

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

In the Matter of:)
)
Petition for Expedited Declaratory) CG Docket No. CG 02-278
Ruling Filed by Glide Talk, Ltd.)

COMMENTS OF NOBLE SYSTEMS CORPORATION

I. INTRODUCTION AND SUMMARY

Noble Systems Corporation (“NSC”) submits these comments in response to the Public Notice from the Federal Communications Commission (“Commission”) seeking comments on the Petition for Declaratory Ruling (the “Petition”) from Glide Talk, Ltd. (“Glide Talk”).¹ The purpose of the Petition is to clarify, in part, the scope of an “autodialer”² as defined in the Telephone Consumer Protection Act (“TCPA”) and interpreted by prior Commission’s Orders.

NSC has been a leading provider of contact center systems, equipment, and management services for approximately 25 years. Headquartered in Atlanta, Georgia, NSC employs more than 350 people and serves over 1,000 client sites.

NSC supports the goal of the Petition to clarify aspects of an “autodialer” as interpreted by the Commission by narrowing the scope of an ATDS through a declaratory ruling. The clarification should result in an autodialer being interpreted in a manner consistent with current

¹ Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling from Glide Talk, Ltd., Public Notice DA13-2303,CG Docket No. 02-278 (CGB, rel. Dec. 2, 2013).

² Also referred to herein as an “automatic telephone dialing system” or “ATDS.”

technology usage, while maintaining the purpose and intent of the statute with respect to regulating equipment that automatically dials calls.

II. CLARIFICATION TO THE SCOPE OF AN ATDS IS REQUIRED

As noted by Glide Talk, the Commission has expanded the construction of an ATDS to encompass dialing devices that use lists of numbers in addition to dialers that dial randomly generated or sequentially generated numbers.³ This interpretation of an ATDS has led to unintended consequences in light of modern technology usage.

Specifically, as noted by Glide Talk and others, most conventional wireline phones and virtually all smart phones store lists of numbers that can be selected and dialed. This leads to the conclusion that an ordinary smart phone dialing a stored number is an ATDS and a user originating such a call to another wireless number (without obtaining prior express consent) is potentially violating the TCPA. This leads to the absurd conclusion that users should not use smart phones to call wireless numbers or dial emergency numbers from a web browser, calling list, or speed dial list. Presumably, such numbers should be only dialed by individually pressing each digit on a keypad.

The Commission may ignore such “violations” of those using an ATDS in this manner by choosing not to pursue enforcement actions and only target the most egregious of violators. However, the private right of action defined in the TCPA means that industry players are subject to the unintended consequences of this broad ATDS definition by class action lawsuits that are filed by the plaintiff’s bar. For these reasons, NSC urges the Commission to update the definition of an ATDS to comport with everyday technology usage.

³ See, e.g., Petition at page 8.

The Commission broadened the definition of an ATDS to encompass predictive dialers, partly because of their ability to originate a large number of calls.⁴ This concern is justified for equipment used for originating robocalls, where no agent is present to connect to an answered call, and the prerecorded content is played to all answering parties.⁵ However, this concern is not justified when agents are available to be connected to the called party. The concern of using predictive dialers involves called parties answering the call and hearing “dead-air” or an announcement instructing them to wait for an agent. This concern of predictive dialer usage can be better regulated by mandating target abandonment rates and a maximum delay before the connected party is connected to an agent.⁶ As long as there are a sufficient number of agents available to connect to the called parties, the issue is not how many calls the predictive dialer can originate *per se*. However, this appears to be the basis that the Commission used for expanding the scope of an ATDS to including dialing a number from a list.⁷ As a consequence, every smart phone today falls within the scope of an ATDS.

NSC believes that predictive dialers should not fall within the scope of an autodialer merely because they can dial numbers from a list, and that predictive dialing should not be precluded from dialing wireless numbers any more so than using a dialing list on a smart phone should be precluded from dialing a wireless number. Nevertheless, NSC believes that the following clarifications will significantly add needed clarity to the scope of an ATDS, while allowing the Commission to continue to regulate automated call originations.

III. PROPOSED ATDS CLARIFICATIONS

⁴ See, e.g., FCC 03-153, ¶¶131-133.

⁵ While such equipment for making robocalls is often called a “dialer”, this term is generally recognized as being distinguished from a “predictive dialer.” A predictive dialer will ‘dial ahead’ when an agent is available or expected to be available, and connect the agent to the first call answered by a person. Thus, the number of calls originated by a predictive dialer is limited by the number of agents.

⁶ See, e.g., FCC 03-153, ¶¶146-157.

⁷ See, e.g., FCC 03-153, ¶133.

NSC proposes to clarify the definition of an ATDS in a manner that addresses both SMS text and voice type calls. While Glide Talk's Petition largely focuses on SMS text calls, the Commission should ensure that any clarifications to the scope of an ATDS are considered with respect to voice calls.

1) The "Capacity" Requirement of an ATDS is a "Present" Capacity

Some have interpreted the "capacity" requirement⁸ to refer to whether the dialing device is capable of being reconfigured to perform the requisite "storing" and "dialing" of numbers.⁹ First of all, every dialing device is capable, given enough time and money, of being reconfigured to store and dial numbers. Attempting to delineate what devices are easily reconfigurable, and therefore have the "capacity," and what devices are not practically reconfigurable, and therefore do not have the capacity, is an exercise in futility that the Commission should not be drawn into. This will only lead to second guessing by the plaintiff's bar through class-action lawsuits as to whether equipment is capable of being reconfigured.

It is only relevant to determine whether the "capacity" is currently present and utilized for the call. If such "capacity" is not present, then reading the statute as requiring a "potential" capacity means that every dialing device is an ATDS, and leads to the absurd conclusion that no device should be used to dial prohibited numbers. Therefore, NSC urges the Commission to clarify the "capacity" is a "present" or "currently configured" capacity.

2) The "Capacity" Requirement of an ATDS Only Applies to the Present Call

As stated above, it is only relevant to determine whether the "capacity" is currently present and utilized for the call. It should not matter if the equipment has the present capacity to

⁸ 47 U.S.C. § 227(1) ("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.").

⁹ See, e.g., *Nelson v. Santander Consumer USA, Inc.*, 2013 Lexis 40799 (W.D. Wis. Mar. 8, 2013).

originate another call or a different type of call (e.g., SMS or voice) as compared to the call in question. This avoids the absurd conclusion that a user manually dialing a wireless number on a smart phone is using an ATDS because the smart phone has the present capacity to send a SMS text message in the future. Whether an ATDS is used to originate a call only depends on that call, not whether and how the equipment can be used to originate other calls.

3) Human Initiated Calls are Not Autodialed Calls and Do Not Involve an ATDS

NSC believes that it is inherent that an autodialed call, or a call initiated by an automatic telephone dialing system, *requires the call to be automatically originated*. Specifically, an autodialed call should broadly refer to any call that originates without direct human intervention. If a person directly causes the call to be initiated, whether by manually pressing individual keys on a dial pad, selecting a number in a calling list, touching a number on a smart phone screen, or clicking a mouse at a computer or smart phone, *then that call is not an autodialed call*. As technology evolves, so will the methods used to initiate the call and the classification of an autodialed call should not be based on the method used to initiate the call. The distinction turns on whether a human directly initiated the call.

NSC believes that a broader interpretation of an autodialed call is needed, given that VoIP technology is now prevalent, and such calls do not “dial” in the conventional sense. Presumably, the Commission views VoIP calls as being within the scope of the TCPA even though this technology does not “dial” calls in the conventional sense and because such equipment employs a user interface for “dialing” that is different from conventional telephones.¹⁰

NSC believes that whether a call is considered to be autodialed should not depend on the man-machine interface used by the user or the underlying technology. Rather, *any call*

¹⁰ “Softphones” are one example of such technology often associated with VoIP technology. A graphical user interface on a computer display may present an icon of a phone that may be ‘dialed’ using a computer mouse.

originated by a human, regardless of the technology used, should not be considered an autodialed call, and the equipment should not be considered as an autodialer for purposes of that call.

IV. THESE CLARIFICATIONS OF THE DEFINITION OF AN ATDS SHOULD ALSO APPLY TO SMS TEXT TYPE CALLS

It is axiomatic that every device originating a SMS text involves a processing device of some form with a memory that stores, for some duration, the number and text to be sent. In most cases, the telephone number of the recipient is associated with a wireless device. Thus, it facially appears impossible to avoid using an “autodialer” in the current regulatory framework to originate an SMS text call to a wireless number.¹¹ It is absurd to expect individuals to obtain express written consent before sending such SMS texts and conclude that they unless they do so, they are violating the TCPA.

Adoption of the above clarification avoids this conclusion. NSC proposes that any call originated by a human (SMS text or voice) is not an autodialed call. Therefore, the equipment used is not an autodialer for purposes of that call. Applying this definition to the application described by Glide Talk produces a reasonable result. The “invitational” texts described by Glide Talk should not be considered as autodialed calls, nor are they originated from an ATDS, *provided each SMS text call is the result of human intervention.* There is little technological distinction between using a *hosted platform* that allows a user to send an invitational text to a friend and a *smart phone* that allows the same user to send an invitational text to a friend. Nor is there any significant distinction based on whether the contents of the text message invites the

¹¹ If the Commission considers that each device capable of initiating a text message is an autodialer, then this provides another reason why the Commission should adopt the distinction between human initiated SMS text calls and autonomously generated text calls. Otherwise, the Commission is left in the position of prohibiting users of smart phones of sending texts without first obtaining express written consent.

recipient to participate in a *video call using the platform* or whether the text invites the recipient to participate in a *voice call using the voice capabilities of the smart phone*.

However, there is a distinction between autonomously generated SMS calls and human initiated SMS calls, just as there is a distinction between autonomously generated voice calls and human initiated voice calls. The distinction should no longer be made on the basis of whether the originating device stores the destination number and dials that number. Rather, the important distinction is whether a human directly initiated the call or a device autonomously initiated the call.

There is also a distinction between calls generated by individuals which are commercial in nature versus those calls which are informational in nature. This applies for both SMS text and voice type calls. NSC believes the basis for excluding regulation of a call should not turn on whether the content is “invitational” or not, but whether a product or service is being promoted (e.g., is the content is commercial).¹²

NSC also notes that just as there are beneficial applications for autonomously generated voice calls, there are beneficial applications for autonomously generated SMS calls. There are various types of autonomously generated voice calls with recorded content of an informational nature that people find useful, e.g., school closing notifications. Similarly, there are autonomously generated SMS text calls with predetermined content of an informational nature that people find useful, such as package delivery notifications.¹³

Many useful and desired services have been identified involving autonomously generated SMS text calls, and these can be regulated without stifling innovation. There is a valid concern regarding autonomously generated SMS calls that contain commercial content or are generated by a commercial enterprise. These concerns about autonomously generated SMS

¹² Cf., Glide Talk Petition, page 13, advocating a distinction based on whether messages are invitational in nature.

¹³ See, e.g., Petition for Expedited Declaratory Ruling of the Cargo Airline Association, CG Docket 02-278 (filed Aug. 17, 2012) describing package delivery notification services.

calls can be regulated, not by broadening the definition of an ATDS, but by other mechanisms which have been identified to the Commission. These include:

- determining whether the content is informative versus commercial,
- potential application of third-party express consent for receiving information-based notifications (e.g., package delivery, prescription refills, schedule changes, etc.),
- application of free-to-end-user (“FTEU”) services, whereby the recipient does not have to pay for receiving such texts, and
- enforcement of do-not-call lists, whereby a user can easily text a response (“stop”) to be placed on a business, state, or federal do-not-call list for SMS texts.

V. PLATFORM PROVIDERS SHOULD NOT BE LIABLE FOR HUMAN INITIATED CALLS

NSC supports Glide Talk’s position that “software and app providers that merely facilitate the sending of text message by their users do not ‘make’ calls” and should not be liable.¹⁴ To be consistent, the Commission should adopt this position to apply to both text and voice calls. NSC submits that calls which are originated by an end user using a platform are not autodialed calls, and the platform is therefore not an autodialer for purposes of that call.

The Commission should also use this opportunity to address aspects with respect to equipment used to provide hosted or cloud-based service offerings. Preferably, the Commission should provide clarity to the usage of an ATDS with respect to cloud-based providers thus avoiding a new wave of TCPA plaintiff’s lawsuits based on the growing use of cloud-based technologies.

¹⁴ Petition, pages 14-16.

Attempting to fashion a technology-based definition of an ATDS and autodialed calls (whether for voice or SMS text) for cloud-based technologies is unlikely to provide the clarity sought by the industry. Cloud technology is evolving, and any technology based definition is unlikely to keep pace. The Commission should consider the example of a cloud-based technology platform that may autonomously generate a voice call for a first client, and be used by another client to allow its users to send an invitational text call. The analysis of whether one user violates the TCPA should not depend on the operation of the equipment used for generating the other call for another user, or whether the cloud infrastructure used is involved in originating other types of calls at later times.

Software developers, platform providers, or hosted service provider should not be held to violate the TCPA merely by providing software, a platform, or hosting a service.¹⁵ Absent egregious circumstances, it is the end user (not the hosted service provider) that initiates the calls, controls the type and content of the calls, and who the calls are sent to. Thus, NSC supports Glide Talk's position that a service provider should not be subject to the crippling penalties of under the TCPA simply because it offers innovative communication services used by others.

VI. CONCLUSION

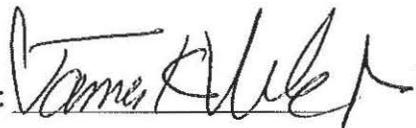
NSC urges the Commission to address the various issues associated with an ADTS in a comprehensive and consistent manner to provide stability and guidance to the public, align the definition with current technology use, and promote the development of new services and technologies. In summary, NSC urges the Commission to:

¹⁵ See also, FCC 13-54, ¶26 stating that a person or entity initiating a call "generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call." A consistent approach with respect to the role of software, platform and hosted providers should be taken by the Commission.

1. Clarify that the “capacity” requirement in the definition of an ATDS refers to a “currently configured” capability, and does not encompass equipment that could be modified from its present form to provide the required capabilities.
2. Clarify that an ATDS only pertains to the automatic origination of calls. That is, an ATDS does not cover equipment in which an agent takes steps physically necessary to place each call.
3. Clarify that the “capacity” requirement refers to the capabilities of the equipment used to originate the specific call in question, as opposed to the capacity of the equipment used for originating other calls, whether of different types, for different users, or at different times.
4. Indicate that the above clarifications to an ATDS apply to text and voice calls.
5. Clarify that Cloud-based infrastructure providers, hosted contact center service providers, and software developers are not generally liable for calls initiated by their users.

Respectfully submitted,

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By: 

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