

FCC's New Autodialer Definition Departs From Past Approach

By **Mark Eisen, Suzanne Aldon de Eraso and David Krueger** (July 7, 2020, 5:48 PM EDT)

On June 25, the Federal Communications Commission issued its declaratory ruling on a 2018 petition filed by the P2P Alliance petition for clarification.[1] This marks the first guidance from the FCC regarding the interpretation of the term "automatic telephone dialing system" under the Telephone Consumer Protection Act.

The significance of this guidance cannot be understated, given the frequency with which the ATDS issue arises in TCPA litigation. In the five years since the FCC last opined on the ATDS definition, trial and appellate courts have reached a deep split over the proper interpretation, resulting, at least one pending U.S. Supreme Court cert petition.

The P2P order, the FCC cautions, is not its final word on the interpretation of the ATDS. It is, nevertheless, a telling tip of the hand as toward a much narrower interpretation than had been previously adopted. And for the first time, the FCC provides concrete specifics in an area of law that could be charitably described as opaque. This article briefly covers the sordid history of the ATDS definition and provides analysis of the P2P order's impact.

ATDS — A Definition 30 Years in the Making

To understand the significance of the P2P order, a brief background on the TCPA and its ATDS definition are necessary. The TCPA was enacted in 1991, along with a deceptively simple definition for an ATDS:

- [E]quipment 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.[2]

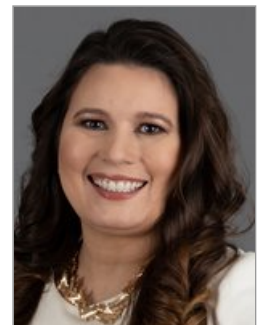
The questions that came to develop over time pertained to (1) whether "using a random or sequential number generator" modify both "store" and "produce," and (2) what the basic functions of an ATDS are.

As the U.S. Court of Appeals for the Eleventh Circuit recently noted in *Glasser v. Hilton Grand Vacations Company*, from 1991 until 2003, everyone — including the FCC and litigants — thought that "using a random or sequential number generator" modified both "store" and "produce." [3] Meaning, the statute did not cover devices that merely stored numbers, like preset contacts or a customer base.

But in 2003 the FCC changed course, indicating for the first time that an ATDS encompassed equipment that merely dialed from stored lists of numbers, even if equipment did not have the ability to generate random or sequential blocks of telephone numbers for dialing.[4]



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In other words, "using a random or sequential number generator" modified only the word "produce" and not the word "store." As the Glasser court noted, this change in view stemmed not from a statutory amendment, but from a change in technology that rendered random or sequential number generators largely superfluous.[5]

The FCC reasoned, nevertheless, that equipment dialing from stored lists of numbers still met the basic function of an ATDS through its ability to dial thousands of numbers in a short period of time without human intervention.[6]

This 2003 order — as well as a subsequent order in 2008 — spurred widespread litigation, confusion among courts and parties, and resulted in dozens of subsequent petitions asking for clarification. This confusion reached a crescendo in 2015, when the FCC issued its so-called omnibus order, simultaneously addressing over 20 long-pending petitions regarding the TCPA.[7]

In its 2015 order, the FCC made a number of critical pronouncements regarding the ATDS definition, which were simultaneously appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

First, the FCC at multiple points in its 2015 order stated that a "random or sequential number generator" was both necessary and unnecessary to the definition of an ATDS.[8] Second, the FCC stated that (1) the use of human intervention in dialing numbers may or may not be relevant, and (2) the ability to dial thousands of numbers in a short period of time is relevant, without identifying how many numbers or what length of time.[9]

Following a consolidated appeal of the 2015 order, the D.C. Circuit vacated the FCC's ATDS guidance in *ACA International v. FCC*. [10] The court took issue with the FCC's mutually exclusive interpretation of the ATDS definition that "a random or sequential number generator" was both necessary and unnecessary.[11]

The court likewise took issue with the FCC's scattershot attempt to specify the basic functions of an ATDS.[12] Specifically, the court found unworkable the FCC's refusal to explain (1) whether human intervention was or was not sufficient to avoid the ATDS definition, and (2) what "dial[ing] thousands of numbers in a short period of time" meant.[13]

The D.C. Circuit thus concluded that the FCC's ATDS guidance failed to meet the requirements of reasoned decision-making. These aspects of the 2015 order, among others, were vacated and sent back to the FCC for further consideration.[14]

Since the *ACA International* opinion, at least five circuit courts of appeal have split on the definition of an ATDS. Specifically, the courts have split on whether the phrase using a random or sequential number generator is in fact necessary to the ATDS definition.

The U.S. Court of Appeals for the Third Circuit, U.S. Court of Appeals for the Seventh Circuit and Eleventh Circuit have determined that it is necessary.[15] The U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Ninth Circuit have determined it is not.[16] Trial and appellate courts alike have been in desperate need of further FCC clarification, if not, eventually, Supreme Court guidance.

The P2P Order Clarifies the Muddled Water

Finally, on June 25, some five years since the FCC's 2015 order, the FCC's Consumer and Governmental Affairs Bureau issued the P2P order. This ruling marks the FCC's first pronouncement on the ATDS definition since *ACA International* opinion.

At the outset, it is important to note what this ruling is not. This is not necessarily the FCC's final word on the ATDS topic. The bureau noted at the very outset in footnote 2 that the FCC was still evaluating its interpretation of ATDS post-*ACA International* and that the P2P ruling simply "rel[ied] on the statutory definition of autodialer."

With that caveat in mind, the P2P ruling provides critical insight into the FCC's current thinking. Specifically, the decision reaches four critical conclusions:

- "[W]hether the calling platform or equipment is an autodialer turns on whether such equipment is capable of dialing random or sequential telephone numbers without human intervention." [17]
- The volume of numbers called "is not determinative of whether that equipment constitutes an autodialer under the TCPA." [18]
- If a messaging or calling platform "requires a person to actively and affirmatively manually dial each recipient's number and transmit each message one at a time," and lacks the capacity to transmit more than one messages without manual dialing, it is not an ATDS. [19]
- "The TCPA does not and was not intended to stop every type of call." [20]

The above conclusions constitute a large scale curtailing of the FCC's prior ATDS guidance. Whereas prior guidance failed to provide concrete parameters, the FCC here places clear stakes in the ground.

First, the FCC implies — if not outright states — that dialing from a stored list of numbers that are not randomly or sequentially generated does not fall within the ATDS definition. Second, the FCC eliminates the idea that simply using equipment with the capacity to dial large volumes of numbers is, in and of itself, probative. Third, equipment that requires manual dialing of each phone number is not an ATDS. And fourth, the FCC rejects the notion that the TCPA was intended to grow with technology, outright stating that it was not intended to stop all calls.

This is a big step back from prior efforts of the FCC to expand the TCPA to meet new technology, even if it did not exist and could not have been envisioned at the time the TCPA was enacted in 1991.

The P2P order, again, was clear that the FCC is still evaluating the ATDS definition in the wake of ACA International. In the interim, there is little doubt that this P2P order will be extremely helpful to defendants, particularly those in circuits that have not yet interpreted the ATDS definition.

It may also provide grounds for courts in the Second and Ninth Circuits to reevaluate definitions that no longer seem to square with the P2P order. And if the P2P order is any indication, the FCC is looking to dramatically scale back the technology covered by the TCPA.

The significance of the P2P order is also dramatically heightened in light of the Supreme Court's decision in *Barr v. American Association of Political Consultants*, which declined in large part to find the TCPA's autodialing and robocalling provisions in violation of the First Amendment.

Though the Supreme Court did not invoke the so-called nuclear option and invalidate much of the TCPA's autodialing and robocalling provisions, the P2P order calls into question — particularly in the Second and Ninth Circuits — whether the dialing equipment at issue in many TCPA cases is actionable in the first instance. The P2P order also places the FCC's thumb on the scale as many expect the Supreme Court to eventually take up and resolve the ATDS circuit split.

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[1] The P2P Order is available at <https://www.fcc.gov/ecfs/filing/10629526112567> [hereinafter "P2P Order"].

[2] 47 U.S.C. § 227(a)(1).

[3] *Glasser v. Hilton Grand Vacations Co., LLC* , 948 F.3d 1301, 1308 (11th Cir. 2020).

[4] In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, 14091-92 (2003) [hereinafter "2003 Order"].

[5] *Glasser*, 948 F.3d at 1308-09.

[6] 2003 Order, 18 F.C.C. Rcd. at 14092.

[7] In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961 (2015) [hereinafter "2015 Order"].

[8] *Id.* at 7972-74.

[9] *Id.* at 7975-76.


[10] *ACA Int'l v. Fed. Commc'ns Comm'n* , 885 F.3d 687 (D.C. Cir. 2018).


[11] *Id.* at 702-03.

[12] *Id.* at 703.

[13] *Id.*

[14] *Id.*

[15] *Dominguez v. Yahoo, Inc.* , 894 F.3d 116 (3d Cir. 2018); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020); *Glasser*, 948 F.3d at 1301.

[16] *Duran v. La Boom Disco, Inc.* , 955 F.3d 279, 281 (2d Cir. 2020); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043 (9th Cir. 2018).

[17] P2P Order ¶ 8.

[18] *Id.*

[19] *Id.* ¶ 9.

[20] *Id.* ¶ 12.