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

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

To: The Commission

REPLY COMMENTS OF ACA INTERNATIONAL
PETITION FOR EXPEDITED DECLARATORY RULING
AND/OR EXPEDITED RULEMAKING
PROFESSIONAL ASSOCIATION OF CUSTOMER ENGAGEMENT

ACA International ("ACA"), through counsel, submits these Reply Comments in connection with the Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking filed by the Professional Association for Customer Engagement ("PACE").[1] There is overwhelming support for the common sense approach urged by PACE to defining "capacity" under the Telephone Consumer Protection Act:[2] (1) "capacity" must mean current ability – not hypothetical future ability; and, (2) if

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[1] Professional Association for Customer Engagement, *Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, CG Docket No. 02-278 (filed Oct. 18, 2013) ("PACE Petition"); *see also*, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking from the Professional Association for Customer Engagement*, Public Notice, CG Docket No. 02-278, DA 13-2220 (rel. Nov. 19, 2013)("Public Notice").

[2] A wide range of entities filed comments filed in support of the PACE Petition, including: The Heritage Company, Communications Innovators, DirecTV, DialAmerica Marketing, Covington & Burling, Nicor Energy Services Company, Twilio, U.S. Chamber of Commerce, and others. *See also* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 ("TCPA"); *see also* 47 C.F.R. § 64.1200 *et seq*.

a system is NOT automatic, it must NOT be an "automatic" telephone dialing system.[3] The Commission will rightfully want to ensure that any potential TCPA clarifications or rule changes do not undermine the consumer protection goals that lie at the heart of the statute. The narrow, common sense clarifications proposed by PACE will not weaken the important goals of the Act.

ACA focuses its Reply on the Comments submitted by the National Consumer Law Center ("NCLC").[4] ACA respectfully urges that the Commission not be misled by the unsubstantiated claims, flawed legal arguments, and irrelevant attachments that comprise the NCLC comments. Frivolous TCPA lawsuits thrive on regulatory uncertainty; unfortunately, they are also a substantial waste of time and money, and fail to benefit consumers. Explicit Commission guidance is desperately needed surrounding the issue of what constitutes an Automated Telephone Dialing System ("ATDS" or "autodialer") to help stem the growing tide of wasteful TCPA litigation and to facilitate consistent judicial treatment of TCPA issues.

ACA agrees with NCLC that the purpose of the TCPA is to protect consumer privacy. Granting the requested narrow clarifications proposed by PACE will not undermine this overarching goal. A grant will explicitly confirm (1) the position that the Commission has historically taken that if a system requires human intervention then it is not "automatic" and cannot be an ATDS, and (2) that equipment must have the present ability to operate as an ATDS, not some

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[3] ATDS is defined as 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." 47 U.S.C. § 227(a)(1).

[4] Comments of the National Consumer Law Center ("NCLC") to the *Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking* filed by the Professional Association for Customer Engagement, in CG Docket No. 02-278 (dated Dec. 18, 2013)("NCLC Comments").

theoretical future ability, to be defined as an ATDS under the TCPA. Granting the Petition will have an immediate, substantial impact on curbing the abusive TCPA class action cottage industry – one the TCPA was not designed to promote or protect. Most importantly, a grant will not lead to the abusive telemarketing practices that the TCPA was designed to protect.

In an apparent effort to instill fear and worry in the Commission's deliberation process, NCLC speculates that the clarifications requested by PACE "would allow a multitude of unwanted calls to cell phones" which it then speculates would result in consumer expense and increased privacy intrusions given the ubiquity of cell phones.[5] But NCLC fails to include any evidence or support to connect how making the specific limited clarifications requested by PACE will produce any such negative results. In fact, the requested "human intervention" confirmation has already been espoused by the Commission and is intuitive: to be an "Automatic Telephone Dialing System" under the TCPA, equipment must have the capacity to dial automatically, *i.e.*, without human intervention.[6]

In another example of its fear-mongering, NCLC incorrectly asserts that granting the PACE Petition "would permit automated calls to consumers regardless of consent."[7] In fact, nothing about the PACE Petition would change the consent that is required before a consumer can be called. Indeed, the requested "present ability" clarification is a common sense interpretation that has

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[5] NCLC Comments at 1.

[6] See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 132 (2003) ("The basic function of [an ATDS], however, has not changed – the capacity to dial numbers without human intervention.") (emphasis added).

[7] NCLC Comments at 4.

already been confirmed by one federal court.[8] Logically, it simply does not make sense that consumers will be at greater risk of harm if the Commission clarifies that some hypothetical future ability to operate as an ATDS is insufficient to be considered an ATDS under the TCPA, and that to be an "*automatic* telephone dialing system" the system must actually be "automatic." These clarifications will not harm consumers, and will facilitate a faithful and consistent adherence to the statutory language and Congressional intent.

The flawed legal arguments advanced by NCLC illustrate why explicit Commission clarification/confirmation of what constitutes an ATDS is so desperately needed. NCLC wrongly suggests that the Commission already has a definition of "capacity."[9] Not only is capacity undefined by the Commission, but the lack of a precise definition for capacity has provided the basis for a substantial number of the mushrooming TCPA class action lawsuits and the reason for a growing number of petitions at the FCC on this specific issue.[10]

NCLC makes arguments that are disconnected from the language of the TCPA. For example, NCLC asserts that the inquiry as to whether smart phones could be considered an ATDS unless the PACE Petition is granted "is not really necessary" because "smart phones themselves are not being used to make multiple calls for commercial purposes so their actual capacity is largely

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[8] *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at *11 (D. Ala. Sept. 17, 2013).

[9] NCLC Comments at 3.

[10] *See, e.g.,* PACE Petition at pp. 7-12; *Petition of Glide Talk, Ltd. For Expedited Declaratory Ruling*, CG Docket No. 02-278, at pp. 9-13 (filed Oct. 28, 2013); YouMail, Inc., *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, at p. 11 (filed April 19, 2013); Communication Innovators, *Petition for Declaratory Ruling*, CG Docket No. 02-278, at p. 15 (filed June 7, 2012) at pp. 5-10; *GroupMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278, at p. 14 (filed March 1, 2012).

irrelevant."[11] NCLC misunderstands that under the statutory definition of an ATDS, the relevant inquiry is "capacity" – not how equipment is "used."[12] NCLC also states that a smart phone "can only initiate one telephone call at a time," and therefore cannot be an ATDS. Obviously, the statute and rules do not carve out an ATDS exception for equipment which can only dial one number at a time. As a result, arguing that a phone is only able to dial one number at a time, even if true, is irrelevant.

Interestingly, it appears that NCLC actually acknowledges the "human intervention" clarification requested by PACE to already be "clear" and the "law of the land," and implies that the "present capacity" clarification is correct. Specifically, NCLC concludes its legal analysis by stating:

> In sum, the current legal landscape is clear: no person may use equipment that has the capacity to call numbers without human intervention to call cellular numbers [*sic*] unless the caller has the "prior express consent" to receive such calls. This definition has been the law of the land for more than twenty years, and there is no reason to change it now.[13]

While ACA disagrees that "the current legal landscape is clear," it agrees with NCLC that the "human intervention" factor is critical and has already been established. Also, given that NCLC uses the present tense when referring to equipment that "has the capacity,"[14] it appears that NCLC also agrees that the appropriate analysis for evaluating capacity already revolves on the present, rather than some theoretical future, ability of a calling system.

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[11] NCLC Comments at 3.

[12] *See, e.g., Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 951 (9th Cir. 2009).

[13] NCLC Comments at 6 (emphasis added).

[14] NCLC Comments at 6 (emphasis added).

Finally, NCLC discusses and includes several lengthy attachments related to a failed bill, H.R. 3035, seemingly in an effort to further distract the Commission from the unrelated narrow issues presented by the PACE Petition. Unlike H.R. 3035, which attempted to make wholesale changes to the TCPA, the PACE Petition is focused solely on two limited and closely tailored requests to explicitly: (1) confirm the position that the Commission has historically taken that human intervention necessarily means that a system is not an "*automatic* telephone dialing system," and (2) clarify that equipment must have the present ability to operate as an autodialer (not merely some hypothetical future ability) to be considered an autodialer.

Granting the PACE Petition will not undermine the purpose of the TCPA, will not alter the statutory definition of an autodialer, will not decrease the instances when consent is required from consumers, and will not weaken any consumer privacy protections. Granting the narrow, limited PACE Petition will provide much needed certainty surrounding what constitutes an autodialer.

Respectfully submitted,

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