

FCC Releases Order Denying Club Texting's 2009 Petition on Text Broadcaster Liability Standards

Article By:

Laura H. Phillips

Anthony D. Glosson

On January 11, 2016, the **FCC's Consumer and Governmental Affairs Bureau** ("Bureau") acted on a petition filed in 2009, and denied Club Texting, Inc.'s ("Club Texting") petition for declaratory ruling, which asked the FCC to clarify that text broadcasters are subject to the same **TCPA** liability standard as that applied to fax broadcasters. See [In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991](#); Petition of Club Texting, Inc. for Declaratory Ruling, Order, CG Docket 02-278 (Jan. 11, 2016) ("*Jan. 11 Order*"); see also [Club Texting](#), Inc. Petition for Declaratory Ruling that Text Broadcasters Are Not "Senders of Text Messages Under § 227(b)(1) of the Telephone Consumer Protection Act, CG Docket 02-278 (Apr. 25, 2009) ("*Club Texting Petition*").

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." Jan. 11 Order at n.5 (quoting 47 C.F.R. § 64.1200(f)(7)). The Commission's fax broadcasting rules impose liability only when a fax 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." *Id.* at 2-3 (quoting 47 C.F.R. § 64.1200(a)(4)(vii)).

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." See Jan. 11 Order at n.4. Club Texting argued that the Commission had left the standard for liability as applied to text broadcasting open, but that in virtually all material respects, text broadcasters are identical to fax broadcasters, and should therefore be evaluated using the fax broadcaster liability standard. *Club Texting Petition* at 8. Consequently, it requested that the Commission clarify that a text broadcaster will be liable 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 transmissions." *Id.* at 9.

The Club Texting Petition explained the offering as "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." *Id.* at 2. Club Texting contended that a text broadcaster is simply a "conduit operating a platform that enables message delivery" and that as a result, text broadcasters should not be liable

for texts sent by their customers. *Id.* at 1.

Several commenters opposed the Petition. These commenters argued that text broadcasters are in the best position to prevent their customers from sending texts that violate the TCPA because text recipients cannot always determine the identity of the text broadcaster's customer. See Jan. 11 Order ¶ 6 (citing Robert Biggerstaff Reply Comments at 2; Jay Connor at 1; Paul D.S Edwards Reply Comments at 2; Gerald Roylance Reply Comments at 5; Joe Shields Reply Comments at 2). One commenter also argued that text broadcasters are in the best position to shoulder TCPA liability because they can negotiate indemnification agreements with customers. See *id.* (citing Robert Biggerstaff Reply Comments at 7).

After holding onto the Petition for over six years, the Bureau, however, denied the Petition on other grounds, concluding that the issue had already been settled in an order issued after the Petition's filing date: namely, the 2015 TCPA Omnibus Declaratory Ruling and Order. See *id.* ¶¶ 7-8 (citing [In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991](#), CG Docket 02-278, *Declaratory Ruling and Order*, 30 FCC Rcd 7961 (July 10, 2015)). In that order, the Commission determined that a party can be liable for initiating calls (including text messages) when it "take[s] the steps necessary to physically place a telephone call," or when it is "so involved in the placing of a specific telephone call as to be deemed to have initiated it." *Id.* at 7978-80, ¶¶ 25-30. In making that determination, the Commission stated that it would:

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 physically 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 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.

Id. at 7980-81, ¶ 30. The Bureau concluded that (1) this newly announced standard applies to text messages; and (2) the standard is not the same as that applicable to fax broadcasters. Jan. 11 Order at ¶ 7. Accordingly, the Bureau denied Club Texting's Petition. *Id.*

If, as the Bureau indicates, the Commission resolved the Club Texting Petition in its July Omnibus Order, then it would have been useful that for the Commission to have provided notice of that fact at the time so that Club Texting could have pursued an appeal of that Omnibus Order. Now, however, it is saddled with a Bureau determination that fax and text broadcasting, from the standpoint of liability, are subject to fundamentally different standards.

© 2025 Faegre Drinker Biddle & Reath LLP. All Rights Reserved.

National Law Review, Volume VI, Number 21

Source URL: <https://natlawreview.com/article/fcc-releases-order-denying-club-texting-s-2009-petition-text-broadcaster-liability>