of equipment with the “present capacity” or “current ability” to store or produce, and dial, numbers using a random or sequential number generator. Any approach that fails to adhere to this statutory language would not only be contrary to law but harmful to consumers, as it would sweep in all kinds of electronics, including smartphones, under the autodialer definition.

¹⁸ 47 C.F.R. § 1.2.

¹⁹ 47 U.S.C. § 227(b)(3)(B), (c)(5).

²⁰ *See* CI Petition at 15.

IV. CONCLUSION

For the foregoing reasons, CI urges the Commission to grant PACE's request for a clarification of the meaning of "capacity" under the TCPA. The Commission should also grant the separate CI Petition and confirm that predictive dialers are not autodialers under the TCPA and the Commission's TCPA rules if they: (1) are not used for telemarketing purposes; and (2) do not have the present capacity or current ability to generate and dial random or sequential numbers.²¹ At a minimum, the Commission should issue a narrow declaratory ruling acknowledging that: (1) there are a variety of predictive dialing solutions available today; and (2) to be considered an autodialer, any solution must have the 'capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers.²²

Respectfully submitted,

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²¹ *Id.* at 1.

²² CI September *Ex Parte* Letter at 2.