

EXECUTIVE SUMMARY

Soundboard technology involves the use of snippets of recorded messages by a live operator to communicate interactively with a call recipient. The operator chooses the appropriate messages in response to the recipient's specific statement or question, just like a traditional two-way telephone call. If needed, the operator can speak directly to the call recipient using his or her own voice. This technology provides a number of benefits to businesses and organizations that rely on telephone communications to interact with consumers. First, the use of recorded messages ensures that the same information is communicated consistently regardless of the operator, which provides for cost-effective quality-control and efficient regulatory compliance. Second, soundboard technology allows for increased accessibility because it provides assistance to those who have difficulty communicating due to, for example, speech impediments, heavy accents, or a physical or mental disability that might otherwise prevent the individual from using the telephone as part of his or her job responsibilities. Most importantly, the use of a live operator to direct the calls gives call recipients the opportunity to communicate directly with a person in the event that the menu of available audio clips does not meet the recipient's needs. The interaction between the operator and the consumer is dynamic, real time, and two-way; there is *not* a message that plays from start to finish to the consumer who picks up the phone, leaving the consumer with no ability to interact. Soundboard technology has become so advanced and seamless that many consumers do not even recognize the difference between it and the traditional call where a human uses his or her own voice.

Despite these benefits, soundboard technology has recently become the subject of undeserved condemnation and substantial litigation. Across the country, plaintiffs and their counsel have brought suit under the Telephone Consumer Protection Act ("TCPA" or "the Act")

alleging that soundboard calls deliver a prerecorded message and, therefore, run afoul of the Act's prohibition against such calls without express consent. Petitioner NorthStar Alarm Services, LLC ("NorthStar"), a home security company serving over 50,000 customers, has recently been targeted by such a suit. In fact, recently, a class was certified in the litigation thereby exposing NorthStar to the prospect of nearly \$400,000,000 in statutory damages. In the course of the proceedings, as well as in other past and pending cases, it is clear that the federal courts require clarifying guidance as to how the requirements of the TCPA apply to soundboard technology. The Commission is empowered by the TCPA to provide such assistance precisely because of the agency's grasp of technology, and the relationship of communications technology to the purposes and goals of the TCPA. As this Petition demonstrates, the statutory text, legislative history, and public policy all preclude a finding that soundboard technology delivers a prerecorded message as contemplated by the Act. Accordingly, the Commission should declare that:

1. The use of soundboard technology does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA; or, in the alternative,
2. The use of soundboard technology on a one-to-one basis, whereby the soundboard agent conducts only one call with one individual at a single time, does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA.

, Only through the requested rulings can the Commission make clear that the TCPA does not categorically ban all marketing and similar calls, and that it is not the Commission's intention to allow its program for dealing with robocalls to stifle legitimate business activities.

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Pursuant to Section 1.2 of the Rules of the Federal Communications Commission (“FCC” or “Commission”),¹ NorthStar Alarm Services, LLC (“NorthStar” or “Petitioner”) respectfully petitions the Commission for an expedited declaratory ruling clarifying that calls using recorded audio clips specifically selected and presented by a human operator in real-time, a tool generally referred to as “soundboard technology,” do not deliver a “prerecorded message” under the Telephone Consumer Protection Act (“TCPA” or the “Act”). A declaratory ruling from the Commission is necessary to provide certainty and clarity to the industry, to prevent conflicting judicial rulings, and to protect the development of technological advancements that have tremendous public interest benefits to consumers as well as to the economy.

In addition, a declaratory ruling will help ebb the rising tide of professional litigants and plaintiffs’ attorneys who target these types of technologically-enhanced communication methods to leverage the threat of massive TCPA damages awards into multi-million dollar settlements of baseless class action litigation. Indeed, by targeting legitimate domestic businesses who are doing nothing more than engaging in a technologically-advanced version of the traditional two-way voice call, litigious plaintiffs are doing the very thing that Chairman Pai previously rebuked:

The TCPA’s private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target. As Adonis Hoffman, former Chief of Staff to Commissioner Clyburn, recently wrote in *The Wall Street Journal*, a trial lawyer can collect about \$2.4 million per suit by targeting American companies. So it’s no surprise the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months

¹ 47 C.F.R. § 1.2.

of 2014.²

And as the data has borne out, the attorneys who file these suits are often the only beneficiaries of such settlements, as the average class member payout is a mere pittance. Specifically, according to one study, the very consumers that the law was designed to protect have, on average, only received between \$4.12 and \$9.53 in private litigations that were settled, while the plaintiffs' attorneys are averaging exorbitant multi-million dollar payouts.³ The current wave of lawsuits targeting soundboard technology chill important technological advancements that the TCPA was never intended to cover in the first instance and ultimately harm consumers and industry.

Accordingly, in order to establish a baseline national standard that prevents the use of class action litigation, which threatens to throw the baby out with the bath water, the FCC must declare that:

1. The use of soundboard technology does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA; or, in the alternative,
2. The use of soundboard technology on a one-to-one basis, whereby the soundboard agent conducts only one call with one individual at a single time, does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA.

I. INTRODUCTION

The TCPA generally prohibits “initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party,” subject to certain exceptions.⁴ The statutory text combined with the legislative

² Courts also have recognized the widespread litigation abuse under the TCPA. *See, e.g., Morris v. Unitedhealthcare Ins. Co., Inc.*, No. 4:15-cv-00638-ALM-CAN, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016) (“TCPA suits have, in many instances, been abused by serial litigants[.]”).

³ *See* Wells Fargo Ex Parte Notice, filed Jan. 16, 2015, in CG Docket No. 02-278, p. 19, available at <http://apps.fcc.gov/ecfs/document/view?id=60001016697>.

⁴ 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3).

history makes clear that the purpose of the Act was and is to curtail “robocalls,” meaning calls that deliver a prerecorded message without any opportunity for the recipient to complain to a human operator or for a human operator to intervene in response to the call recipient’s expressed needs. Indeed, it is clear that Congress did not intend to completely foreclose the use of recorded messaging in its enactment of what is now Section 227(b) of Title 47. Soundboard technology does not involve the use of passive prerecorded messages that play from start to finish without any intervention by a human operator. Rather, soundboard technology requires the careful attention of a well-trained operator who responds with appropriate audio snippets to a call recipient, creating a unique, individualized experience. Because soundboard technology does not implicate the scope, purpose, or spirit of the Act, and instead serves a vital role in connecting businesses with consumers, the Commission must rule that use of soundboard technology does not constitute a violation of the TCPA.

II. SOUNDBOARD TECHNOLOGY

Soundboard technology works by allowing call center agents to interact and converse with consumers on a real-time basis using recorded audio clips in lieu of or in combination with the agent’s own voice, in the same manner that call center agents would conduct compliant live telemarketing calls reading a pre-determined script, and responding appropriately to queries and interjections from consumers. Thus, for example, if a consumer asks a particular question during a conversation, the call center agent using soundboard technology (*i.e.*, the soundboard agent) can respond by playing the audio clip that best answers the consumer’s question.

Generally speaking, each script, and the accompanying library of available audio clips, is tailored to the needs of a particular marketing campaign, and, in most cases, is developed and revised based on assessments of actual calls. Soundboard agents are highly trained and skilled,

and their ability to timely, accurately, and appropriately interact with consumers using soundboard technology can be monitored during training and during telemarketing campaigns using real-time soundboard metrics. In addition, soundboard agents also have access to “response keys” connected to common interactive conversational responses such as “I understand,” “exactly,” and “yeah.” The result is that the consumer experiences a completely natural conversation complete with positive affirmation and, most importantly, natural, two-way interaction. In the vast majority of instances, consumers who receive soundboard calls are not aware that the conversation used audio clips. And, in situations where a consumer asks a question for which there is no audio-clip response, well-trained soundboard agents in compliant soundboard campaigns will either interject their own voice or select an audio clip response to explain that he or she is a real person using audio clips to communicate clearly and effectively, and to offer the consumer the choice between continuing the soundboard call or speaking with a live operator’s own voice for the duration of the call.

Soundboard has been utilized to effectively conduct telemarketing and other types of outbound and inbound calls in numerous regulated industries, including but not limited to financial services, insurance, and healthcare. Soundboard provides a host of regulatory compliance and consumer-protection benefits because of its ability to control scripts and minimize non-compliant variations, to accurately document and analyze calls, to support and monitor the effectiveness of call center agents, and to ensure a positive consumer experience. For instance, the use of soundboard keeps agents from misstating offers, programs, incentives, or other terms and conditions, or otherwise causing confusion on the part of the consumers who receive these calls.. It also ensures that all federal and state-specific mandatory disclosures are properly conveyed to consumers; and it can deter agents from improperly terminating calls if, for example, a consumer

asks to be placed on a do-not-call list.

III. BACKGROUND ON PETITIONER'S CASE

On April 5, 2017, Robert H. Braver⁵ filed a putative class action complaint in the United States District Court for the Western District of Oklahoma against NorthStar and other unknown entities. Braver filed an Amended Complaint on June 8, 2017, which named Yodel Technologies, LLC as one of the formerly unknown entities. The Amended Complaint alleged that NorthStar hired Yodel to make telemarketing calls using prerecorded messages. The Amended Complaint further alleged that Braver received two of these calls and that he had not provided his express consent. According to Braver, he received two calls on August 26, 2016 that began with a prerecorded message about home security. During the second call, Braver “feigned[] interest in an alarm system” in order to obtain more information about the caller and was connected to a NorthStar representative. Thereafter, Braver filed his complaint, seeking injunctive and monetary relief based on, among other things, violations of the TCPA’s prohibition on prerecorded telemarketing calls to residential telephone lines. Braver alleged that NorthStar, through Yodel, had made calls to thousands of residential numbers using prerecorded messages. In August 2017, the Court dismissed Braver’s claims of direct TCPA liability against NorthStar but found that the company nevertheless still may be held liable pursuant to a vicarious liability theory.

On October 15, 2018, the court issued an order certifying several classes totaling approximately 240,000 individuals, each of whom received, on average, one call. The court found

⁵ Braver is a serial litigant, having filed more than 60 TCPA lawsuits and extracting pre-suit nuisance settlements by means of countless additional TCPA demand letters. He also maintains a website – www.do-not-call.com – the URL for which is misleadingly similar to the federal www.donotcall.gov website for the National Do Not Call Registry (“NDNC”). On his website, Braver, among other things, counsels consumers on “How to Fight Back” against unwanted telephone calls and attempts to whip would-be litigants into a frenzy by citing outdated statistics from the late 1970s until 1991. While the landing page of Braver’s website instructs consumers to sign up for the NDNC in order to avoid unwanted telemarketing calls, Braver himself removed his residential telephone number from the NDNC years ago.

as a matter of fact that NorthStar had hired Yodel to place telemarketing calls and that Yodel had obtained numbers from a data vendor. Yodel then called these numbers. During the calls, Yodel agents used soundboard technology to select from a menu and play specific audio clips for the call recipient based on the natural flow of the conversation. The agents coded the calls according to how many snippets of audio were played and whether the recipients stated they did not want to be called again.

In granting Braver's motion for class certification, the court ruled that an issue that was capable of being resolved on a class-wide basis later in the merits portion of the case was whether the TCPA prohibits calls using soundboard technology. The court did not resolve this question because it was not, and is not yet, before the court. The issue that the court will later address in the merits portion of Braver's case is the same issue that is presented to the Commission in this Petition. As a result, prompt action by the Commission on this petition will assist the court in addressing the central legal issue without interfering with the judicial process and, at the same time, will establish a national standard for courts to consider when confronted with this issue.⁶

IV. ARGUMENT

The issue of whether the TCPA prohibits calls using soundboard technology absent express consent is one of first impression and ripe for resolution. The Commission is best suited for this task because it involves technical expertise as to how information is delivered on telephone calls. This issue also requires careful consideration of the statutory text, legislative intent, and public policy motivations of the Act. This analysis fits squarely within the powers Congress vested in

⁶ Underscoring the lack of certainty on this issue and the need for the Commission to issue guidance, another court, although still not reaching the merits of whether a TCPA violation, in fact, had occurred, expressed that it was unclear whether "the use of any prerecorded message violates the TCPA" or whether "the use of any prerecorded message in an otherwise interactive call does not necessarily violate the TCPA." Order Denying Motion for Class Certification, *Fitzhenry v. ADT Corp.*, 2014 WL 6663379, at *6 (S. D. Fla. Nov. 3, 2014).

the Commission.

The Commission consistently has recognized that the TCPA does not prohibit all telemarketing calls. The indiscriminate use of the word “robocalls” tends to obscure the precise and carefully defined scope of Section 227(b)’s limitation of prerecorded messages: The TCPA prohibits calls where there is no live operator, *i.e.*, no opportunity for human intervention to assist and respond to the call recipient. The converse is also true. Where a live agent engages in a dynamic, interactive exchange with the call recipient throughout the entirety of the call, as is the case with soundboard technology, the call is not delivering a prerecorded message as defined by the Act.

A. The Statutory Text Does Not Cover Soundboard Technology.

The plain language of the TCPA demonstrates that it does not prohibit soundboard technology. The statute states that “[i]t shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party,” barring certain exceptions.⁷

Several parts of this provision indicate that it is not meant to include dynamic, interactive technologies like soundboard. First, the provision prohibits “initiat[ing]” the call. Implicit in this term is the idea that human intervention will not continue beyond the call’s initiation. That is not the case with soundboard calls, in which a live human agent interacts with the call recipient in real time throughout the call, responding to the recipient’s specific questions and responses.

⁷ 47 U.S.C. § 227(b)(1)(B). The corresponding regulation is identical in all relevant respects. 47 C.F.R. § 64.1200(a)(3).

Second, the provision prohibits “using an artificial or prerecorded voice to deliver a message.” Again, this language implies that the only mechanism employed to deliver a message is the recording, meaning that there is no dynamic interaction between the agent and the call recipient. But soundboard agents do not simply press play on a prerecorded message. They choose snippets of a live voice that have been researched and designed to best respond to the call recipient’s anticipated needs and questions. The message within the conversation is delivered by the soundboard agent just as an agent delivers a message during a traditional live voice conversation.

Finally, the provision prohibits delivering “*a* message” using an artificial or prerecorded voice. By using the singular “message,” the statutory text reinforces that the Act prohibits calls that simply play to the recipient a uniform, singular message, regardless of whether the recipient asks a question, demands not to be called again, or conveys confusion. This is the antithesis of a soundboard call. Indeed, soundboard technology harnesses the power of numerous, nuanced messages to create a natural conversation. And should this prove insufficient, the soundboard agent is readily available to and regularly does intervene with his or her own voice.

In short, the plain text of the TCPA’s prerecorded message provision demonstrates that it is not intended to prohibit calls using soundboard technology. In fact, soundboard technology avoids the very problems that the statute expressly seeks to remedy.

B. The Legislative History Demonstrates that the Act Was Not Intended to Regulate Soundboard Technology.

When drafting the TCPA, Congress could not have been envisioning that the Act would prohibit the use of soundboard technology because the technology did not exist. Moreover, the legislative history is replete with evidence that Congress was not worried about the use of audio clips being deployed as part of a dynamic, real-time, two-way conversation. Rather, Congress was

concerned about the number of consumer complaints in which a recipient picked up the phone, heard dead air, and then was disconnected.⁸ This created an obvious nuisance, particularly when it occurred with alarming frequency and absent a live operator where there was no way for the call recipient to express a desire not to be called again or obtain information about the caller.⁹ South Carolina Department of Consumer Affairs Administrator Steven W. Hamm cast the Congressional concern as follows: “[t]he public at least deserves the right to slam the telephone receiver down and have a real person on the other end of the line hear just how frustrated and angry these calls make people.”¹⁰ Congress attributed many of these undesirable characteristics and outcomes to the use of automation and the corresponding lack of human oversight. Without the limitations inherent in human intervention, the calls were relentless and, when the calls disconnected, they provided little-to-no value to the consumer to counterbalance their intrusion. In similar contexts, the FCC has also recognized that the key to whether a technology or practice may run afoul of the Act’s original intent is the lack of human intervention.¹¹

In passing the Act, Congress, and concurrently, the FCC, recognized the need to allow for

⁸ *The Automated Tel. Consumer Protection Act of 1991*, Hrg. Before the Subcomm. on Commc’ns of the Comm. on Commerce, Science, and Transp., S. 102-960, at 16 (1991) (hereinafter, “*Subcomm. on Commc’ns Hrg.*”) (Bulmash Statement).

⁹ *Moser v. F.C.C.*, 46 F.3d 970, 972 (9th Cir. 1995); see also *Subcomm. on Commc’ns Hrg.*, at 3 (Opening Statement of Sen. Hollings) (detailing constituent complaint of being “roused with a telephone [marketing] message, apparently taped” and explaining that “that is an example of the automated calls that this Senator is concerned with, not the live, conversational solicitations.”); *id.* at 8 (Prepared Statement of Steven W. Hamm, Administrator, South Carolina Dep’t of Consumer Affairs) (“[t]he public at least deserves the right to slam the telephone receiver down and have a real person on the other end of the line hear just how frustrated and angry these calls make people”); *id.* at 22 (Senator Hollings Remarks) (“Let me emphasize the fact that, yes, our bill is only for the automated, not the individual commercial cause or whatever it is, but the one-way, automated electronic devices that come booming into your house, and it is only like that, only to the homes.”).

¹⁰ *Subcomm. on Commc’ns Hrg.*, at 8.

¹¹ This has been well-documented in the Commission’s opinions and guidance on automatic telephone dialing systems, which present analogous problems and equally analogous solutions. See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, ¶¶ 132-33 (2003) (*2003 TCPA Order*). In both cases, the presence of human intervention tempers the ability of the technology to overwhelm or frustrate call recipients.

technological advancements.¹² Indeed, Congress sought to restrict only the most disruptive practices, while still permitting the use and development of beneficial technology. And it was clear that there was opportunity and motivation to improve the technology. Disconnecting calls were hardly of value to businesses that sought to reach consumers through the telephone. Nor was it effective for every business to play a standard, prerecorded message and obtain no feedback from the consumer. Soundboard technology, which addresses these drawbacks by combining the interactive, dynamic experience of a live call with the consistency and efficiency of a recorded message, is the type of technological development the drafters of the TCPA sought to protect by the limited the scope of the Act's prerecorded message restrictions. For this reason, it would defeat the purpose of the legislation and the goal of Congress to find that soundboard technology is prohibited.

C. Public Policy Supports Permitting Calls Using Soundboard Technology.

Soundboard technology provides numerous benefits to industry, consumers, and regulatory enforcement agencies. First and foremost, soundboard technology protects consumers. By using recorded snippets that have been carefully researched and scripted, and by recording and analyzing calls, businesses, as well as the regulatory agencies, can ensure that consumers are not being misled by inadvertent unscripted comments. Businesses also can respond quickly and efficiently to changes in regulatory requirements.

Soundboard technology also benefits consumers by providing clear, consistent information as well as the opportunity to respond and interact in any way that they wish and to receive an

¹² As then-FCC Chairman, Alfred Sikes stated, "Industry should be free to combine the capabilities of computers and advanced communications where that can significantly promote productivity. In so technologically and commercially dynamic a sector as communications, great care should be taken to avoid any negative effects on innovation." *Subcomm. on Commc'ns Hrg.*, at 54; *see also 2003 TCPA Order*, ¶ 132 ("We fully expect automated dialing technology to continue to develop.").

appropriate response in return, whether through the audio snippets or an agent. This individualized experience saves the consumers' time because they no longer need to wait for a prerecorded message to finish. In fact, soundboard technology has become so advanced and refined that consumers usually do not even recognize the difference between it and a traditional live voice operator.

Businesses and other users of the telephone system, such as health care providers also benefit from soundboard technology: were the Commission to rule that that the TCPA prohibits soundboard technology in telemarketing calls absent prior express consent, businesses with legitimate interests in reaching new customers, including, for example, insurance companies, financial service organizations, and others who may need to convey information to consumers from whom they do not have consent will be severely impaired in their efforts. Indeed, the risk of regulatory compliance issues created by agents going "off script" will increase, thereby harming consumers and creating exposure for industry. This is so despite the fact that businesses using soundboard technology have chosen to do exactly what the TCPA was intended to encourage: provide for human intervention to improve the consumer experience. And if the Commission declines to rule at all, the number of opportunistic plaintiffs taking advantage of the uncertainty will only increase as will the inevitable disagreement among courts. The result will be the same. Industry will suffer and consumers will receive little-to-no benefit while plaintiffs and their counsel gain large sums simply by waving the bloody shirt term "robocall" in front of courts that ought not to be expected to understand the technology and the purposes of the Act as deeply as this Commission does.

V. CONCLUSION

For the reasons expressed above, NorthStar respectfully asks that the Commission issue a

declaratory ruling holding that:

1. The use of soundboard technology does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA; or, in the alternative,
2. The use of soundboard technology on a one-to-one basis, whereby the soundboard agent conducts only one call with one individual at a single time, does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA.

Respectfully submitted,

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A handwritten signature in blue ink, appearing to be "D. S. Blynn", written over a horizontal line.

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