

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991
Petition of Club Texting, Inc. for Declaratory
Ruling
CG Docket No. 02-278

ORDER

Adopted: January 11, 2016

Released: January 11, 2016

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. Robocalls to wireless telephone numbers and other specified numbers are prohibited except when made for an emergency purpose, with the prior express consent of the called party, or pursuant to a Commission-granted exemption. Congress identified calls to such numbers as susceptible to the harms associated with the use of automated dialing technologies, which can generate large numbers of calls in a short period of time. Pursuant to Congress' mandate in the Telephone Consumer Protection Act (TCPA), the Commission has for over two decades protected wireless consumers from harassing, intrusive, and unwanted robocalls by adopting and enforcing rules that implement the protections afforded to wireless consumers under the TCPA. The Commission has concluded that this protection encompasses both voice and text calls, including short message service (SMS) calls and text calls made using Internet-to-phone technology or an interconnected text provider.

1 The Commission has used the term "robocalls" to refer both to calls placed using an automatic telephone dialing system and to prerecorded or artificial voice calls. See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, para. 1 (2012). Because this Order addresses only text messages and not prerecorded or artificial voice calls, the term "robocall" as used herein refers primarily to text messages sent by "automatic telephone dialing systems" or "autodialers" as defined in the TCPA. See 47 U.S.C. § 227(a)(1).

2 See 47 U.S.C. § 227(b)(1), (b)(2)(C); 47 CFR § 64.1200(a)(1).

3 See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 at 14115, para. 165 (2003) (2003 TCPA Order); see also Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call"); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, 30 FCC Rcd 7961, 8017, para. 108.

2. In this Order, we deny a petition seeking a declaratory ruling that text broadcasters<sup>4</sup> should be subject to the same liability standard as fax broadcasters<sup>5</sup> when providing a text messaging service on behalf of third-party clients.<sup>6</sup> In denying this request, we note that since the filing of Club Texting's petition the Commission has adopted a "totality of the circumstances" test to determine liability for robocalls, including autodialed text messages.<sup>7</sup> That ruling by the Commission effectively resolves the issue raised in the Petition.

## II. BACKGROUND

### A. The Telephone Consumer Protection Act and the Commission's Implementing Rules

3. In 1991, Congress enacted the TCPA to protect consumers from unwanted calls and faxes.<sup>8</sup> In relevant part, section 227(b)(1)(A) of the Act prohibits making "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system" to certain categories of protected telephone numbers.<sup>9</sup> Specifically, this provision prohibits the use of autodialers or artificial or prerecorded voice messages for calling, among others, telephone numbers assigned to cellular services.<sup>10</sup> In so doing, Congress recognized the potential costs and privacy risks imposed on wireless consumers from the use of autodialing equipment, which can generate large numbers of unwanted calls.<sup>11</sup>

4. In 1992, the Commission adopted rules implementing the TCPA, including a prohibition on using autodialers to make any telephone call (other than a call made for emergency purposes or with the prior express consent of the called party) to any number assigned to a wireless service.<sup>12</sup> In addition, based on a separate provision of section 227, the Commission's rules prohibit the use of any telephone fax machine, computer, or other device to send an unsolicited ad to a telephone fax machine.<sup>13</sup> The rules

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<sup>4</sup> As used herein, a "text broadcaster" is a person or entity that transmits text messages to mobile telephones on behalf of another person or entity for a fee.

<sup>5</sup> A "fax broadcaster" is "a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee." See 47 CFR § 64.1200(f)(7).

<sup>6</sup> See *Petition of Club Texting, Inc. for Declaratory Ruling*, CG Docket No. 02-278 (filed Aug. 25, 2009) (Petition). Under the Commission's rules, a fax broadcaster will not be held liable for violations of the TCPA's prohibitions against unsolicited fax ads unless the broadcaster demonstrates "a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions." See 47 CFR § 64.1200(a)(4)(vii).

<sup>7</sup> *TCPA Omnibus Declaratory Ruling and Order*, 30 FCC Rcd at 7980, para. 30.

<sup>8</sup> The TCPA is codified at 47 U.S.C. § 227.

<sup>9</sup> 47 U.S.C. § 227(b)(1)(A). In relevant part, section 227(b)(1)(A)(iii) prohibits non-emergency robocalls "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call" without prior express consent.

<sup>10</sup> *Id.*; see also 47 CFR § 64.1200(a)(1). An "automatic telephone dialing system" 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." 47 U.S.C. § 227(a)(1).

<sup>11</sup> See, e.g., 137 Cong. Rec. H11307 (Daily Ed. Nov. 26, 1991) (noting that telephone subscribers found automated calls to be a particular nuisance and an invasion of privacy).

<sup>12</sup> See 47 CFR § 64.1200(a)(1)(iii); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*).

<sup>13</sup> See 47 CFR § 64.1200(a)(4). This rule implements section 227(b)(1)(C) of the Act.

further provide that a fax broadcaster will be liable for violations of this rule only “if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions”<sup>14</sup>

## B. Club Texting Petition

5. Club Texting has filed a petition for declaratory ruling asking the Commission to clarify that, consistent with treatment of fax broadcasters, text broadcasters are not “senders” of text messages under section 227(b)(1) of the TCPA.<sup>15</sup> Rather, Club Texting argues that text broadcasters act as a “conduit operating a platform that enables message delivery.”<sup>16</sup> Club Texting indicates that it provides “a self-service text message marketing service by licensing its clients to use a software platform that they can use to contact their target audience via text message.”<sup>17</sup> Club Texting contends that aside from “the technological characteristics of the medium with which they work, companies like Club Texting are in all material respects identical to fax broadcasters.”<sup>18</sup> As a result, Club Texting requests that text broadcasters be subject to the same standard as fax broadcasters with respect to liability for unsolicited messages when they provide text messaging service on behalf of their clients.<sup>19</sup> Specifically, Club Texting requests clarification that liability will attach only if a text broadcaster “demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such transmissions.”<sup>20</sup> Club Texting suggests that clarifying that text broadcasters are not senders for TCPA purposes would promote compliance by imposing liability upon its third-party clients who, Club Texting opines, are in the best position to ensure that recipients have consented to receive the text messages.<sup>21</sup>

6. The Commission sought public comment on the issues raised in the Petition.<sup>22</sup> The majority of commenters oppose granting the requested declaratory ruling.<sup>23</sup> Several of these commenters argue that granting the Petition would encourage violation of the TCPA because it limits primary responsibility for unsolicited text messages to third-party clients of text broadcasters whose identities are often difficult to determine.<sup>24</sup> One commenter notes, for example, that unlike the situation with

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<sup>14</sup> See 47 CFR § 64.1200(a)(4)(vii).

<sup>15</sup> See *supra* n.5. Section 227(b)(1) of the TCPA is incorporated in the Commission’s rules at 47 CFR § 64.1200(a)(1).

<sup>16</sup> Petition at 1.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.* (citing 47 CFR § 64.1200(a)(4)(vii)).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> See *Consumer and Governmental Affairs Bureau Seeks Comment on Club Texting’s Petition for Declaratory Ruling*, CG Docket No. 02-278, Public Notice, 24 FCC Rcd 13635 (CGB 2009).

<sup>23</sup> See Robert Biggerstaff Reply Comments; Jay Connor Reply Comments; Paul D.S. Edwards Reply Comments; James Goodluck Reply Comments; Gerald Roylance Reply Comments; Joe Shields Reply Comments.

<sup>24</sup> See Robert Biggerstaff Reply Comments at 2 (“text messages are much more prone to abuse, as the perpetrator can be impossible to identify”); Jay Connor at 1 (granting the fax broadcaster standard would make “it almost impossible for consumers to identify the responsible party”); Paul D.S. Edwards Reply Comments at 2 (granting the Petition will “allow Club Texting, similarly situated persons, and similar entities to circumvent the TCPA and engage in illegal activity”); Gerald Roylance Reply Comments at 5 (“[t]he FCC should not make it easy for broadcasters to profit while their clients break the law and anonymously avoid prosecution”); Joe Shields Reply Comments at 2 (“the Commission should consider imposing strict identification rules so that the recipients of text message blasts will know who sent the text message and on whose behalf it was sent”).

unsolicited faxes, neither the TCPA nor the Commission's rules require an opt-out notice or any sender identification on autodialed text messages.<sup>25</sup> As a result, these parties argue that if the text broadcaster cannot be held liable under the fax broadcaster standard, then wireless consumers will be left with no ability to enforce the TCPA's safeguards against any responsible party.<sup>26</sup> One commenter argues that text broadcasters are in the best position to ensure that the client is operating within the law by contractually securing indemnification from the client where claims are made that the client did not have prior permission to send the text message.<sup>27</sup> This commenter also notes that there are important legal and technical differences between robocalled text messages and fax ads that militate against granting of the request.<sup>28</sup> In addition, several commenters reference the higher protections afforded to wireless numbers under the TCPA along with the potential abuses that the use of autodialers can impose on wireless consumers from the receipt of potentially unlimited numbers of calls and messages that can be made with such technologies.<sup>29</sup> One commenter, SoundBite, supports the Petition, reiterating many of the arguments made by Club Texting that it contends warrant similar regulatory treatment for text and fax broadcasters.<sup>30</sup>

### III. DISCUSSION

7. We deny the petition seeking a declaratory ruling that text broadcasters should be subject to the same liability standard as fax broadcasters when providing a text messaging service on behalf of third-party clients. In light of a Commission decision made after Club Texting filed its request, we conclude that text broadcasters can be liable for TCPA violations based on the factors discussed in that decision. Specifically, in the *2015 TCPA Omnibus Declaratory Ruling and Order*, the Commission clarified who is liable for calls, including text messages, made in violation of the TCPA.<sup>31</sup> In so doing, the Commission stated:

Specifically, a “direct connection between a person or entity and the making of a call” can include “tak[ing] the steps necessary to physically place a telephone call.” It also can include being “so involved in the placing of a specific telephone call” as to be deemed to have initiated it. Thus, we look to the *totality of the facts and circumstances surrounding the placing of a particular call* to determine: 1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA. ... Similarly, whether a person who offers a calling platform service for the

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<sup>25</sup> See Robert Biggerstaff Reply Comments at 2 (also noting the size and character limitations on text messages); see also Letter from Scott A. Delacourt, Counsel to Club Texting, to Marlene Dortch, FCC, CG Docket No. 02-278 (dated Dec. 23, 2009) (suggesting that providing contact information on a text message would be “technologically infeasible”) (Club Texting Dec. 23 *ex parte*).

<sup>26</sup> See, e.g., Robert Biggerstaff Reply Comments at 3 (also contending that many text broadcasters will not cooperate or divulge any information about the client, or the information provided is false and untraceable); Jay Connor Reply Comments at 1; James Goodluck Reply Comments at 1; Gerald Roylance Reply Comments at 4.

<sup>27</sup> See Robert Biggerstaff Reply Comments at 7.

<sup>28</sup> See, e.g., Robert Biggerstaff Reply Comments at 2-3 (noting that SMS text messages have “limited size, and contain only text. No ID requirements in the TCPA. No ‘opt-out’ notice requirements in TCPA. No call detail records maintained by carriers” while faxes have “virtually unlimited size with text and images. Explicit ID requirements in the TCPA. Explicit ‘opt-out’ requirements in TCPA. Call detail records maintained by carriers.”

<sup>29</sup> See, e.g., Robert Biggerstaff Reply Comments at 3-4; Paul D.S. Edwards Reply Comments at 1-2; Joe Shields Reply Comments at 1

<sup>30</sup> See SoundBite Comments at 2-3.

<sup>31</sup> *TCPA Omnibus Declaratory Ruling and Order*, 30 FCC Rcd at 7978-80, paras. 25-30.

use of others has knowingly allowed its client(s) to use that platform for unlawful purposes may also be a factor in determining whether the platform provider is so involved in placing the calls as to be deemed to have initiated them.<sup>32</sup>

8. As a result, the Commission has concluded that the determination as to who is liable as the person who “makes” or “initiates” a particular robocall (including an autodialed text message) requires a fact-based determination governed by factors such as which party takes the “steps necessary to physically place” that call and the extent and nature of involvement by others, including the provider of the calling platform used to make that call. Therefore, we confirm that this Commission precedent is the applicable standard for determining text broadcaster liability for TCPA violations. Because the Commission has clarified the standard to be applied to text broadcasters and that standard is not the same standard as applies to fax broadcasters, we deny Club Texting’s request for a determination that text broadcasters are subject to the fax broadcaster standard. In addition, we note that the record in this matter is insufficient to make such a fact-specific determination as to any specific text broadcaster.

#### IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to sections 1-4, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, sections 1.2 and 64.1200 of the Commission’s rules, 47 CFR §§ 1.2, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the rules, 47 CFR §§ 0.141, 0.361, that the Petition for Declaratory Ruling filed by Club Texting, Inc. in CG Docket No. 02-278 on August 25, 2009, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Alison Kutler  
Acting Chief  
Consumer and Governmental Affairs Bureau

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<sup>32</sup> *Id.* at 7980-81, para. 30 (internal citations omitted) (emphasis added).

**APPENDIX****List of Commenters**

The following parties have filed comments in response to the Public Notice issued in this matter (CG Docket No. 02-278):

Commenter

Robert Biggerstaff

Club Texting, Inc.

Jay Connor

Paul D.S. Edwards

James Goodluck

Gerald Roylance

Joe Shields

SoundBite Communications, Inc.

Abbreviation

Robert Biggerstaff

Club Texting

Jay Connor

Paul D.S. Edwards

James Goodluck

Gerald Roylance

Joe Shields

SoundBite