

**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 of Robert Biggerstaff on the Petition of TextMe, Inc.<sup>1</sup>**

**Supplemental Comments of Robert Biggerstaff on the Petitions regarding  
“Automated Telephone Dialing System” and “capacity” in the TCPA and Commission’s  
TCPA rules.**

There are multiple petitions pending before the Commission that regard the construction and application of the definition of “automated telephone dialing system” (“ATDS”) and “capacity” as used in that definition.<sup>2</sup>

The essence of all of these petitions is that businesses want to use autodialing systems to call cell phones, so that they can manage their calling campaigns and prevent mis-dialed numbers that arise from hand-dialing. These businesses want to restrict the definition of ATDS so that they can construct and configure their dialers so that they will not be an ATDS under the TCPA. Consumers are justifiably worried that any change in current guidance of what is an ATDS would be exploited because of the huge financial incentives for making autodialed calls to cell phones. The elephant in the room is that any device that is not an ATDS, will be essentially unregulated by the TCPA’s restrictions on autodialed calls and text messages to cell phones.

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition For Expedited Declaratory Ruling Filed by TextMe, Inc.*, DA 14-468 (FCC, April 7, 2014).

<sup>2</sup> E.g., Petitions of Communication Innovators, Inc., Professional Association of Customer Engagement (PACE), ACA International, GlideTalk, Ltd., and TextMe, Inc.

Even the petitioners themselves seem to have recognized this risk, and have sought to assure consumers and the Commission that they do not seek to create gaping loopholes in current protections.<sup>3</sup> Each petitioner has reiterated that they do not seek any relief for solicitation calls or telemarketing. Nearly everyone—consumer and industry alike— has acknowledged the usefulness of a “human intervention” test as useful in determining whether the call was an “automated” call or not. For example PACE freely concedes that where a single human act, such as clicking a button, results in multiple calls, that such a device is an ATDS.

Ultimately, what the industry seeks, is the ability to construct and use a dialer with no “predictive dialer” function presently installed, so it can only be used with the “one-click-makes-one-call” dialing mode even if the dialer being used could be modified to engage in predictive dialing.

One point that has been overlooked is that nearly all dialers are highly configurable. In many call centers, some agents will be using the dialer in predictive-mode calling (no human intervention), while other agents in the same call center are using the same dialer but making preview-mode calls (direct human intervention with one-click dialing). These call centers allocate their agents on an as-needed basis between different calling campaigns. Under the suggested interpretations of ATDS proposed by the petitions, those calls made in a “mixed” environment would all be made by an ATDS with the “present capacity” to make autodialed calls. **Furthermore, to accomplish the admitted intent of petitioners to only allow non-telemarketing calls, it would require a content-based distinction to be engrafted onto the content-neutral definition of ATDS.**

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<sup>3</sup> Indeed, if as a result of these petitions Consumers see any increase in unwanted cell phone calls or text messages, those consumers will not likely be shy about visiting their displeasure on anyone associated with the perceived “permitting” of those calls.

As has been documented by many filings on this docket, there are two different approaches to accomplishing what the industry seeks. One is to alter the definition of ATDS so that if a dialer has no currently installed predictive dialer functions, that it is not an ATDS. The other is to create an exemption or “safe harbor” as provided for by §227(b)(3)(C).

Many commenters have pointed out substantial flaws with the alteration of the definition of ATDS or “capacity” or a change in the Commissions’ guidance regarding what constitutes an ATDS. The benefits that the industry claims it seeks are much more properly achieved through §227(b)(3)(C) authority. With the Cargo Airline Association declaratory ruling<sup>4</sup>, the Commission did exactly that, rather than alter a foundational element that upends 20 years of well-settled TCPA guidance.

What has been missing from the ATDS discussion, however, is an updated<sup>5</sup> and principled suggestion as to what that exemption under §227(b)(3)(C) that addresses these petitions on the issue of ATDS use should provide.

Consistent with prior filings in this docket, Biggerstaff supports the Commission addressing the issues raised in the Communication Innovators, PACE, and other petitions by including the following conditions as part of an exemption pursuant to §227(b)(3)(C) for use of an ATDS to make non-solicitation calls to wireless telephone numbers without first obtaining prior express consent of the called party:

- 1) The caller employed direct human intervention to dial the individual call or to send the individual text message;

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<sup>4</sup> *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, FCC 14-32 (March 27, 2014).

<sup>5</sup> A preliminary set of suggestion were part of *Comments of Robert Biggerstaff on the Petition of PACE*, CG docket 02-278, filed December 19, 2013, pp. 5-7.

- 2) The call or message is made to a wireless telephone number provided to the caller by the called party;
- 3) The call or message must not include or introduce any telemarketing, solicitation, or advertising, and must not be part of an campaign to market property, goods, or services;
- 4) The call must not contain or deliver a message using an artificial or prerecorded voice;
- 5) Entities relying on this exemption must honor opt-out requests within a reasonable time from the date such request is made, not to exceed thirty days; and,
- 6) Each call or message must facilitate opt out of future calls; voice calls answered by a live person must record a consumer's do-not-call request and place the subscriber's name, if provided, and telephone number on the opt out list at the time the request is made; voice calls that could be answered by an answering machine or voice mail service must provide a toll-free number that the consumer can call to opt out of future calls; text messages must include the ability for the recipient to opt out by replying "STOP."

"Direct human intervention" is epitomized not just by manually dialing 10 digits, but also by "speed-dialing" or selecting a single phone number and dialing it from an address book on a smart phone. It requires a one-to-one relationship where a single act of the caller can only result in a single call or message. Direct human intervention includes use of "one-click" agent-initiated preview mode<sup>6</sup> dialing when the agent who will talk to the called party initiates the call with a direct act such as clicking or pressing a button. It excludes any system where multiple calls or messages are made in response to a single act of the caller. Any system which is used in a fashion that causes any abandoned calls, or which is

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<sup>6</sup> As discussed in other comments, there are preview modes of dialing that will automatically progress without human intervention, such as via a timeout function. These would not satisfy the exemption *See, e.g. Comments of Robert Biggerstaff on the Petition of PACE*, CG docket 02-278, filed December 19, 2013, p. 6.

used in a way to pre-dial calls in advance such as by predicting call completion rates or agent availability, does not constitute direct human intervention.

This exemption will expressly permit a dialer that is an ATDS to be used to call cell phone numbers as long as all the elements of the exemption are met. This permits callers to utilize the efficiencies of calling wireless numbers from a list by using direct human intervention (i.e. one-click dialing), while maintaining the Commission's existing guidance on predictive dialers and similar technology and ensuring the TCPA and its implementing rules are not being circumvented.

It is expected that the person that takes the act that initiates the call will be the person that talks to the consumer if the call is answered. Any scheme which employs a system where a different person takes the action that causes the call to be made should be strictly scrutinized as whether it adequately serves the protection of the consumer rather than is merely a scheme contrived principally to evade the Commission's rules.<sup>7</sup>

This exemption meets the criteria set out by the PACE petition itself, which seeks to exempt a call initiated using human intervention "regardless of whether a call is initiated by entering ten digits of a telephone number or by a one-click dialing method."<sup>8</sup>

This exemption for use of an ATDS also provides flexibility to callers, who have call centers where they allocate agents on an as-needed basis between predicative dialing and preview-mode dialing on the same dialing hardware. However should any question arise as to whether a particular call was made in a fashion permitted by this exception, such as in agent-initiated preview mode (i.e. one-click dialing) the caller is expected to be able to document the dialing mode used for that particular call.

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<sup>7</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); *Comments of Robert Biggerstaff on the Petition of PACE*, CG docket 02-278, filed December 19, 2013, pp.1-3.

<sup>8</sup> PACE Petition p. 4.

### **Reasonable Period of Time**

Like the declaratory order in the CAA petition which imposes an opt out provision on the exempted package deliver calls using an ATDS or prerecorded call, this exemption imposes a similar opt out provision. There are reports of callers seeking to exploit generous time frames in which to continue calls that would otherwise be prohibited. One of these exploited periods is the "30 day" window after an opt out request. Some companies appear to have intentionally delayed compliance with an opt out request in order to make large numbers of calls to a consumer in the 30-day window. The following guidance is suggested:

A "reasonable time" for the purposes of implementing a consumer's opt out request under this exemption, should be evaluated by considering the frequency in which a caller makes repeat calls to the same cellular telephone number. If a caller can implement an opt out request within 5 days, then that caller should not call any cellular numbers more than once in 5 days. If a caller need a full 30 days to implement an opt out request, then it should not make more than one call to a cellular telephone number per 30 days. This will provide a market-based incentive to companies to implement opt out requests within a time frame that fits their business practices while at the same time protects consumers.

Respectfully submitted, this the 29<sup>th</sup> day of April, 2014.

*/s/ Robert Biggerstaff*