

FCC Issues Order Confirming that Manual Dialing Means a System is not an ATDS; Wades Into the Random or Sequential Debate

WRITTEN BY

Amanda K. Blackmon | Brooke K. Conkle | Virginia Bell Flynn | David M. Gettings | John C. Lynch | Alan D. Wingfield

The Federal Communications Commission (FCC) [issued a noteworthy order](#) on June 25, 2020, in its continuing interpretation of the Telephone Consumer Protection Act (TCPA). In its order, the FCC confirmed many courts' existing interpretation of the TCPA, noting that any text platform that requires manual entry of telephone numbers and manual launching of texts on a one-by-one basis is not an automatic telephone dialing system (ATDS). The FCC also waded into the debate regarding random or sequential number generation, stating that whether a telephone is an "autodialer turns on whether such equipment is capable of dialing random or sequential telephone numbers without human intervention."

Background

P2P Alliance, a coalition of providers and users of peer-to-peer text messaging services, petitioned the FCC in 2018 for clarity regarding text messaging platforms that most P2P members use. The Alliance described the P2P platforms as "ones that enable two-way text communication, require a person to manually send each text message one at a time, and enable the sender to exercise discretion regarding the content and other features of the text messages." The Alliance further confirmed that the platforms do not have the capacity to store or produce telephone numbers to be called, using a random or sequential generator. Instead, the platform "requires a person to actively and affirmatively manually dial each recipient's number and transmit each text message one at a time." The Alliance emphasized the fact that their text message communications are the result of a relationship between the sender and recipient, "where the recipient has indicated his or her consent to receive such messages by providing a contact number to which P2P Alliance messages are delivered."

The Order

In its order, the FCC confirmed that a text message system that "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 message without a human manually dialing each recipient's number," then it is not an ATDS. While courts have disagreed on what constitutes an ATDS with regard to random or sequential number generation, courts on both sides have still found that human intervention reigns supreme. The FCC order reinforced this conclusion. According to the FCC, where a party can show that its telephone system or text message platform requires human beings to manually initiate each call one at a time, that system is not an ATDS.

The FCC order also waded into the debate regarding random or sequential number generation. There is currently a Circuit split as to how to interpret the random or sequential number generation requirement in the TCPA's ATDS definition. Some courts, like the Ninth Circuit, have held that "storage" of telephone numbers alone – without random or sequential number generation – is enough to satisfy the first prong of the ATDS definition. Other courts, like the Seventh Circuit, have concluded that a telephone without the capacity to generate numbers randomly or sequentially cannot be an ATDS, even if it is capable of storing numbers. The FCC is aware of the debate raging in these courts and [solicited public comment](#) in light of the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*.

In its order, the FCC did not explicitly state that it was wading into the debate regarding random or sequential number generation. But the order's language implies otherwise. According to the FCC's order, "whether 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." This statement is significant. If the FCC believed storage of telephone numbers was enough to satisfy the first prong of the ATDS definition, there would be no reason for the FCC order to reference "random or sequential" telephone numbers. But, it chose to do so, nonetheless. This suggests that the FCC – perhaps implicitly – is endorsing the majority rule that a telephone does not constitute an ATDS unless it is capable of generating random or sequential numbers, regardless of whether the telephone can also store numbers to be called.

"Take Aways"

Although the order is relatively short, it provides several important "take aways."

- The FCC confirmed that a system is not an ATDS if it is not capable of dialing numbers without a human "actively and affirmatively dialing each one."
- The FCC clarified that whether a platform or system is able to send texts or make calls to a considerable volume of telephone numbers is not dispositive of the ATDS issue. In doing so, the FCC emphasizes human intervention over volume of calls or messages.
- The FCC rejected the notion that policy concerns should invade the interpretation of the TCPA's ATDS definition. For example, consumer groups argued that telemarketers "would immediately gravitate to P2P systems as a way to evade the TCPA's restrictions on unwanted calls." The FCC responded that "[t]he TCPA does not and was not intended to stop every type of call."
- The FCC suggested that random or sequential number generation is an ATDS requirement, although it left a more definitive interpretation of that issue for another day.

In sum, the FCC's order confirms the analysis coming from the courts for the past two years – human intervention is a powerful argument against a telephone system constituting an ATDS. As the number of human steps a telephone system requires to launch a call or text increases, the likelihood that the system is an ATDS decreases. In addition, the FCC provided new fodder for arguing that random or sequential number generation is a requirement for a system to constitute an ATDS.

RELATED INDUSTRIES + PRACTICES

- Financial Services Litigation
- Consumer Financial Services
- Telephone Consumer Protection Act (TCPA)