

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Dialing Services, LLC*, File No. EB-TCD-12-00001812.

It should come as no surprise that I continue to seek greater precision in our enforcement work. I said as much in the past on numerous occasions, and I reemphasized the point at last month's disposition of an Enforcement Bureau item. When the Commission is seeking to impose substantial fines on a company and issue allegations that could seriously undermine a business, we better be sure we are right and have sufficiently addressed every component of the case. The Commission must always present the best possible arguments, evidence and precedent. Too often, at least in my opinion, the EB items fail to meet to this standard.

After months of working on this case and hoping to reach common ground, we reached a point where additional edits and input weren't getting us closer on a couple of key issues. And so, we now have a Forfeiture Order to fine a company, Dialing Services, almost \$2.9 million for operating a technology platform in violation of TCPA. Unfortunately, the item before us today is so lacking that I do not have sufficient confidence that the allegations are correct. Let me explain some of its problems.

While the Commission's desire to attack illegal robocalling is admirable, in this item, it seeks to punish a technology and its operator rather than the actual originators of alleged illegal robocalls – the companies that used the platform to contact consumers. Did the Commission actually seek enforcement action against the companies or individuals that directly made the alleged illegal robocalls? The item doesn't tell us, but the NAL response suggests it did not. Instead, the Commission attempts to deem the platform operator as violating the TCPA with little facts and questionable arguments. Overall, this seems like an extremely far stretch under the law and begins to look a lot like those that sue gun makers whenever there is horrible event. Moreover, it opens a huge can of worms given that this same platform technology can be used for completely legitimate purposes and often is. So, the Commission is then forced to try to define what is a good use and what is an illegal use. And, therein lies an even bigger problem.

The TCPA applies to parties that “make” or “initiate” a call. But here, it's the actual callers who load the numbers to be dialed, execute the software and push send. Is Microsoft liable if I were to use Windows 10 or Outlook to send a threatening email? Of course, not.

Therefore, the item focuses instead on whether Dialing Services is “so involved in the making of the calls as to be deemed to have made them.” In doing so, the Commission essentially establishes a three-prong test on who is susceptible for being captured under this vague determination: it offers spoofing capability; is involved in creation of the call's content; and markets that it can reach a wide audience. But all of these features can be used for generate calls for legitimate purposes, a point the Commission completely concedes regarding spoofing.<sup>1</sup>

On the first point, the NAL response notes that while the software can transmit calling party numbers provided by clients, there has been no indication that any telephone number supplied by a client to Dialing Services is spoofed or inaccurate. Indeed, the Commission does not show that spoofing was present in this case so that should be a completely irrelevant factor here. Yet the item asserts, without evidence, that Dialing Services knows that caller ID spoofing and blocking are likely to be used deceptively by its customers.

Second, in terms of the content of the scripts, the Commission argues that Dialing Services actively assists its clients with the creation and structure of messages and that the messages would *likely* show that the calls are designed to target recipients who didn't consent to be called. However, the NAL

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<sup>1</sup> *Supra*, note 43.

response states that the company has no involvement in the creation of scripts and that all content is created by the clients. It reviews or edits messages only when necessary to prevent unlawful or fraudulent behavior by a client. The easiest way to resolve this point of contention would have been to contact the clients. It would also seem prudent to obtain copies of the messages rather than hypothesize about what might have been in them. But it appears that this basic due diligence did not occur.

Third, is it possible that other platforms would market themselves to suggest that they can reach a wide audience? That would seem to be a no-brainer as being able to conduct mass calling campaigns would be appropriate for legitimate robocalls as well. Thus, the Commission's new "test" on its face appears to be arbitrary and capricious.

To go so far as to implicate the technology platform provider, there should have to be some demonstrable evidence of clear intent to violate TCPA, not just speculation about what a company could have done or might have known. This is certainly what I have been calling for as it relates to pirate radio broadcasting and the need to get to those that aid and abet them, such as property owners or advertisers – clear intent. Wasn't there one Dialing Services' email or a conversation from a former client to shed light on Dialing Services' intent? Yet that seems too much to wish for as the item doesn't prove intent or even try but relies on the old "willful" standard. I am sure that someone will say that willful is the standard in the law and I would agree. However, since the Commission has taken TCPA far outside its original the bounds of the law or its intent, we should prove more than mere willfulness before further expanding the scope of the TCPA to cover platform liability.

In addition, on its face it appears that this particular company certainly tried to address potential exposure points, at least according to the data presented in the item. Specifically, paragraph 4 outlines the circumstances that led the Commission to issue its 2013 citation: the company was alleged to have made 4.7 million illegal robocalls in a three-month period. That's an average of a little over 1.5 million per month. Yet, when the Commission staff reviewed the company's practices just months later, they found only 184 instances. While not perfect, from 1.5 million to 184, that equates to a 99.99 percent decrease in a short amount of time. In fact, the item explains later that Dialing Services did further work to scrub its calling lists to show compliance and there have been zero incidents since mid-2013. Which makes you wonder, is the goal to get TCPA compliance or get enforcement victories?

My knowledge of Dialing Services is limited to what is contained in the item and the NAL response, and I had no preconceived notions about whether they should be liable. My interest is in making sure that they receive full consideration of their arguments and the outcome is just. Unfortunately, their response was given short shrift, and I am concerned about the outcome.

Beyond the fate of this particular company, I worry even more about the precedential value of this item. The Commission is fond of declaring that its enforcement actions stand as new guidelines by which others will be judged. Thus, the "guidance" provided via this decision will affect other platforms that have struggled with the overbroad and bad TCPA decisions recently made by the Commission. I think of Rob Sweeney of Mobile Media Technologies, who testified before a House Judiciary Subcommittee in June. Mr. Sweeney stated that his business, which allows customers – like television stations, newspapers, schools, local governments, hospitals, hotels and not-for-profit organizations – to send non-commercial text messages to their opt-in patrons, has had to face huge legal bills, downsizing, and customer uncertainty because of TCPA actions and inactions by the Commission. How does today's action affect Mr. Sweeney's business? The Forfeiture Order's vague statement that "there may be instances in which a platform provider serves merely as a conduit for robocalls" probably doesn't help Mr. Sweeney keep his clients or grow his business.

For the previous reasons, I vote no.