

FCC Holds "Robocall Broadcaster" Liable for Its Clients' Prerecorded Messages

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Already in May, the FCC Enforcement Bureau had proposed multi-million dollar NALs for [cramming](#) and [TRS violations](#). On May 8th, the FCC proposed a forfeiture for unlawful prerecorded messages ("robocalls") sent to wireless phones. What is most interesting, though, is that the FCC held the entity that facilitated the calls liable, not the parties on whose behalf the calls were made.

In the [Dialing Services NAL](#), the FCC proposed a forfeiture of \$2.9 million against an entity for having placed 184 unlawful prerecorded message calls to cell phones. The recipient of the proposed fine is Dialing Services, LLC ("Dialing Services"), a developer of a software platform that allows customers to record their own messages and send them to a designated list of recipients. Specifically, as described in the NAL, Dialing Services allows users to upload a sound recording to the company's website or to create a new recording by dialing a telephone number interface. In either event, once the customer has created the content to be sent, Dialing Services permits the customer to send the prerecorded message to telephone numbers the customer designates. Dialing Services acts as a platform through which a customers may originate these prerecorded messages. In essence, Dialing Services is what I will term here a "robocall broadcaster."

The Commission found that at least 184 unsolicited political messages were sent to subscribers' cell phones. Under [rules that were revised in October 2013](#), such non-telemarketing calls to cell phones require customer consent, albeit not necessarily written consent. The fact that these calls were made does not appear to be in dispute. Nor does the fact that the calls appeared not to have the recipient's consent.

However, Dialing Services disputed liability for the calls. This is where the NAL gets interesting. Dialing Services contended that, as merely the broadcaster, it is not responsible for the prerecorded messages that its customers send. The Commission disagreed. The Commission found that Dialing Services "makes" or "initiates" a prerecorded message within the meaning of the TCPA rules through the operation of its platform. Specifically, the Commission concluded that Dialing Services dials the phone numbers provided by the customer, that it may, in some instances control the numbers to be dialed (by providing voter lists, for example) and may review or edit messages. The fact that Dialing Services often does not choose the numbers to be called, and the fact that the software, rather than a human, automatically places the calls, is "irrelevant," the Commission found. Instead, Dialing Services' direct actions to originate calls are sufficient to mean that Dialing Services "makes" or "initiates" a call under the TCPA.

Notably, Dialing Services contended that a robocall broadcaster should be liable under the same standard that is applicable to entities that facilitate the initiation of facsimile messages. Under FCC orders, fax broadcasters are liable for the transmissions of their customers *only if* the fax broadcaster has a "high degree of involvement" in the fax or has actual notice of an illegal use and

does not take steps to prevent such unlawful transmissions. Dialing Services asserted that this standard should apply to its conduct as well.

The Commission, however, ruled that the "high degree of involvement" standard did not apply to other TCPA calls. It asserted that Congress viewed unsolicited calls to cell phones as a greater invasion of privacy than calls to residential lines or unsolicited advertisements sent to fax machines. Moreover, in 2005, Congress provided an express exemption for unsolicited faxes (the established business exemption), but has not mandated such an exemption for other TCPA calls. "Even after more than twenty years of opportunity to amend the law," the Commission wrote, "Congress has let the prohibition against unsolicited robocalls stand."

(Note: on the facts, the standard might not have mattered. Even if the fax broadcaster standard applied, Dialing Services might have had a "high degree of involvement" because it (a) sometimes supplied the list of numbers to be called, (b) provided unspecified "technical support" to assist customers and (c) reviews or edits certain messages. These actions are of the type that the FCC concluded could be evidence of a high degree of involvement in a facsimile transmission. The FCC did not address whether the specific factual circumstances were sufficient to arise to a "high degree of involvement" in this case, however.)

Thus, for now at least, platforms and service providers that facilitate the sending of autodialed calls, prerecorded messages and text messages face a potentially broader liability than do fax broadcasters. There are several petitions pending before the Commission that address liability for "robocall broadcasters" but the Commission has not yet acted upon them. Until then, broadcasters should be careful in determining how to structure their services so as to minimize potential TCPA liability.