

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

In the Matter of Rules and  
Regulations Implementing the  
Telephone Consumer Protection  
Act of 1991

CG Docket No. 02-278

**COMMENTS ON THE PACE PETITION**

Having first hand experience with the types of tortuous (and when they ultimately violate the TCPA, tortious) construction that users of autodialers conjure of the Commission’s rules and interpretative guidance, I see great mischief that would be enabled by the construction of ATDS sought by the PACE petition and its supporters.

**A need to *strictly* define use of the term “direct human intervention”**

First the notion of a “human intervention” test has, depending on its implementation, a degree of merit, but the term itself is horribly ambiguous. As my prior comments in this docket pointed out, “human robots” are available for pennies, to click on a button with a mouse 200 times a minute.<sup>1</sup> Such mechanisms would be immediately exploited to deluge cell phones with calls enabled by such evasions. Does “human intervention” mean simply turning the device on? Does it mean merely hanging up the previous call? To protect consumers—and businesses—the words must be crystal clear and unambiguous.

As a threshold matter, the concept of “human intervention” is a practical application of the *existing* Commission guidance. As such it has no place as an *additional element* of the definition of ATDS, but is instead a concept that guides application of the existing

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<sup>1</sup> See, e.g., *Comments of Robert Biggerstaff opposing GroupMe Petition*, CG docket 02-278, at n. 14–15 and accompanying text (August 28, 2013).

guidance—the Commission said in essence that the *sin qua non* of what is the target of the TCPA’s autodialer rules is whether a dialing system has the capacity to dial without human intervention, such as proceeding through a list of numbers. The Commission made this crystal clear in 2003 when it first used the term “human intervention” in the context of the TCPA:

The basic function of such [autodialer] equipment, however, has not changed—the capacity to dial numbers without human intervention. We fully expect automated dialing technology to continue to develop.<sup>2</sup>

This application guidance is appropriate due to the propensity for scofflaws to attempt to design their dialing equipment around the letter of the law and rather than with its spirit. This is precisely the type of evasion of the statutory scheme that should be prophylactically quashed by administrative agency like the Commission. This is consistent with the oft-applied “mischief rule” (Heydon's Case, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584)) particularly when applied to a consumer protection statute such as the TCPA, and this is the well-grounded basis for the Commission's 2003 guidance regarding predictive dialers that recognized that randomly or sequentially dialing from a list of every phone number in the country presents the same “mischief” as dialing from a list of randomly generated numbers.

But most importantly, a human intervention test should be styled as “*direct* human intervention” and must mean ***direct*** human intervention by the individual person who will talk live (and not via a recording) to the called party and it must be a direct act for the purpose of making the call and not attached to some other action such as merely hanging up the prior call. Direct human intervention must also be a 1-to-1 intervention per call . . . meaning that one human intervention can not result in multiple calls being dialed or multiple text messages being sent. There can be no “multiplication” effect where a single

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<sup>2</sup> 18 FCC Rcd 14014 at ¶132 (2003).

human act results in multiple calls being placed or multiple text messages being sent. Nor can “human intervention” mean filling the check-boxes on a computer screen for a list of 1,000 phone numbers that will then all be dialed over the next hour for a bank of telephone agents in their cubicles.

One necessary and intended effect of the “direct human intervention” test would be that “predictive dialing” must categorically fail such a test. A call that was made with “direct human intervention” cannot result in an abandoned call . . . period.

However, the Commission must not discount the huge incentives for callers to evade the thrust of even a direct human intervention rule. One potential evasion would be for a call center in a low-wage area overseas to make the calls with “direct human intervention” and then tell the answering party “please hold” and then transfer them to the agents in the USA who would then conduct the “real” call. This is not “genuine” human intervention, as there is no meaningful interaction with the called party. It is no different than being hit with a predictive dialer that then delays while it finds an open agent to the called party—at the called party’s time and expense. Such evasions must be expressly rejected by the Commission in an appropriate interpretative Order.

**The definition of ATDS is statutory and should remain unchanged.**

Second, any direct human intervention test should *not* be implemented as part of the definition of ATDS. Changing the ATDS definition would render all prior Commission guidance on interpretation of what is and is not an ATDS potentially void. Furthermore, it would conflict with Congressional intent with respect to that definition which was explicitly intended that it would apply to any device with that capability “when used in conjunction with other equipment:”

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).

**Changing the interpretation of the term “capacity” would invalidate long-standing Commission orders.**

An interpretative change regarding the term “capacity” which has been suggested by some is equally unwise. In addition to running contrary to the intent of Congress expressed above, a strict limitation to “current” capacity would walk back over a decade of Commission guidance. It would also have unintended consequences outside the context of the ATDS regulations, since the term is used in other parts of the TCPA such as in the definition of “telephone facsimile machine.” Fax spammers would leap at the opportunity to claim that a fax server or a PC with a fax-modem without a printer “currently” attached does not have the “current” capacity to print—and thus not subject to the proscription on sending junk faxes. Of course, this is contrary to the Commission’s long-settled holding that fax servers and PC’s with fax modems *are* covered by the TCPA’s restrictions on sending fax advertisements<sup>3</sup> which includes the broader reading of “capacity.”

**The better course is a safe harbor carve-out.**

If the Commission finds that some limited uses of what (under current guidance) is an ATDS for calls to cell phones are appropriate, the better course would be to create a safe harbor pursuant to Commission’s authority under 47 U.S.C. § 227(b)(2)(C) for *use* of an ATDS under limited circumstances, and leave the existing definition of ATDS as is. This would provide the Commission greater latitude for tailoring such a safe harbor without affecting the definition (and prior interpretations) of what is an ATDS. This is the same mechanism the Commission used to create a safe harbor for calls to ported cell phone

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<sup>3</sup> Rules and Regulations Implementing the TCPA, 18 FCC Rcd. 14014, ¶200 (2003) (emphasis added).

numbers.

In addition, since a number of pending petitions and comments on this docket seek content-based exception to ATDS use, creating a content-based exception to the use of an ATDS is better drafting than adding a content-based or usage-based clause in a definition of ATDS—particularly since the term ATDS is in fact defined in the statute. The Commission’s definition of ATDS should not differ from the term as written in the statute. Congress clearly indicated that the Commission should make any necessary accommodations through *exceptions* rather than rewriting the statute. Congress anticipated use-based or content-based exceptions and set out the criteria and hard limits on what can and cannot be excepted by the Commission in § 227(b)(2)(C).

**Deny the Petition in favor of adopting exemptions under § 227(b)(2)(C).**

Finally, the contours of such an exception to ATDS use are not ripe for determination in this Petition. The Commission should deny the Petition in favor of retaining the long-standing Commission guidance on the term ATDS and “capacity”, and instead invite those entities that believe their *particular* use of an ATDS would fit within the provisions of §227(b)(2)(C) and it’s mandate to protect privacy interests, to suggest appropriate safe harbor language to the Commission for a subsequent NPRM.<sup>4</sup>

In a subsequent NPRM, the contours of such an exemption for “direct human intervention” when using an ATDS (but not robocalls<sup>5</sup>) should be limited to ATDS calls and SMS messages that meet **all** the following criteria **in addition to** “direct human intervention:”

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<sup>4</sup> I note that the Commission has received one such suggested exemption from the Cargo Airline Association, in their *ex parte* presentation to the Commission on November 15, 2013, which set out 7 conditions that must be met for such an exemption to apply. *See Notice of Ex Parte Presentation*, CG Docket No. 02-278, filed by Mark W. Brennan, Counsel to the Cargo Airline Association on Nov. 19, 2013.

<sup>5</sup> It is unfortunate, but while this entire discussion clearly excludes application fo robocalls, some deceptive robocallers would nonetheless attempt to claim that they are also intended beneficiaries of an ATDS exemption. The Commission should affirmatively forestall such attempts **with appropriate language**.

- 1) the call must not constitute any form of solicitation, lead to a solicitation, or be made as part of an overall marketing campaign; and
- 2) the call must be made to a phone number directly provided by the recipient of the call to the caller; and
- 3) the caller must record and comply with a request to “opt-out” of receiving future calls at that number (and if calling on behalf of another entity, the caller must forward such a request to that entity who shall be equally bound by the called party’s request); and
- 4) the call must not be made before the hour of 9 a.m. or after 7 p.m. (local time at the called party's location); and
- 5) the caller must provide the called party with appropriate identification and point of contact for the calling party (and if calling on behalf of another entity, identification and point of contact for both); and
- 6) the call must be FTEU and not result in a charge to the recipient.

These provisions are the minimum necessary to satisfy the requirement of protecting the privacy rights § 227 is intended to protect

**A caution about predictive dialers and “preview” mode.**

I have suggested in the past that use of a direct human intervention test as an exemption to the use of an ATDS would mean that a dialer operating in “preview mode” is an ATDS, but would satisfy an exemption using such a test. There are, however, nuances to what technical experts in the industry calls “preview mode” and the general understanding outside the industry. There are in fact multiple different “preview modes” available on dialers. Some, such as what is sometimes called “agent initiated preview mode” require an affirmative act of the agent who actually places the call and who talks to the called party, to click a button to make the call. No button click, and no call take place.

In some instances of preview mode dialing, however, a timeout is implemented, and the button is “automatically” clicked after a few seconds of the agent remaining idle. Some will automatically dial the next call unless the agent affirmatively  *Cancels* it. This is still called “preview mode” dialing in the industry, but categorically does *not* pass the “direct

human intervention” test. The Commission must make clear that regardless of what the dialing algorithm is called, the test must be rigorously applied to the function, and not simply turn on names and nomenclature.

*/s/ Robert Biggerstaff*

December 19, 2013