

**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

**REPLY COMMENTS ON THE PACE PETITION**

Petitioner itself, the Professional Association for Customer Engagement (“PACE”) (formerly know as the American Telemarketing Association), has conceded that when “multiple calls [are] being made at the touch of a single button [i.e. direct human intervention], PACE agrees that the equipment making such calls would constitute an ATDS.”<sup>1</sup> Indeed, PACE is correct. One important aspect of the “automatic” in ATDS is the “multiplication effect” where a single human act results in multiple calls. And yet many smart phones have this ability.<sup>2</sup> But what happens when someone uses what is admittedly an ATDS, but manually dials each of the 10 digits? Under the TCPA, permitting such a “hand-dialed” call when made with what is admittedly an ATDS, is properly done with a use-based exception for use of an ATDS under 47 U.S.C. § 227(b)(2)(C), rather than a change or “re-interpretation” of the statutory definition of what is or is not an ATDS.

The Reply Comments of Noble Systems Corporation imply that the “solution” for people who don’t want ATDS calls to their cell phone is to elect inclusion in the various

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<sup>1</sup> *Reply Comments of Professional Association for Customer Engagement at 7.*

<sup>2</sup> While most cell phones don’t engage more than one cell call at once, they can—and do—make multiple VOIP calls at the same time. But on a more basic level, the notion of a single human act causing multiple calls to be dialed doe NOT require that those multiple calls be made at the same time. Dialing them serially, one after the other is the same effect, the same evil, and the same offense. One need look no further than a dialer hooked up to a single phone line, that robodials each number in a list of 100,000 numbers—one call at a time—before stopping.

do-not-call databases.”<sup>3</sup> This demonstrates an all too common shortsightedness of many industry commenters on this Petition and others—the prohibition on automated calls to cell phones has nothing to do with telemarketing. It is cost shifting and the heightened invasion of privacy of unwanted cell phones that are carried with consumers into the most personal of spaces, and generally kept with arm’s reach 24 hours a day. DNC lists apply to telemarketing calls, and not to the cornucopia of other invasive and unwanted calls consumers receive on the cell phones that would be unleashed if the Petition was granted.

Recognizing that if the relief sought by the Petition were granted, it would radically change the Commission’s existing guidance for the applicability of the Commission’s rules to junk faxes, Noble Systems also suggest that the Commission “can define an exception for one definition (ATDS) and not the other (Telephone Facsimile Machine), if such is the appropriate course of action.”<sup>4</sup> An exception, of course, what was suggested in the opening comments by consumers but not by an exception in the definition of ATDS, but by an exception under 47 U.S.C. § 227(b)(2)(C).<sup>5</sup> 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 (and “capacity”) as is.

Finally, I urge the Commission to be skeptical the claims from the industry commenters that “proxy” dialing or a “human-powered” predictive dialer either is not a “current” problem (yet) or is a “distinction without a difference.” The fact that so many

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<sup>3</sup> *Reply Comments of Noble Systems Corporation* at 3.

<sup>4</sup> *Id.*, p. 4.

<sup>5</sup> *Comments of Robert Biggerstaff on the Petition of PACE*, p.4.

industry commenters want to prophylactically protect such a practice from being prohibited, while in the same breath claim that while it can be done, no one is doing it, should give the Commission great pause. The notion of a “human-powered predictive dialer” is being actively contemplated—else why would they spend the ink to try to preserve it?

*/s/ Robert Biggerstaff*

January 6, 2014