

July 21, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Notice of Ex Parte – CG Docket No. 02-278**
ACA International

Dear Ms. Dortch:

Monica Desai of Squire Patton Boggs (US) LLP, counsel to ACA International, along with Robert Föehl, Vice President and General Counsel of ACA International, met with Federal Communications Commission staff from the Office of General Counsel: Suzanne Tetreault (Deputy General Counsel); Diane Griffin Holland (Deputy Associate General Counsel and Deputy Chief, Administrative Division); Marcus Maher (Assistant General Counsel); and Richard Mallen (attorney advisor); as well as Kristi Lemoine of the Consumer and Governmental Affairs Bureau (attorney advisor, Policy Division). The discussion focused on ACA's request to the Commission seeking clarification that (1) just because a predictive dialer can be an automatic telephone dialing system (ATDS) does not mean that a predictive dialer must be an ATDS under the TCPA; and (2) "capacity" for TCPA purposes means the present ability of a dialing system at the time the call is made.¹

(1) Just because a predictive dialer can be an ATDS, does not mean it must be an ATDS.

During the meeting, ACA reiterated its request that the FCC provide prompt and clear guidance regarding the Commission's treatment of predictive dialers within the context of the TCPA.² As is evident from the plain language of the statute, Congress created a clear, concise, and

¹ Mr. Föehl participated in the meeting by telephone.

² Petition for Rulemaking of ACA International at 8, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (dated Jan. 31, 2014)(ACA Petition).

very specific definition of an ATDS under the TCPA.³ Per the statute, an ATDS is “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.”⁴ As a result, and grounded in the most basic rules of statutory interpretation, any device—including a predictive dialer—that does not contain all of the statutory elements of an ATDS simply, by definition, is not an ATDS under the statute.⁵ Moreover, an agency does not have the authority to simply overlook or disregard the “clear and precise statutory definition provided by Congress.”⁶ Indeed, as the Supreme Court recently opined, “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”⁷

Due to surging litigation related to this point, ACA reiterates its request that the Commission clarify that it never stated—and could not have stated—that the statutory elements of an ATDS need not be met in order for dialing equipment to qualify as an ATDS under the statute.⁸

Notwithstanding the fact that the ATDS definition promulgated by Congress is clear and unambiguous, certain aggressive litigants misrepresent in court language issued by the Commission in its 2003 and 2008 TCPA Orders, to support the erroneous theory that a predictive dialer

³ ACA Petition at 6 (explaining that “ATDS has a very specific definition under the TCPA”); *accord* Comments of ACA International at 10, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (dated Mar. 24, 2014)(ACA Comments); Reply Comments of ACA International at 3, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (dated Apr. 8, 2014)(ACA Reply Comments); ACA International Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (dated July 2, 2014)(ACA July 2 Ex Parte Notice).

⁴ 47 U.S.C. § 227(a)(1).

⁵ ACA Petition at 6 (noting that, “[p]ursuant to the statute, to be an ATDS under the TCPA, equipment must have the listed elements”); ACA Comments at 10 (“[T]he Commission must clarify that if a technology does not meet the explicit statutory definition of an ATDS under the TCPA, then it is not an ATDS under the TCPA.”); ACA International Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (dated May 9, 2014)(ACA May 9 Ex Parte Notice)(stating that ACA has “emphasized the importance of the FCC clarifying the obvious—that the statutory elements of an ATDS must be met in order for a dialing system to be an ATDS under the TCPA”); ACA July 2 Ex Parte Notice at 2 (“Fundamentally, the statutory elements of an ATDS must be met in order for equipment to be considered an ATDS under the statute.”).

⁶ ACA July 2 Ex Parte Notice at 3 (citing the Supreme Court’s recent opinion in *Utility Air Regulatory Group v. Environmental Protection Agency*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272, 2014 U.S. LEXIS 4377, at *19-20, 28 (2014)(“*Utility Air Regulatory Group*”).

⁷ *Utility Air Regulatory Group* at *19-20 (citing *Arlington v. Federal Communications Commission*, 133 S. Ct. 1863, 1869-1871, 185 L. Ed. 2d 941, 951-953 (2013)(*Arlington*)).

⁸ ACA Petition at 8; ACA Comments at 12; ACA Reply Comments at 4; ACA International Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (dated Mar. 10, 2014)(ACA Mar. 10 Ex Parte Notice); ACA July 2 Ex Parte Notice at 2.

categorically qualifies as an ATDS—even if it does not meet the definition created by Congress.⁹ Of course, this is both legally and factually incorrect. In 2003, the Commission stated:

We believe the purpose of the requirement that equipment have the “capacity to store or produce telephone numbers to be called is to ensure that the prohibition on autodialed calls *not be circumvented*. Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of “[ATDS]” and the intent of Congress.¹⁰

In 2008, the Commission confirmed that “a predictive dialer constitutes an [ATDS] and is subject to the TCPA’s restrictions on the use of autodialers.”¹¹ As ACA has explained before, the best reading of the Commission’s language in the 2003 and 2008 orders—and the only reading consistent with the TCPA—is that a telemarketer cannot circumvent the statutory definition of an ATDS by using a predictive dialer.¹² And ACA agrees with this fundamental point: companies should not be able to circumvent the TCPA by using a predictive dialer.¹³

Numerous comments representing thousands of organizations support ACA’s request.¹⁴ Companies forced to defend their use of dialing systems that do not meet the statutory definition of

⁹ See, e.g., *Griffith v. Consumer Portfolio Services, Inc.*, 838 F.Supp. 2d 723, 727 (N.D. Ill. 2011)(The FCC concluded that predictive dialers are governed by the TCPA because, like earlier autodialers, they have the capacity to dial numbers ‘without human intervention.’ In doing so, it interpreted ‘automatic telephone dialing system’ to include equipment that utilizes lists or databases of known nonrandom telephone numbers.)(internal citations omitted).

¹⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 133 (2003)(emphasis supplied).

¹¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559, 562-63 ¶ 7 (2008)(2008 Declaratory Ruling).

¹² ACA Petition at 8; ACA Comments at 10; ACA Reply Comments at 4; ACA July 2 Ex Parte Notice at 2.

¹³ See *supra* note 8; see also 2008 Declaratory Ruling, ¶ 13.

¹⁴ In addition to ACA, a number of other commenters in the proceeding support this clarification. See, e.g., Comments filed in Support of Petition in CG Docket No. 02-278, by: American Bankers Association (“represents banks of all sizes and charters and is the voice for the nation’s \$14 trillion banking industry and its two million employees”) (March 24, 2014); American Financial Services Association (over 350 members including consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers) (Mar. 24, 2014); Coalition of Higher Education Assistance Organizations (“a partnership of colleges, universities, and organizations promoting Federal Campus Based loan programs, student institutional and private loans, campus receivables, financial literacy, and other student financial services”) (Mar. 24, 2014); National Association of Industrial Bankers (members range from banks serving under-served segments of society such as taxi drivers and public service organizations, to large credit card and commercial finance companies) (Mar. 24, 2014); National Association of Retail Collection Attorneys (“more than 700 debt collection law firms and in-house legal counsel of creditors”) (Mar. 21, 2014); Professional Association for Customer Engagement (a non-profit trade organization dedicated to the advancement of customer engagement) (Mar. 24, 2014); Student Loan Servicing Alliance (SLSA) and SLSA Private Loan Committee (non-profit trade association of student loan

ATDS equipment are often either forced to pay high discovery costs or to pay large settlement amounts to avoid long and costly litigation.¹⁵ In addition, high cost litigation leads to other costly increases¹⁶ and can prevent economic growth.¹⁷

While some courts agree with ACA's position,¹⁸ other courts have misconstrued the Commission's language in the 2003 and 2008 TCPA to conclude that the statutory definition of an ATDS is irrelevant, and that TCPA statutory liability can extend to devices that do not even contain all of the required elements of the statute.¹⁹

It is clear that Commission clarification is desperately needed.²⁰ ACA reiterated during the meeting that explicit clarification from the Commission will alleviate the uncertainty impacting businesses, preserve Congress's intent and TCPA consumer privacy protections, and prevent frivolous lawsuits.²¹ ACA notes further that a decision from the Commission on this matter would also promote administrative efficiency, as other commenters in this docket have requested this same clarification and their concerns would be addressed by the Commission's response to ACA's request.

servicers and organizations involved in financing, lending, servicing, and collecting private education loans) (Mar. 24, 2014).

¹⁵ ACA May 9 Ex Parte Notice at 2-3 (Leslie Bender, President of ACA, explaining that "the growing number of TCPA lawsuits on this issue and others has caused significant operational issues for companies that are trying diligently to comply").

¹⁶ For example, due to the risk of substantial litigation, "insurance premiums have increased by over 30%, there is very little choice for insurance (sometimes none at all), and . . . where insurance is available, the deductibles are extremely high." *Ibid.*

¹⁷ Lance Black, President of Northland Group has noted that some private collection agencies are denied the opportunity to combine because of the TCPA liability risk. *Id.* at 3.

¹⁸ See e.g., *Dominguez v. Yahoo!, Inc.*, 2014 U.S. Dist. LEXIS 36542 at *18 (E.D. Pa. Mar. 20, 2014) ("As discussed above, Plaintiff has not offered any evidence to show that Yahoo's system had the capacity to randomly or sequentially generate telephone numbers (as opposed to simply storing telephone numbers) as required by the statutory definition of ATDS.").

¹⁹ See *supra* note 9.

²⁰ See Amy M. Gallegos, *Confusion Over FCC's Autodialer Definition Continues*, Law360, Mar. 14, 2014, available at <http://www.law360.com/articles/518599> (last visited Apr. 8, 2014) (highlighting the confusion related to the Commission's language in the 2003 TCPA Order and the need for clarification).

²¹ ACA Petition at 8; ACA May 9 Ex Parte Notice at 2; ACA Mar. 10 Ex Parte Notice at 2.

(2) “Capacity” under the TCPA means “present ability.”

ACA also reiterated during the meeting that the Commission must clarify that “capacity” under the TCPA means “present ability” of an ATDS. As ACA explained, Congress defined an ATDS 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.”²² Congress did not define the term “capacity.” When Congress chooses not to define a term, its ordinary meaning typically applies.²³ And as the Supreme Court has recently explained, “even under *Chevron’s* deferential framework, agencies must operate ‘within the bounds of reasonable interpretation.’”²⁴ Reading “capacity” to mean “present ability” is the only reasonable and logical interpretation of the statute for any number of reasons. As explained in more detail below and in prior filings, the “present ability” interpretation is consistent with the plain language of the TCPA, dictionary definitions, prior Commission rulemakings, the everyday meaning of the term, and the legislative history of the statute.

First, basic statutory construction principles and the plain language of the TCPA support a “present tense” interpretation of capacity. The statute begins with the present tense, i.e., “has” the capacity, which as ACA has noted previously, reflect[s] that the statute is intended to apply only to equipment with current or present capacity.²⁵ In contrast, in another section of the TCPA, Congress purposefully describes the word “capacity” in the future tense.²⁶ If Congress wanted to describe “capacity” as meaning hypothetical future ability in the context of the ATDS definition, it could also have similarly inserted “would have the” before capacity in that section of the statute. Instead it used the present tense word “has” before “capacity” in the ATDS definition.

Also, dictionary definitions support present or current capabilities as the ordinary meaning of “capacity.”²⁷ Specifically, the Merriam-Webster Dictionary defines “capacity” as “the facility or power to produce, perform, or deploy.”²⁸ This definition implies present ability. In its petition, the Professional Association of Customer Engagement (PACE) listed several definitions for “capacity”—each from a different dictionary—noting that these definitions focus on or imply “the

²² 47 U.S.C. § 227(a)(1).

²³ See, e.g., *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (U.S. 2011)(citing *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

²⁴ *Utility Air Regulatory Group* at *30 (citing *Arlington*, 185 L. Ed. At 951).

²⁵ 47 U.S.C. § 227 (c)(1)(B); ACA Petition at 10.

²⁶ See 47 U.S.C. § 227 (c)(1)(B)(“The proceeding shall. . . evaluate the categories of public and private entities that *would have the capacity* to establish and administer such methods and procedures.”)(emphasis added).

²⁷ Professional Association of Customer Engagement Petition for Expedited Declaratory Ruling or Expedited Rulemaking at 10-11, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (dated Oct. 18, 2013)(PACE Petition). See also Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/capacity> (defining capacity as “the facility or power to produce, perform, or deploy.”).

²⁸ Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/capacity>.

current capacity of a person, organization or object.”²⁹ For example, PACE explains that capacity is defined as “the ability to do something,”³⁰ or “the ability to do or produce,”³¹ both notions that fit only within the context of the present tense, rather than some future or hypothetical time.

Court decisions related to this issue are mixed. Some courts have taken a reasonable, common sense approach, determining that liability turns on whether the dialing system is capable of automatic dialing “in its present state.”³² Other courts have adopted an arguably nonsensical theory that “capacity” could be read to mean some hypothetical, future ability enabled by modification to the equipment.³³ The problem with this reading, however, is that under an interpretation that disregards actual, present ability, and that is expanded to encompass such hypothetical abilities, any device could be swept within the scope of the TCPA. Given today’s technology, any smart phone or personal computer (or even a smart refrigerator) could potentially be included in such an expansive interpretation.³⁴ In fact, the *Hunt* court even “pointed to the creation of such software as

²⁹ PACE Petition at 11 (emphasis supplied). See *ibid.* and *id.* at nn.20-23, describing the various definitions.

³⁰ *Id.* (citing Macmillan Dictionary, available at: <http://www.macmillandictionary.com/usdictionary/american/capacity>).

³¹ *Id.* (citing WordReference.com, available at: <http://www.wordreference.com/definition/capacity>).

³² *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574 at *10 (D. Ala. Sept. 17, 2013)(*Hunt*). The *Hunt* court also explained that:

[T]o meet the TCPA definition of an ‘automatic telephone dialing system,’ a system must have a present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator. While a defendant can be liable under § 227(b)(1)(A) whenever it has such a system, even if it does not make use of the automatic dialing capability, it cannot be held liable if substantial modification or alteration of the system would be required to achieve that capability. *Id.* at *11.

See *Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 (W.D. Wa. Feb. 7, 2014)(noting that “[t]he Court declines to adopt an interpretation of ‘system’ that would lead to an absurd result” (citing [Griffin v. Oceanic Contractors, Inc.](#), 458 U.S. 564, 584, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982)), and that [a]dopting plaintiff’s broad interpretation that any technology with the potential capacity to store or produce and call telephone numbers using a random number generator constitutes an ATDS would capture many of contemporary society’s most common technological devices within the statutory definition” (citing *Hunt* at *4.)).

³³ See, e.g., *Griffith*, 838 F.Supp. 2d at 727 (equipment could be treated as an ATDS if it could be programmed in the future to perform ATDS functions).

³⁴ ACA Reply Comments at 5. See *Gragg* at *8-9 (“The Court declines to adopt an interpretation of ‘system’ that would lead to an absurd result. . . . Adopting plaintiff’s broad interpretation that any technology with the potential capacity to store or produce and call telephone numbers using a random number generator constitutes an ATDS would capture many of contemporary society’s most common technological devices within the statutory definition.”).

an iPhone app and questioned whether ‘roughly 20 million American iPhone users’ would be subject to the TCPA’s mandates.”³⁵

There is overwhelming support in the record for the clarification ACA requests.³⁶ What seems obvious to ACA and to the many other commenters and petitioners requesting Commission action on this point, is that a dialing system that otherwise meets the criteria for an ATDS does not carry such a “capacity” if it cannot perform functions in its current form.

Given the devastating impact of continued litigation and the disparate opinions resulting from TCPA litigation on this issue, and to avoid the frivolous lawsuits that continue to be filed across the country, the Commission should provide the clarification ACA and others seek, confirm that capacity must mean present or current ability, and confirm that equipment must have the statutory elements of an ATDS to be an ATDS under the statute.

Respectfully submitted,



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³⁵ ACA Petition at 11 (citing *Hunt* at *11).

³⁶ See PACE Petition at 7-12; *GroupMe, Inc.’s Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278, at 14 (dated Mar. 1, 2012); YouMail Petition for Declaratory Ruling at 11, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition of YouMail, Inc. For Expedited Declaratory Ruling That YouMail’s Service Does Not Violate the TCPA*, CG Docket No. 02-278 (dated Apr. 19, 2013); Petition of Glide Talk Ltd. for Expedited Declaratory Ruling at 9-13, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition of Glide Talk Ltd. for Expedited Declaratory Ruling*, CG Docket No. 02-278 (dated Oct. 28, 2013); TextMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification at 7-12, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (filed Mar. 18, 2014).

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