

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Dialing Services, LLC)	File No.: EB-TCD-12-00001812
)	NAL/Acct. No.: 201432170006
)	FRN: 0023613144

FORFEITURE ORDER

Adopted: July 13, 2017

Released: July 26, 2017

By the Commission: Chairman Pai issuing a statement; Commissioner O’Rielly dissenting and issuing a statement.

I. INTRODUCTION

1. We impose a penalty of \$2,880,000 against Dialing Services, LLC (Dialing Services or Company) for making robocalls to wireless phones using artificial or prerecorded voice messages without the prior express consent of the called parties. Federal Communications Commission staff investigated Dialing Services in 2012 and found that the Company was responsible for more than 4.7 million calls to wireless phones over a three-month period. The calls were non-emergency communications and were made without the called parties’ prior consent, in violation of the Telephone Consumer Protection Act (TCPA). The Enforcement Bureau (Bureau) issued a citation in 2013 warning the Company that it could be liable for monetary forfeitures if it made such unlawful calls to wireless phones in the future. The Bureau subsequently investigated and determined that the Company continued to be responsible for unlawful robocalls. The Commission issued a Notice of Apparent Liability in 2014, and now imposes a penalty of \$2,880,000 against Dialing Services for subsequent violations.

2. We have considered Dialing Services’ arguments and find, for the reasons set forth below, that the Company is deemed to have made or initiated the calls at issue, and thus was required—but failed—to show that it or its customer(s) had obtained the called parties’ consent. We also find that our decision advances Congress’ goal of protecting consumers from the nuisance, invasion of privacy, cost, and inconvenience that autodialed and prerecorded calls generate.

II. BACKGROUND

3. Dialing Services offers a robocalling service to third-party clients. Dialing Services’ clients pay the Company, on a per-call basis, to make artificial or prerecorded voice calls to telephone numbers of the clients’ choosing.¹ Among other things, Dialing Services records and stores messages for its clients and plays the sound recordings to the called party. Dialing Services’ clients may use the Company’s website to upload sound recordings (i.e., prerecorded voice messages) to the Company’s servers.² Alternatively, clients may create prerecorded messages by dialing one of the Company’s phone numbers and recording a message over the phone.³ The calling party’s telephone number is blocked

¹ See Dialing Services Order Form, <http://www.politicalcaller.com/ORDERFORM.pdf> (on file in EB-TCD-12-00001812) (“Dialing Services, LLC will dial the phone numbers and play the recorded message provided by Customer to live answered calls and/or answer machines as indicated by Customer on this order form”).

² See Letter from Mitchell Roth, Roth Doner Jackson, PLC, to Richard Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (June 13, 2012) at 5-8 (on file in EB-TCD-12-00001812) (June 13, 2012 Response).

³ See *id.* at 7.

unless the client enters in a phone number to display on the recipient's caller ID. That phone number may be a "spoofed" number, which modifies (rather than blocks) the originating number. The Company has advertised the fact that it is able to make millions of robocalls for its clients: "Reach thousands, hundreds of thousands or even millions of customers with your personal message."⁴

4. This Forfeiture Order is the culmination of a long process during which the Commission endeavored to alert Dialing Services to its violations of the TCPA and work with the Company to come into compliance. Rather than alter its practices, Dialing Services, during months of interaction with the Bureau, asserted that it was not violating the TCPA.⁵ This case began in 2012, when the Bureau initiated an investigation of Dialing Services' compliance with the provisions of the Communications Act of 1934, as amended (Act), governing robocalls.⁶ As part of its initial investigation, Bureau staff determined that, in just three months, Dialing Services made more than 4.7 million non-emergency robocalls to cell phones without prior express consent in violation of the TCPA⁷ provisions of the Act and the Commission's rules (Rules).⁸ Bureau staff met with the Company to discuss the violations. Subsequently, on March 15, 2013, the Bureau cited Dialing Services for the apparent violations.⁹ The *Citation* notified Dialing Services of its obligations under the Communications Act and warned the Company that it could be liable for monetary forfeitures if it made any more unlawful robocalls to wireless phones in the future.¹⁰ The *Citation* directed the Company to file a certification affirming, under penalty of perjury, that Dialing Services had ceased making autodialed or prerecorded voice message calls to wireless phones, and that it had ceased making any prerecorded message calls that lacked the identification information required in Section 227(d)(3)(A) of the Act and Section 64.1200(b) of the Rules.¹¹ In addition, the *Citation* provided Dialing Services an opportunity to meet with staff and file a written response. On April 5, 2013, Dialing Services met with Bureau staff to discuss the *Citation*, and in particular, the certification. Counsel stated that the Company was unclear on its obligations with respect to certain aspects of the certification, and on April 12, 2013, the Bureau suspended Dialing Services' obligation to file the certification. On April 15, 2013, Dialing Services filed a response to the *Citation*.¹²

5. Starting in June 2013, the Bureau conducted a follow-up investigation to determine if Dialing Services had ceased making robocalls after receiving the *Citation*.¹³ From the date of the *Citation*

⁴ See In Touch Systems Website, Products – In Touch, <http://www.gointouch.com/products.html> (on file in EB-TCD-12-00001812).

⁵ The Commission believes that Dialing Services eventually did alter its practices several months after it received the *Citation*.

⁶ *Dialing Services, LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5537, 5539–40, para. 7 & n.15 (2014) (*NAL*). The *NAL* includes a more complete discussion of the facts and history of this case and is incorporated herein by reference.

⁷ 47 U.S.C. § 227.

⁸ *NAL*, 29 FCC Rcd at 5539-40, para 7.

⁹ *Dialing Services, LLC*, Citation and Order, 28 FCC Rcd 1840 (2013) (*Citation*). See *infra* note 91.

¹⁰ Even before the *Citation*, Bureau staff met with Dialing Services and its counsel and warned the Company that its activities violated the TCPA, and that if the Company continued to make unauthorized robocalls, it could be held liable for those calls. See *infra* note 51.

¹¹ *Id.* at 1846–47, paras. 3, 22.

¹² See Response and Petition for Reconsideration filed by Dialing Services, LLC (Apr. 15, 2013) (on file in EB-TCD-12-00001812) (*Citation Response*). Dialing Services availed itself of the opportunity to meet with Commission staff after TCD issued the *Citation*. See *infra* para. 31.

¹³ *NAL*, 29 FCC Rcd at 5540, para. 9 & n.19. See Letter from Mitchell Roth, Roth Doner Jackson, PLC, to Richard Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Oct. 28, 2013) (on file in EB-TCD-12-00001812); see also Letter from Mitchell Roth, Roth Doner Jackson, PLC, to Richard Hindman, Chief,

(continued...)

through October 2013, Bureau staff discovered that Dialing Services had apparently made 2,153,748 non-emergency robocalls. In investigating the calls made during a two-week period in May 2013 (from May 9 through May 20), Bureau staff verified that the Company made 184 additional unauthorized robocalls to cell phones after Dialing Services received the *Citation*.¹⁴ On May 8, 2014, the Commission issued a Notice of Apparent Liability (*NAL*), proposing a \$2,944,000 forfeiture against Dialing Services for its apparent willful and repeated violation of Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the Rules by delivering 184 unauthorized prerecorded message calls to wireless phones.¹⁵ On June 9, 2014, Dialing Services filed a response to the *NAL*.¹⁶

III. DISCUSSION

6. The Commission proposed a forfeiture in this case in accordance with Section 503(b) of the Act,¹⁷ Section 1.80 of the Rules,¹⁸ and the Commission's *Forfeiture Policy Statement*.¹⁹ When we assess forfeitures, Section 503(b)(2)(E) requires that we take into account the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²⁰ In its response to the *NAL*, Dialing Services argues that the *NAL* should be cancelled and/or the forfeiture reduced.²¹ We examine both the application of the Section 503 factors in this case and the Company's response in the discussion below.

A. We Conclude That Dialing Services Violated the TCPA

7. Dialing Services disagrees with the Commission's determination in the *NAL* that the Company is apparently liable for violations of the TCPA. In its *NAL* Response, Dialing Services argues that (1) Dialing Services does not "make" or "initiate" robocalls, and therefore should not be held responsible for making robocalls to wireless phones without the prior consent of the recipients of the call,²² (2) the Commission's investigation was tainted by questionable methods and accuracy,²³ (3) the

(Continued from previous page) _____

Telecommunications Consumers Division, FCC Enforcement Bureau (Aug. 7, 2013) (on file in EB-TCD-12-00001812); E-mail from Mitchell Roth, Roth Doner Jackson, PLC, to Kristi Thompson, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, and Lloyd Collier, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau (Aug. 7, 2013, 15:22 ET) (on file in EB-TCD-12-00001812).

¹⁴ *NAL*, 29 FCC Rcd at 5540, para. 9.

¹⁵ *See id.* at 5549, para. 29.

¹⁶ Dialing Services, LLC's Written Statement Seeking Cancellation and/or Reduction of the Proposed Forfeiture (June 9, 2014) (on file in EB-TCD-12-00001812) (*NAL* Response).

¹⁷ 47 U.S.C. § 503(b).

¹⁸ 47 CFR § 1.80.

¹⁹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

²⁰ 47 U.S.C. § 503(b)(2)(E).

²¹ *See NAL* Response at i.

²² *Id.* at 15–19.

²³ *Id.* at 10–13.

Company did not “willfully” violate the law,²⁴ and (4) the Commission improperly dismissed the Citation Response.²⁵

8. We have fully considered Dialing Services’ NAL Response, and find the Company’s arguments in favor of canceling the *NAL* unpersuasive. Although we do not rescind the forfeiture, the Company has produced sufficient evidence to persuade us that the proposed forfeiture should be reduced by \$64,000. We therefore affirm \$2,880,000 of the forfeiture proposed in the *NAL*.

1. Dialing Services Is Deemed to Have “Made” the Calls for Purposes of Determining Liability Under the TCPA

9. Dialing Services disagrees with the *NAL*’s determination that in some cases, web platforms such as Dialing Services “make” or “initiate” robocalls for the purposes of liability under the TCPA. The Company argues that the TCPA did not anticipate that prerecorded calls would migrate away from call centers and move onto Internet servers; therefore, according to Dialing Services, web-based hosted dialing companies cannot reasonably be viewed as responsible under the TCPA.²⁶ We disagree. Both the TCPA and our implementing regulations apply broadly to any “person” who makes a call using an autodialer, an artificial voice, or a prerecorded voice, and there is no suggestion that “person” was intended to be limited to only those persons who use certain technological platforms. All that is legally relevant is whether a person “makes” or “initiates” a covered call—an issue that we fully addressed in the *NAL* and herein.

10. The Company argues that its actions do not meet the dictionary definition of the word “initiate.” Dialing Services quotes the U.S. Supreme Court for the proposition that “[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”²⁷ After quoting from a dictionary definition for the word “initiate,”²⁸ Dialing Services concludes that the Company’s clients “caused the beginning of” (and therefore “initiated”) the robocalls to cell phones.²⁹ Dialing Services argues that, in contrast to its clients, the Company is merely a “conduit” for robocalls.³⁰

11. We disagree. In the *DISH Network* declaratory ruling,³¹ the Commission addressed the meaning of the term “initiate” for the purposes of the TCPA—thus we need not rely on a non-contextual dictionary definition alone.³² Therein, the Commission clarified that a caller may be found to have made or initiated a call in one of two ways: first, by “tak[ing] the steps necessary to physically place a telephone call;”³³ and, second, by being “so involved in the placing of a specific telephone call as to be

²⁴ *See id.* at 2–10.

²⁵ *Id.* at 13–15.

²⁶ *Id.* at 15.

²⁷ *Id.* at 16 (citing *Edwards v. Aguillard*, 482 U.S. 578, 598 (1987) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979) (internal quotations omitted)).

²⁸ NAL Response at 16.

²⁹ *Id.*

³⁰ *Id.*

³¹ *In re Joint Petition filed by DISH Network LLC, Declaratory Ruling*, 28 FCC Rcd 6574 (2013) (*DISH Network*).

³² *Id.* at 6582–6586 (noting that the term “initiate” in the statute is undefined, and declaring that “a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call”).

³³ *Id.* at 6583.

directly liable for making it.”³⁴ Following the issuance of the *NAL*, the Commission released the *TCPA Omnibus Order* that, among other things, addressed three petitions for declaratory ruling regarding whether the platform provider could be held liable under the TCPA as the “maker” of a call.³⁵ The Commission provided some guidance as to how it would evaluate potential TCPA liability of platform providers, but said that it would consider “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.”³⁶

12. In the *NAL*, the Commission considered whether Dialing Services makes or initiates the calls. The Commission applied the FCC’s holding in *DISH Network* and found that Dialing Services “makes” or “initiates” calls for the purposes of the TCPA.³⁷ Dialing Services has not presented any evidence to alter that determination. Dialing Services argues that even if the *NAL*’s reliance on *DISH Network* is appropriate, Dialing Services is still not the initiator of the calls, because it does not take “the steps necessary to physically place a telephone call.”³⁸ Assuming *arguendo* this is true, Dialing Services is not the maker or initiator of the calls under the first prong of the *DISH Network* test. Under the second prong, however, the totality of the circumstances may indicate that Dialing Services is so involved in the making of the calls as to be deemed to have made them. As explained below, we find that to be the case.

13. Dialing Services argues that the *NAL* improperly cited *DISH Network* out of context in order to find that Dialing Services is the initiator of the robocalls.³⁹ In Dialing Services’ view, the Commission in *DISH Network* did not establish whether a telemarketer or a software dialing platform is the “initiator” of the calls.⁴⁰

14. Although the *DISH Network* declaratory ruling did not involve a software platform, the decision did not hinge on the technology used to make autodialed calls. Rather, *DISH Network* addressed the circumstances under which a client or seller that engages telemarketers to make calls for it can be held vicariously liable for the calls that were physically made by the telemarketer; direct liability of the telemarketer was apparent. As explained in the *NAL*, “the Commission’s analysis presumed that *both* a seller who engages a telemarketer, and the telemarketer so engaged, may be liable for TCPA violations.”⁴¹ We have no doubt that, on the face of the statute, a company like Dialing Services that is so involved in placing the robocalls can be held liable under the TCPA.

³⁴ *Id.*

³⁵ *Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7978-84 (2015) (*TCPA Omnibus Order*) (citing S. Rep. No. 102-178, 1st Sess., 102nd Cong., (1991) at 2, 4-5). In two of the three cases, the Commission found that the platform provider could not be liable under the TCPA, but in the third case, the Commission found that the provider was sufficiently involved in making the calls that it could properly be deemed to have made or initiated the calls.

³⁶ *Id.* at 7980-81, para. 30.

³⁷ *See NAL*, 29 FCC Rcd at 5542–5545, paras. 13–21.

³⁸ *See NAL Response* at 16–18.

³⁹ *See id.* Dialing Services argues that even if the *NAL*’s reliance on *DISH Network* is appropriate, under *DISH Network*, Dialing Services is still not the initiator of the calls, because it does not take “the steps necessary to physically place a telephone call.” *Id.* at 17–18 (citing *DISH Network*, 28 FCC Rcd at 6583, para. 26). While that may be the case, it is not the end of our inquiry. As we explain, Dialing Services was so involved in the making of the calls at issue that it can be deemed, under the second prong of our test, to have initiated them, along with its client, even though Dialing Services did not take the steps necessary to physically place the calls under the first prong. *TCPA Omnibus Order*, 30 FCC Rcd at 7980-81, para. 30.

⁴⁰ *NAL Response* at 17.

⁴¹ *NAL*, 29 FCC Rcd at 5542, para. 15 (emphasis in original).

15. In addition, the Company claims that it is merely a third party that plays a small role in the causal chain that results in the final placement of the call, and therefore Dialing Services should not be held responsible for those calls.⁴² The Company's response to the *NAL* argues that the affirmative acts the Commission pointed to in the *NAL* as evidence of more than a minor role in the process were "inaccurate, grossly exaggerated or taken out of context."⁴³ Dialing Services minimizes its involvement and characterizes several of its actions discussed in the *NAL* as mere "technical support."⁴⁴ Dialing Services' arguments are unpersuasive. For example, the *NAL* noted that Dialing Services offers a spoofing functionality to its clients.⁴⁵ The Company does not contest this fact, but states in its *NAL* Response that there is no indication that the calls at issue in the *NAL* were spoofed.⁴⁶ But the fact that Dialing Services markets the ability to make thousands or millions of spoofed robocalls through its platform indicates that it is more than a mere conduit in the process. In contrast to other functionalities Dialing Services may offer, Caller ID spoofing and blocking functionalities are designed to deceive consumers about the originating point of calls or to hide the originating point altogether, although in other contexts there may be legitimate reasons to change or block Caller ID.⁴⁷ Moreover, Dialing Services does not refute that its service automatically blocks the originating number, requiring the called party to answer the call in order to learn who is calling.

16. Significantly, the record also shows that Dialing Services was directly involved in creation of the content of illegal robocall campaigns.⁴⁸ The *NAL* noted that Dialing Services assists

⁴² *NAL* Response at 17–18 (citing *DISH Network*, 28 FCC Rcd at 6583, para. 26). Dialing Services states that its clients upload the numbers and sound files, and click "dial" on the web page to start the calling program. Based on that, Dialing Services concludes that its clients "initiate" the calls, and that without the Company's clients, there would be no calls at all. *NAL* Response at 18. First, we are not persuaded that liability should be limited only to Dialing Services' customers, in light of the fact that Dialing Services was, as described herein, so involved in the placement of the calls as to be deemed to have initiated them along with the client. Second, in its effort to cast blame on its clients for clicking "dial," Dialing Services ignores the fact that in *DISH Network*, the *DISH* telemarketers were in an analogous position (i.e., there would have been no calls by *DISH* telemarketers but for the *DISH* clients). The question in that case was not whether the telemarketing company was liable for making the calls (the telemarketer was presumptively liable), the question was whether the company that hired the telemarketer—i.e., *DISH Network*—was also liable. *DISH Network*, 28 FCC Rcd at 6584, para. 28.

⁴³ *NAL* Response at 8–9.

⁴⁴ *Id.* at 10.

⁴⁵ *NAL*, 29 FCC Rcd at 5544, para. 17.

⁴⁶ *NAL* Response at 9-10.

⁴⁷ If the spoofing functionality was not used to deceive the called party in a particular case—for example, because it was used instead to direct the called party to the client's actual customer service number—proof of such use may be relevant in refuting the presumption that the offered spoofing services were inherently deceptive. See *Rules And Regulations Implementing The Truth in Caller ID Act of 2009*, Report and Order, 26 FCC Rcd 9114, 9121-22, 9128, paras. 19-21, 35 (2011) (stating that the Truth in Caller ID rules "are consistent with Congressional intent to focus on whether a person or entity has knowingly manipulated the caller identification information in order to defraud, cause harm, or wrongfully obtain anything of value" and that "a person or entity that blocks or seeks to block a caller identification service from transmitting or displaying that person or entity's own caller identification information shall not be liable for violating our rules implementing the Truth in Caller ID Act").

⁴⁸ *Cf. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005) (holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties"). As was the case with the file-sharing software at issue in *Grokster*, Dialing Services went beyond merely providing a platform that some clients used unlawfully, and instead affirmatively designed its platform in such a way as to facilitate unlawful uses, or was so actively involved in the calls or the manner in which they were made that it can be deemed to have made or initiated the calls.

clients in the “proper structuring of a message.” In doing so, Dialing Services becomes a direct participant in determining the content of the calls at issue. Dialing Services actively assists its clients with the creation and structure of those messages, the content of which would likely show that the calls will be targeted at recipients who neither consented to receive them nor had any other prior contact with the client. These facts, in combination with Dialing Services’ offering of functions like caller ID spoofing and blocking, which it knows are likely to be used deceptively by its customers, reflect that Dialing Services provides more than passive involvement in, or technical assistance with, making robocalls. Rather, Dialing Services becomes “so involved” in the making of the calls that it can itself be deemed the maker or initiator of the calls together with its customer who asked it to provide the assistance. While there may be instances in which a platform provider serves merely as a conduit for robocalls, that is not the case presented here. When we consider Dialing Services’ role in placing the calls, we are convinced that Dialing Services is properly subject to liability under the TCPA.⁴⁹

17. Both the *NAL* and our decision here are consistent with the 2015 *TCPA Omnibus Order*, and Dialing Services has not alleged otherwise. Under the “totality of the facts and circumstances”⁵⁰ approach detailed in the 2015 *TCPA Omnibus Order*, Dialing Services satisfies several of the factors that the Commission said were relevant in determining whether a platform provider makes or initiates a call, or is deemed to have done so by being so involved in the call. Moreover, Dialing Services was on notice that Commission staff believed that it was operating in violation of the TCPA, and it chose to continue its service offerings.⁵¹ In the 2015 *TCPA Omnibus Order*, the Commission noted that in determining potential liability, the Commission would consider whether a person offering a calling platform “has knowingly allowed its client(s) to use that platform for unlawful purposes”⁵² These factors support the conclusion that Dialing Services may be liable under the TCPA for robodialed calls made without the called parties’ consent.

18. Congress enacted the TCPA to protect consumers from the nuisance, invasion of privacy, cost, and inconvenience that autodialed and prerecorded calls generate.⁵³ Dialing Services markets itself as a robocalling service. It advertises that it can enable clients to reach “thousands, hundreds of thousands, or even millions of customers”⁵⁴ Its business plan depends on attracting clients that want a

⁴⁹ As the Commission has said, in determining whether a person may be held liable under the TCPA as the maker or initiator of the call will depend “upon the facts of each situation” *TCPA Omnibus Order*, 30 FCC Rcd at 7980-81, para. 30.

⁵⁰ *Id.* at 7980-81, para. 30 (stating that identifying the party who made or initiates a call “look[s] to the totality of the facts and circumstances surrounding the placing of a particular call”).

⁵¹ Dialing Services received formal notice on March 15, 2013 that its platform was being used to make unlawful robocalls when the Commission issued the Company a citation stating that (1) Dialing Services had made millions of robocalls in violation of the TCPA, and (2) that any such future conduct would result in further enforcement action, including forfeitures. *Citation*, 28 FCC Rcd 1840. Even before that formal notice, Bureau staff met with Dialing Services and its counsel and warned the Company that its activities violated the TCPA, and that if the Company continued to make unauthorized robocalls, it could be held liable for those calls. The fact that Dialing Services may have disagreed with the citation did not change the fact that it had actual notice that its clients were making autodialed, pre-recorded calls without the called party’s consent, nor did it alter its obligation to comply with the citation. The Enforcement Bureau did not stay the effect of the *Citation*. Under Section 1.102 of the Rules, non-hearing and interlocutory actions taken pursuant to delegated authority are effective upon release; the Bureau, acting on delegated authority, may, in its sole discretion, stay the effect of an action taken on delegated authority while a petition for reconsideration is pending. *See* 47 CFR § 1.102. Accordingly, Dialing Services was obligated to follow the directions of the citation and the warnings of FCC staff who directed the Company to cease the unauthorized robocalling of wireless phones.

⁵² *TCPA Omnibus Order*, 30 FCC Rcd at 7980-81, para. 30.

⁵³ S. Rep. No. 102-178, 1st Sess., 102nd Cong., (1991) at 2, 4-5.

⁵⁴ *NAL*, 29 FCC Rcd at 5539, para. 6 & n.14.

provider to perform mass calling campaigns. Dialing Services offers caller ID blocking and spoofing that are apparently used in a deceptive manner.⁵⁵ Dialing Services assists customers in structuring the message of the call. And the Company had specific notice that its service was being used to make unlawful robocalls. Under both the holding in *DISH Network* and a “totality of the facts and circumstances” approach regarding the making of the unlawful calls, Dialing Services bears responsibility for them and, by this action, we hold Dialing Services accountable because we deem it to be the maker or initiator of the calls.

2. The Bureau’s Investigation Was Thorough and Supports the Factual Findings of the *NAL*

19. Dialing Services argues that the Bureau’s investigation was flawed, and that these flaws undermine the legitimacy of the Commission’s proposed forfeiture. Specifically, Dialing Services argues that by requiring the Company to produce documentary evidence of prior express consent of the called parties, the Commission held Dialing Services to a higher standard than is required by the TCPA.⁵⁶ The Company also criticizes the outreach that Bureau staff performed when staff contacted the recipients of Dialing Services’ robocalls.⁵⁷ Dialing Services accuses the Bureau of making “inflammatory” inquiries and questioning the ability of ordinary citizens to understand the meaning of “prior express consent.”⁵⁸

20. We disagree with both points. First, Dialing Services was held to the correct standard under the TCPA. As part of its investigation, the Bureau directed the Company to produce documentary evidence of prior express consent.⁵⁹ Dialing Services argues that it cannot obtain prior express consent from consumers because (1) it has no direct relationship with the call recipients, (2) it is not the initiator of the messages, and (3) the call recipients have no knowledge of Dialing Services or its role.⁶⁰ Dialing Services’ arguments⁶¹ are unavailing. As a preliminary matter, we reject Dialing Services’ assertion that it does not make or initiate the calls, given that it was “so involved” in the customers’ making of the calls as to be deemed the maker or initiator of the calls along with the customers. The fact that Dialing Services has no preexisting relationship with the called parties does not absolve the Company of its obligation to obtain consent. In fact, that is exactly the kind of uninvited contact that the TCPA was designed to combat. Similarly, the fact that the called parties are unaware of Dialing Services’ involvement, and thus do not have a way to consent (or refuse consent) to the contacts does not relieve Dialing Services of its obligation to obtain their respective consents.

21. Dialing Services argues that its clients made the calls and thus had the responsibility to obtain consent from the called parties. We disagree with the implicit assertion that only one party can be liable under the TCPA for illegal calls. Indeed, the fact that the Commission recognized potential liability for (1) the maker of the call, and (2) a person so involved that it could be deemed to have made the call,⁶²

⁵⁵ *NAL*, 29 FCC Rcd at 5544, para. 17.

⁵⁶ *NAL* Response at 12.

⁵⁷ *See id.* at 10–11.

⁵⁸ *See id.* at 11–12.

⁵⁹ *See* Letter from Richard Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Anthony C. Kolker, President, Dialing Services, LLC at 3 (June 28, 2013) (on file in EB-TCD-12-00001812); Letter from Richard Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Anthony C. Kolker, President, Dialing Services, LLC at 3 (Sept. 27, 2013) (on file in EB-TCD-12-00001812).

⁶⁰ *NAL* Response at 4–5. Dialing Services asserts that it gave the Bureau enough information to investigate any of Dialing Services’ clients who may have been culpable, because Dialing Services merely facilitates but does not make the robocalls. *Id.* at 12–13.

⁶¹ *See id.* at 4–5; 10–13.

⁶² *See TCPA Omnibus Order*, 30 FCC Rcd at 7980-81, para. 30.

reflects that responsibility to obtain consent may lie with more than one entity. As the Commission stated in the *NAL*, and as set forth explicitly in the *DISH Network*, both a seller (or client, in this case) who engages a telemarketer (or robocaller, in this case) and the telemarketer (or robocaller) so engaged, may be liable for TCPA violations.⁶³

22. Moreover, Dialing Services could have required its clients (who, according to the Company, have the “direct relationship” with call recipients) to provide proof of their respective consents and furnished it to the Bureau as evidence. It did not do so. Dialing Services requires its clients to sign a terms of service agreement promising that the clients will comply with federal regulations governing prerecorded messages.⁶⁴ But that falls short of demonstrating that the called parties expressly consented to the communications. The TCPA prohibits autodialed and prerecorded calls made without the called party’s consent. Nothing in the statute or our rules suggest that the consent requirement may be overcome by a general statement from third parties that they will not violate the law. We reject the idea that the Company may satisfy its independent obligation under the TCPA by relying on a broad promise by a third party that it will not violate the TCPA.

23. Dialing Services also alleges that the Bureau failed to consider that prior express consent could have been given orally or in ways not easily documented.⁶⁵ This argument is without merit. As we held above, Dialing Services is deemed to have made the calls at issue and was responsible for ensuring that those calls complied with the TCPA and FCC Rules requirements concerning prior express consent. Dialing Services was asked to produce any and all evidence of prior express consent.⁶⁶ Dialing Services was able to provide evidence of consent for only four (4) of the 184 robocalls it made after being warned to stop making unlawful calls. As the Commission informed the Company in the *Citation* and reiterated in the *NAL*, it is well-settled that “[c]allers contending that they have the prior express consent to make prerecorded voice or autodialed calls to cell phones or other mobile service numbers have the burden of proof to show that they obtained such consent.”⁶⁷ Dialing Services proceeded at its own risk by ignoring the citation and proceeding without either obtaining the required consents or ensuring that its customers

⁶³ See *NAL*, 29 FCC Rcd at 5542, para. 15.

⁶⁴ See Letter from Mitchell Roth, Roth Doner Jackson, PLC, to Richard Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau at 4, 12 (June 13, 2012) (on file in EB-TCD-12-00001812).

⁶⁵ *NAL* Response at 12. Dialing Services points specifically to the *ACA* and *GroupMe* declaratory rulings, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 29 FCC Rcd 3442 (2014) (*GroupMe*); *Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559 (2008) (*ACA*). The Company’s reliance on these decisions is misplaced. In *ACA*, the Commission clarified that consumers effectively give prior express consent to receive autodialed or prerecorded messages pertaining to debts when they provide their wireless number on the application for the loan. *ACA*, 23 FCC Rcd at 564–565, para. 10. In *GroupMe*, the Commission held that a sender of non-telemarketing autodialed or prerecorded calls may obtain prior express consent through an intermediary, but emphasized that when an intermediary fails to obtain consent, the sender of the autodialed or prerecorded calls is liable for any resulting violations. *GroupMe*, 29 FCC Rcd at 3444, 3446, paras. 6, 11. In contrast, Dialing Services failed to provide evidence that the call recipients furnished their numbers to Dialing Services or any intermediary whatsoever, with the exception of the four calls that a Dialing Services client arranged for the Company to make to his own wireless phone.

⁶⁶ See Letter from Richard Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Anthony C. Kolker, President, Dialing Services, LLC (June 28, 2013) (on file in EB-TCD-12-00001812); Letter from Richard Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Anthony C. Kolker, President, Dialing Services, LLC (Sept. 27, 2013) (on file in EB-TCD-12-00001812).

⁶⁷ See *Citation*, 28 FCC Rcd at 1842–1843, para. 7; *NAL*, 29 FCC Rcd at 5541, para. 10; see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559, 565, para. 10 (2008) (concluding that “[s]hould a question arise as to whether express consent was provided, the burden will be on [the caller] to show it obtained the necessary prior express consent”).

had obtained consent. With respect to the four robocalls for which Dialing Services produced proof of consent, however, we will reduce the forfeiture amount by \$64,000 (\$16,000 per each of four calls, the forfeiture amount attributed to each call in the *NAL*⁶⁸).

24. Dialing Services argues that—based on these four calls alone—the Bureau’s entire investigation was necessarily “incomplete” and incapable of being the basis for a forfeiture.⁶⁹ Dialing Services is simply wrong. As explained in the *NAL*, Bureau staff contacted a large sample size—52 recipients—of the pool of robocalls made by Dialing Services.⁷⁰ All but one of these consumers denied ever having given anyone permission to robocall them.⁷¹ These interviews, combined with Dialing Services’ failure to produce any evidence to the contrary,⁷² properly supported the conclusion that Dialing Services failed to obtain the necessary prior express consent to send robocalls to any of the consumers.⁷³ Dialing Services bears the burden of disproving the assertions of the recipients who insist that Dialing Services did not obtain their prior express consents to be called.⁷⁴ Dialing Services neither claimed nor offered evidence that it had consent for the 180 calls upon which the forfeiture is based.

25. Second, the Company also criticizes the outreach that Bureau staff performed when staff contacted the recipients of Dialing Services’ robocalls. Dialing Services accuses the Bureau of making “inflammatory” inquiries and questions the ability of ordinary citizens to understand the meaning of

⁶⁸ See *NAL*, 29 FCC Rcd at 5548, para. 28 (stating “we again propose the statutory maximum penalty of \$16,000 for each of Dialing Services’ 184 apparent violations at issue in this *NAL* . . .”).

⁶⁹ *NAL* Response at 13.

⁷⁰ *NAL*, 29 FCC Rcd at 5541–42, para. 12.

⁷¹ *Id.* The single consumer who indicated that he had given permission was excluded from the Commission’s tally of apparently unlawful robocalls cited in the *NAL*. *Id.* at para. 12 & n.28.

⁷² See *supra* note 59; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559, 565, para. 10 (2008) (concluding that “[s]hould a question arise as to whether express consent was provided, the burden will be on [the caller] to show it obtained the necessary prior express consent”).

⁷³ *Id.* The Commission’s burden in the *NAL* was to prove, by preponderance of the evidence, that Dialing Services apparently violated the Communications Act and/or the Rules. Under that standard, the Commission was required to show that it was more likely than not that the robocalls at issue were made to wireless phones without the prior express consent of the recipient. As explained in the *NAL*, the Bureau identified robocalls that were made to wireless phones, and then contacted a significant sample of the recipients of those calls to find out whether the recipients had given their permission (i.e., prior express consent) to any third party to robocall them on that number. Based on the overwhelming majority of answers—51 “no” and only one “yes,” the Commission concluded that the preponderance of evidence indicated that the robocalls were unlawful. Once the Commission meets its burden (preponderance of the evidence), the burden then shifts to the target (Dialing Services in this case) to produce evidence demonstrating that the Commission’s conclusion is in error. See 5 U.S.C. § 556(d); S. Doc. No. 248, 79th Cong., 2d Sess. *Administrative Procedure Act—Legislative History* (1946). In this case, Dialing Services only provided evidence to prove that four of the 184 calls were made in compliance with the Act and Rules but otherwise provided no such evidence as to the remaining 180 violations. As discussed below, the Commission accepts Dialing Services evidence with respect to the four calls and has adjusted the forfeiture accordingly.

⁷⁴ *Id.* See *Lyft, Inc.*, Citation and Order, 30 FCC Rcd 9858, 9861 (Sept. 11, 2015); *Call-Em-All, Inc.*, Citation and Order, 30 FCC Rcd 4532 (May 4, 2015); *Ifonoclast, Inc. d/b/a/ Phonevite*, Citation and Order, 30 FCC Rcd 4541, 4543 (May 4, 2015); *M.J. Ross Group, Inc. d/b/a PoliticalRobocalls.com*, Citation and Order, 30 FCC Rcd 4548, 4550 (May 4, 2015); *Telephone Consumer Protection Act Robocall Rules Political Campaigns And Promoters Are Reminded Of Restrictions On Autodialed And Prerecorded Calls*, FCC Enforcement Advisory, 27 FCC Rcd 11017, 11018 (Sept. 11, 2012) (advisory during the 2012 political campaign season reminding makers of political and other robocalls that “[c]allers contending that they have the prior express consent to make prerecorded voice or autodialed calls to cell phones or other mobile service numbers should know that they have the burden of proof to show that they obtained such consent”).

“prior express consent.”⁷⁵ Specifically, Dialing Services claims that when the Bureau asked a sample of robocall recipients “whether they had ever given permission to anyone to make prerecorded message calls to their respective cell phones at any time,”⁷⁶ the wording of the Bureau’s question was inflammatory.⁷⁷

26. We disagree. The Bureau’s question to consumers was straightforward, factual, and could be answered with a simple yes or no.⁷⁸ The anodyne nature of the calls becomes clear when we consider that one person responded that they had indeed given permission to receive robocalls.⁷⁹ The fact that some consumers contacted by the Bureau expressed negative opinions about robocalls they had received is not a reflection of the question, but rather of the well-known and widespread dissatisfaction that consumers feel toward robocalls in general, and unwanted robocalls in particular.⁸⁰

27. Dialing Services also argues that the Bureau’s questions to consumers were flawed because (1) by asking whether consumers gave “permission” instead of “prior express consent” the Bureau applied the wrong standard; and (2) the average consumer cannot “understand the nuances associated with this legal term of art [‘prior express consent’].”⁸¹

28. The Company does not explain how the use of the word “permission” in place of the words “prior express consent” disadvantages the Company, nor how it would have altered the consumers’ responses. Although Dialing Services argues that consumers may provide prior express consent “in several ways, which are more nuanced than [sic] mere ‘permission’ as phrased by the Enforcement Bureau’s investigators,”⁸² the Company fails to identify any such “nuanced” forms of prior express consent. Moreover, the record in this case does not reveal any such nuanced forms in use by Dialing Services or its clients. We reject Dialing Services’ argument that using the term “permission” rather than “prior express consent” prejudiced the Company. To the extent that Dialing Services believed that consumers were mistaken or confused about whether they gave consent, the Company had an opportunity to produce supporting evidence, and it did not do so.

B. Dialing Services’ Violations of the Law Were Willful and Its Remedial Actions Were Insufficient and Untimely

29. Dialing Services argues that the Company’s actions were not “willful” violations of the TCPA because (1) the Company did not intend to violate the TCPA,⁸³ (2) the Company continuously communicated with the Bureau over the course of the investigation,⁸⁴ and (3) the Company eventually took remedial action to prevent further violations.⁸⁵

⁷⁵ NAL Response at 10–12.

⁷⁶ *Id.* at 10–11 (quoting *NAL*, 29 FCC Rcd at 5541–5542, para. 12).

⁷⁷ *Id.* at 10–11.

⁷⁸ One consumer respondent did just that, confirming giving permission to be called. *See NAL*, 29 FCC Rcd at 5542, para. 12 & n.28.

⁷⁹ As noted in the *NAL*, the calls made to this person were not included in the 184 calls that led to the proposed forfeiture. *NAL*, 29 FCC Rcd at 5542, para. 12 & n.28.

⁸⁰ *See id.* at 5537–39, paras. 2–5.

⁸¹ NAL Response at 11–12.

⁸² *Id.*

⁸³ *Id.* at 6–8, 19–20.

⁸⁴ *Id.* at 3–4. *See* NAL Response at 14–15 (arguing that the Company’s discussions about the applicability of the TCPA to its activities indicated no willful disregard for the law).

⁸⁵ NAL Response at 7–8.

30. The Company's "intent" argument misapplies the way the Act defines a "willful" violation. Section 503(b)(1)(B) of the Act states that any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁸⁶ Section 312(f)(1) of the Act, which likewise applies to 503(b) of the Act,⁸⁷ defines "willful" as the "conscious and deliberate commission or omission of [any] act, *irrespective of any intent to violate*" the law.⁸⁸ Whether Dialing Services intended to violate the TCPA is not relevant to determining whether the Company's conduct was willful. Dialing Services willfully committed the act of making prerecorded message calls—a service for which it received financial compensation from its clients—and those calls violated the TCPA. Dialing Services' violations were therefore willful.⁸⁹

31. Dialing Services' arguments about communicating with the Bureau and its belated attempts to come into compliance do not mitigate the Company's violations, as we discuss below. Dialing Services' communications with staff over the course of the Bureau's investigation are not evidence of any meaningful attempts to comply with the TCPA, nor do they mitigate or excuse the violations. Dialing Services did, in fact, meet with the Bureau on several occasions: prior to the issuance of the *Citation*, after the *Citation* was issued, and prior to the issuance of the *NAL*. In those meetings, Dialing Services argued that the Company did not "make" or "initiate" calls for the purposes of the TCPA and attempted to persuade the Bureau that Dialing Services should not be held liable for unlawful robocalls. In response, Bureau staff told Dialing Services that the Bureau disagreed with the Company's interpretations of the TCPA, did not find its arguments persuasive, and that the Company risked further enforcement action if it refused to comply. Later, in 2013, the *Citation* formally warned the Company that if it continued to make robocalls to wireless phones, the Commission could take further enforcement action.⁹⁰ Despite both formal and informal invitations from the Bureau to comply with the TCPA, the Company elected to continue its behavior.⁹¹

⁸⁶ 47 U.S.C. § 503(b)(1)(B). See *NAL*, 29 FCC Rcd at 5547–5548, para. 26; 47 CFR § 1.80(a).

⁸⁷ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act. See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms"). The Commission has so interpreted the term in the Section 503(b) context. See e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992).

⁸⁸ 47 U.S.C. § 312(f)(1) (emphasis added).

⁸⁹ Moreover, Section 503(b)(1)(B) of the Act penalizes actions that are willful *or repeated*. 47 U.S.C. § 503(b)(1)(B) (emphasis added). There is no question that the actions giving rise to liability in this case were repeated; Dialing Services made 180 separate, unlawful robocalls to wireless telephones in violation of the TCPA. Accordingly, even if we were to agree with Dialing Services' interpretation of the word "willful" (though we do not), doing so would not lessen the Company's culpability under Section 503(b).

⁹⁰ See *Citation*, 28 FCC Rcd at 1840, 1845–46, paras. 2, 17.

⁹¹ Dialing Services dedicates several pages of its *NAL* Response to discussion of the Bureau's decision to suspend the Company's requirement to comply with a separate order that the Bureau included in the *Citation*. Specifically, the *Citation* ordered Dialing Services to submit a response to a request for information to confirm that the Company had ceased making any robocalls to cell phones except as permitted by the TCPA and FCC Rules, and ceased making any robocalls that lacked identifications required by the TCPA and FCC Rules. See *Citation*, 28 FCC Rcd at 1841, 1846–47, paras. 3, 22. The *Citation*'s request for information is a separate matter that formed no part of, or basis for, the violations alleged in the *NAL*. The *Citation*'s information request is therefore irrelevant to this proceeding. That said, with respect to Dialing Services' argument that the decision to suspend the Company's

(continued....)

32. Similarly, the belated remedial steps that Dialing Services took do not excuse its unlawful actions. Dialing Services argues that, after it learned that it was under investigation by the FCC in 2012, the Company sought to comply with the law.⁹² The Company states that, beginning in May 2012, it began to require its clients to promise (via a popup window) that the clients had obtained prior express consent from wireless phone recipients of their robocalls.⁹³ It was only in late May 2013—more than two months after receiving the *Citation* and almost a year after FCC staff warned counsel for the Company that its calls to wireless phones were illegal⁹⁴—that the Company finally required scrubbing wireless numbers from the lists of calls clients paid the Company to make.⁹⁵ Dialing Services claims that as a result of its actions, there were zero violations after May 20, 2013.⁹⁶ But the NAL and this Forfeiture Order pertain to unlawful calls made subsequent to the *Citation* and before Dialing Services took serious steps to address the TCPA violations. Dialing Services’ remedial steps completed on May 20, 2013 do not excuse the violations that occurred before that date.

C. The NAL Properly Applied Section 503 Factors to Determine the Amount of the Forfeiture in this Case

33. As the Commission stated in the *NAL*,⁹⁷ Section 503(b)(2)(E) requires that “the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require” when determining the amount of a proposed forfeiture.⁹⁸ Our forfeiture guidelines also identify criteria, consistent with the Section 503(b)(2)(E) factors, that may influence whether we adjust the base amount downward or upward.⁹⁹ For example, we may adjust a penalty upward for “[e]gregious misconduct,” an “[i]ntentional violation,” or where the subject of an enforcement action has engaged in “[r]epeated or continuous violation.”¹⁰⁰ The maximum penalty per violation in the present case is \$16,000.¹⁰¹

(Continued from previous page) _____

obligation to comply with the request for information indicates that “the Enforcement Bureau is/was struggling with finding a manner in which to apply the TCPA Regulations to hosted dialer platforms” (NAL Response at 6), we disagree. As discussed above, Bureau staff met with Dialing Services before the *Citation* was issued and warned the Company that the robocalls made on its platform violated the TCPA. The Company disagreed with the Bureau and continued making unlawful robocalls. The Bureau also met with Dialing Services after the *Citation* was issued and warned it that it could be held liable for forfeitures if it continued the same conduct in the future. Dialing Services elected not to heed the Bureau’s repeated and consistent advice.

⁹² NAL Response at 7.

⁹³ *Id.*

⁹⁴ At the very first meeting between the staff and Dialing Services’ counsel, FCC staff warned that the Company’s actions were unlawful and that the Company should immediately cease all prerecorded message calls to wireless telephones unless it had the prior express consent of the called parties.

⁹⁵ *Id.*

⁹⁶ *Id.* at 7–8.

⁹⁷ *NAL*, 29 FCC Rcd at 5547–5548, para. 26.

⁹⁸ 47 U.S.C. § 503(b)(2)(E).

⁹⁹ See 47 CFR § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd 17087. The absence of a particular type of violation from the forfeiture guidelines must “not be taken to mean that the violation is unimportant or nonexistent,” and “the Commission retains discretion to impose forfeitures for other violations.” *Forfeiture Policy Statement*, 12 FCC Rcd at 17110.

¹⁰⁰ 47 CFR § 1.80(b)(8), Note to paragraph (b)(8).

¹⁰¹ See 47 U.S.C. § 503(b)(2)(E). Section 503(b)(2)(D) of the Act provides for forfeitures of up to \$10,000 for each violation or each day of a continuing violation, up to a maximum of \$75,000 for a single continuing violation in

(continued....)

34. Dialing Services argues that the Commission acted arbitrarily and capriciously by proposing penalties at the statutory maximum level of \$16,000 per violation.¹⁰² Specifically, Dialing Services argues that it was unfair to take into account the 4.7 million unlawful robocalls that Dialing Services made that predate the *Citation*, because when those calls were made, Dialing Services thought that it was in compliance with the law.¹⁰³

35. We disagree. There is no question that the Commission may take into account violations that occurred before a citation was issued when the cited person or entity thereafter engages in the same unlawful conduct.¹⁰⁴ The Commission considered the 4.7 million unlawful robocalls that Dialing Services made in three months in 2012 to inform its decision to impose the statutory maximum penalty. These violations demonstrated the seriousness and egregiousness of Dialing Services' conduct. The Commission's action was neither arbitrary nor capricious.

36. Furthermore, as discussed in the *NAL*, Dialing Services' pre-*Citation* unlawful conduct was not the only factor the Commission considered when it decided to set the penalty at the statutory maximum level. As discussed in the *NAL*, the Commission also considered the existence of more than 300 additional post-*Citation* violations that fell outside of the statute of limitations.¹⁰⁵ Although the Commission was barred by statute from assessing a forfeiture for these additional 300 violations, the existence of additional violations was a relevant factor to determining the amount of the forfeiture to impose for the violations that were not so barred.¹⁰⁶ The Commission also found that Dialing Services intentionally disregarded the prohibitions against robocalls to wireless phones by continuing to make unlawful calls after being warned to stop by the *Citation*.¹⁰⁷ The Commission further took into account the fact that Congress deemed robocalls a particularly pernicious threat to the privacy of wireless telephone consumers, and that Dialing Services' egregious conduct therefore caused serious harm to consumers.¹⁰⁸ All of these factors, together with the 4.7 million unlawful robocalls that Dialing Services made in 2012, properly justified assessing a penalty at the statutory maximum level.

(Continued from previous page) _____
cases, as here, where the violation does not involve a Commission licensee or common carriers, among others. *See* 47 U.S.C. § 503(b)(2)(D). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under Section 503(b)(2)(D) to \$16,000 for each violation or each day of a continuing violation, up to a maximum of \$112,500 for any single continuing violation. *See* 47 CFR § 1.80(b); *see also Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845 (2008). In 2013, the Commission increased its maximum statutory forfeitures to reflect further inflation. *See Amendment Of Section 1.80(B) Of The Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, DA 13-1615, 78 Fed. Reg. 49371 (Rel. Aug. 1, 2013) (amending section 1.80(b) to reflect inflation of the forfeiture maxima applicable in this case).

¹⁰² *NAL* Response at 8.

¹⁰³ *Id.* In the *NAL*, the Commission applied the statutory maximum penalty in part based on evidence of Dialing Services' 4.7 million unlawful robocalls to wireless phones that led to the *Citation*. *NAL*, 29 FCC Rcd at 5548–5549, para. 28.

¹⁰⁴ Congress expressly contemplated that the Commission would consider unlawful conduct that occurred before issuance of a citation at the *NAL* stage if the unlawful conduct continued. *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. at 9 (1977) (if a person or entity that has been issued a citation by the Commission thereafter engages in the conduct for which the citation of violation was sent, the subsequent notice of apparent liability “*would attach not only for the conduct occurring subsequently but also for the conduct for which the citation was originally sent.*” (emphasis added)).

¹⁰⁵ *NAL*, 29 FCC Rcd at 5548–49, para. 28.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

D. Dialing Services' Objections to the *Citation* Are Without Merit

37. Dialing Services argues that the Bureau improperly ignored the Citation Response, and that the Commission improperly dismissed the Company's Citation Response as an unauthorized Petition for Reconsideration in the *NAL*.¹⁰⁹ Specifically, Dialing Services argues that because the *Citation* permitted the Company to file a written response, the Bureau was then obligated to respond to or otherwise act upon that response.¹¹⁰

38. Dialing Services' argument is unavailing. Not only did the *NAL* dismiss the Petition for Reconsideration on procedural grounds,¹¹¹ but, far from ignoring Dialing Services' pleading, the Commission fully considered and addressed the merits of Dialing Services' arguments,¹¹² as an independent and alternative basis for its decision.¹¹³ The fact that Dialing Services continues to disagree with the outcome does not create a defect on the part of the Commission.

IV. CONCLUSION

39. Based on the record before us and in light of the applicable statutory factors, we conclude that Dialing Services willfully and repeatedly violated Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the Rules by making robocalls to wireless phones using artificial or prerecorded voice messages without the prior express consent of the consumers it called. We also conclude that Dialing Services has presented evidence that four of the robocalls were not made in violation of the Act or the Rules. Accordingly, we reduce the proposed forfeiture by \$64,000, and affirm \$2,880,000 of the forfeiture proposed in the *NAL*.

V. ORDERING CLAUSES

40. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,¹¹⁴ and Section 1.80 of the Rules,¹¹⁵ Dialing Services, LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of two million eight hundred eighty thousand dollars (\$2,880,000) for willfully and repeatedly violating Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the Rules.

41. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release of this Forfeiture Order.¹¹⁶ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.¹¹⁷

42. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the *NAL*/Account Number and FRN referenced above. Dialing Services, LLC shall send electronic notification of payment to Lisa Williford at Lisa.Williford@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance

¹⁰⁹ *NAL* Response at 13–15.

¹¹⁰ *Id.* at 14.

¹¹¹ *NAL*, 29 FCC Rcd at 5546, paras 23–24.

¹¹² The Company argued, among other things, that it did not violate the Act and Commission's Rules because it does not "initiate" robocalls to cell phones. See Citation Response at 3.

¹¹³ See *NAL*, 29 FCC Rcd at 5546–5547, para. 25.

¹¹⁴ 47 U.S.C. § 503(b).

¹¹⁵ 47 CFR § 1.80.

¹¹⁶ *Id.*

¹¹⁷ 47 U.S.C. § 504(a).

Advice) must be submitted.¹¹⁸ When completing the Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions that should be followed based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with completed Form 159) must be mailed to the Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

43. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, D.C. 20554.¹¹⁹ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

44. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to Dialing Services, LLC, Attn: Anthony C. Kolker, President, 5149 Cotton Road, Roswell, NM 88201; and to Mitchell N. Roth, Esquire, Roth Doner Jackson, PLC, 8200 Greensboro Drive, Suite 820, McLean, VA 22102.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹¹⁸ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹¹⁹ See 47 CFR § 1.1914.

**STATEMENT OF
CHAIRMAN AJIT PAI**

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

This FCC has made consumers' top priority—stopping unlawful robocalls—one of the agency's top priorities. We're taking steps to allow voice providers to block spoofed phone numbers. We're exploring ways to make sure that calls can be authenticated. Last month, we proposed the largest fine in FCC history—\$120 million—against an individual who apparently unleashed almost 100 million robocalls on American consumers in just three months.

And today, we impose a \$2.88 million fine against Dialing Services for its willful and repeated violations of the Telephone Consumer Protection Act, or TCPA.

Here's why we are imposing this fine.

An investigation by our Enforcement Bureau found that Dialing Services was responsible for more than 4.7 million robocalls to cell phones in just three months—all without prior express consent. Then, after Dialing Services was issued a citation, staff found in a follow-up investigation that it was responsible for yet *more* unauthorized robocalls to cell phones.

Dialing Services offers a software-based robocalling service to third-party clients. But make no mistake: Although it may not have physically placed the calls itself, Dialing Services was not the unwitting conduit or passive technical support service it claims to be. Indeed, one of the Company's featured services is a spoofing functionality designed to provide deceptive information about a call's originating point or to hide that information altogether. But even more significant, the Company directly assists its clients in crafting and structuring their messages to help them conceal their true intentions, all for one purpose: to maximize the effectiveness of the illegal robocall campaigns that Dialing Services helps facilitate.

This is not the conduct of a merely passive actor. No, these are the actions of a company "so involved" in the making of the illegal calls that it can itself be deemed the maker or initiator of the calls for purposes of liability under the TCPA.

This substantial forfeiture order is the latest step we've taken to stop the scourge of illegal robocalls. But it won't be the last.

I want to thank my colleague, Commissioner Clyburn, for her support on this item and her commitment to combating illegal robocalls. I also want to thank the staff who worked so hard to bring this order to fruition: Michael Carowitz, Lloyd Collier, Lisa Gelb, Rosemary Harold, Richard Hindman, Michael Janson, Michael Scurato, and Kristi Thompson from the Enforcement Bureau; Rick Mallen, from the Office of General Counsel; and John B. Adams, Kurt Schroeder, Mark Stone, and Kristi Thornton from the Consumer and Governmental Affairs Bureau. It's been a long time coming, but your work has given voice to millions of American consumers who have been spammed by these illegal robocalls.

**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.¹

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

¹ *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.