

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

In the Matter of )  
 )  
Petition for Expedited Declaratory Ruling of ) CG Docket No. 02-278  
NorthStar Alarm Systems, LLC )

**Comments of the Soundboard Association in Support of  
NorthStar Alarm Systems, LLC’s Petition for Expedited Declaratory Ruling**

**I. Introduction**

The Soundboard Association (“Association”) respectfully submits these comments to the Federal Communications Commission (“FCC”) in response to its Public Notice requesting comment on the Petition for Expedited Declaratory Ruling filed by NorthStar Alarm Systems, LLC (“NorthStar”) (the “NorthStar Petition”) on January 2, 2019, in the above-referenced docket.<sup>1</sup>

The Association urges the FCC to grant the NorthStar Petition and rule that the use of soundboard technology does not constitute the use of an artificial or prerecorded voice that delivers a message under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. The Association is well positioned to comment on soundboard technology because it is a trade association of companies that make and use the technology. The Association is dedicated to promoting and protecting the responsible use of soundboard in conformity with all applicable laws and regulations.

**II. Background**

In January 2017, the Soundboard Association challenged the Federal Trade Commission (“FTC”) staff’s procedurally and substantively invalid and unconstitutional rule extending the Telemarketing Sales Rule’s (“TSR’s”) robocall prohibition to apply to soundboard technology. Without honoring the required notice and comment rulemaking procedure, FTC staff concluded that soundboard technology now constitutes the delivery of “a prerecorded message,” which is prohibited under the TSR.<sup>2</sup> The FTC is actively enforcing its new rule. Notwithstanding, the agency denies that its rule is final and claims that it cannot be held accountable for the actions of its staff, regardless of the consequences to industry.<sup>3</sup> That case is currently pending certiorari before the United States Supreme Court.<sup>4</sup>

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<sup>1</sup> Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling by NorthStar Alarm Services, LLC*, CG Docket No. 02-278, DA 17-368 (Rel. Apr. 18, 2017).

<sup>2</sup> See *Soundboard Ass’n v. FTC*, 251 F. Supp. 3d 55, 59 (D.D.C. 2017).

<sup>3</sup> *Id.* at 61.

<sup>4</sup> *Soundboard Ass’n v. FTC*, 888 F.3d 1261 (D.C. Cir. 2018), *petition for cert. filed* (U.S. Nov. 30, 2018) (No. 18-722).

The soundboard industry has been upended not only by the threat of FTC enforcement and business-ending civil penalties under an invalid and unconstitutional FTC rule, but also by draconian class actions now seeking a similarly erroneous ruling from lower courts under the TCPA.<sup>5</sup> However, as Petitioner makes clear, the plain meaning of the TCPA does not support such a reading, nor does its legislative history or public policy.

### **III. Statutory Framework**

Congress passed the TCPA in 1991 to protect consumers from invasions of privacy caused by unsolicited telephone calls. In relevant part, the TCPA 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 narrow exceptions.<sup>6</sup>

### **IV. The Speech Activity at Issue**

Soundboard provides interactive, voice-assisted communication via telephone with American consumers, including marketing calls made for the sale of goods or services.

Soundboard calls are not robocalls. Unlike “robocalls,” which are automated, one-way, radio-like broadcasts of a recorded message with no human being on the other end of the line, soundboard calls involve a live agent who operates a soundboard through which he or she speaks to consumers in a real-time, consumer-driven conversation.

A soundboard is a device that facilitates communication. It is used in many contexts, particularly by those with physical disabilities, and it is used by Association members to ensure compliance with state and federal laws regulating telemarketing. *Id.* Soundboard technology requires a human operator or agent to operate the soundboard at all times, selecting recorded audio snippets to speak with and reply to consumers’ responses in a live telephone call. *Id.*

The speaker determines the content of the message to respond to individualized consumer responses on the other end of the line, no different than if the speaker were using a script without the technology. In a soundboard call, the speaker listens to and interacts with the consumer in a live two-way conversation. The technology offers many benefits to consumers and regulators, which protect consumers and ensure compliance.

### **V. Argument**

#### **A. Statutory Construction**

The plain meaning of the statutory text is clear and necessitates NorthStar’s requested ruling. The TCPA prohibits telephone calls “*using an artificial or prerecorded voice to deliver a message*

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<sup>5</sup> See *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8072-73 (July 10, 2015) (Pai, A., dissenting) (“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.”)(hereinafter “2015 TCPA Order”).

<sup>6</sup> 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3) (emphasis added).

without the prior express consent of the called party.”<sup>7</sup> Textually and contextually, the delivery of “a message” means the automated delivery of “one” prerecorded message that is played from start to finish lasting the duration of the call. In other words, as Petitioner explained, the “TCPA prohibits calls where there is no live operator, i.e., no opportunity for human” interaction.<sup>8</sup>

The delivery is singular, and it targets a particular kind of call – the broadcast of “an” advertisement during which the call recipient is left powerless to interact with the caller. Such calls foreclose the opportunity to converse with the caller because there is no human being on the other end of the line – there is no speaker with whom to interact or request to be placed on the do-not-call list.

The statutory text illustrates the obvious difference between robocalls and soundboard calls. The purpose and function of a robocall is to “deliver *a* message.” It is a one-way broadcast that turns the telephone into a radio. “The” message lasts the duration of the call, usually resulting in the call recipient hanging up. It uses “an artificial or prerecorded voice” to deliver the message in lieu of a human being.

Conversely, a soundboard call does not to deliver a singular message using an artificial or prerecorded voice. Rather its only function and purpose is to facilitate a live, two-way dialogue between two human beings. While a soundboard call involves a speaker utilizing recorded audio snippets to assist his or her voice in a live call, it does not contemplate using an “artificial or prerecorded voice” to broadcast a singular “message.”

If Congress intended the TCPA’s prohibition to include the delivery of “any” message, including technologies such as soundboard that facilitate voice-assisted calls to ensure the accuracy of the speech, compliance with state and federal laws, and increased access to two-way telephone communication by persons with disabilities, it would have said so. Expanding the reach of the prohibition beyond its plain meaning without affording Congress the opportunity to weigh in usurps the legislative function.<sup>9</sup>

If the FCC believes more regulation is needed, it should make its case to Congress, but should not adopt an interpretation that goes beyond the plain meaning of the TCPA.

## **B. Balancing Consumer Benefits**

As explained by Petitioner, Congress implemented 47 U.S.C. § 227(b)(1)(B) to ameliorate consumer harm caused by the receipt of unsolicited prerecorded advertisements broadcast across the telephone like a radio, leaving consumers powerless to interact.<sup>10</sup> Soundboard calls are quite the opposite – they require at all times a human being to operate the soundboard through which he or she speaks; thus it is a live, interactive call between marketer and consumer (like any other live call made without the technology).

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<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> See *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petition for Expedited Declaratory Ruling by NorthStar Alarm Services, LLC*, CG Docket No. 02-278, at 7 (filed Jan. 2, 2019).

<sup>9</sup> See 2015 TCPA Order at 8076 (Pai, A., dissenting) (“if the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress—not make up the law as it goes along.”).

<sup>10</sup> See *NorthStar Petition* at 8-9.

Soundboard facilitates live, consumer-driven conversations in real time. And the technology has improved such that one cannot distinguish a live call using the technology from a live call without the technology. Thus, the consumer harm the TCPA sought to prevent is not present here when a soundboard merely assists the voice of a caller in a live, two-way dialogue.

To the extent the FCC wishes to regulate new technologies like soundboard, it must go back to Congress and afford the legislature the opportunity to assess and weigh in on a technology it has never before considered.<sup>11</sup>

Congress should consider the benefits of soundboard technology to consumers. As voice-assisted technology, soundboard benefits speakers with certain physical disabilities. It also minimizes, if not eliminates, human error in ensuring that scripts are followed and state and federal mandated disclosures are accurately made during the call.

The technology was designed as a tool to enable speakers to communicate accurately and in compliance with state and federal regulations, including mandatory disclosure statements. The technology allows users and government enforcers to measure compliance in ways and depths not possible with live calls made without the technology. Soundboard technology would thus benefit both consumers and federal and state regulators as an effective and accurate measure of compliance and, thereby, an enforcement tool.

But the harm and uncertainty caused by the inappropriate expansion of the TCPA to soundboard calls is tremendous. Such a rule would lead to claims against legitimate businesses who have been targeted by class action plaintiffs' attorneys for multi-million dollar damages under the TCPA and concomitant settlement demands.<sup>12</sup> Further, such a rule raises significant First Amendment issues as it brings protected speech by legitimate businesses within its proscription.<sup>13</sup> Such a rule, which would effectively ban the technology, also risks driving unscrupulous telemarketers offshore where enforcement becomes difficult if not impossible, and only increases the use of unlawful robocalls from afar. Balancing these interests, it is clear that the FCC should grant the Petition.

### C. Consumer Harm

Despite the technology's benefits to consumers, regulators, and persons with disabilities, "plaintiffs and their counsel" across the country "have brought suit under the TCPA [] alleging

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<sup>11</sup> As Petitioner explained, when Congress enacted the TCPA, it "sought to restrict only the most disruptive practices, while still permitting the use and development of beneficial technology." *NorthStar Petition* at 10. In fact, "Congress, and concurrently, the FCC," specifically "recognized the need to allow for technological advancements." *Id.* at 9-10 (citing *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 54 (1991); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, ¶ 132 (July 3, 2003)).

<sup>12</sup> See 2015 TCPA Order at 8076 (Pai, A., dissenting) ("trial lawyers have found legitimate, domestic businesses a much more profitable target"); see also, *Morris v. United Healthcare Ins. Co., Inc.*, No. 4:15-cv-00638-ALM-CAN, 2016 WL 7115973, at \*6 (E.D. Tex. Nov. 9, 2016) (recognizing abuse of TCPA suits by serial litigants).

<sup>13</sup> *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (the First Amendment has long preferred punishing unlawful speech to prohibiting protected speech before it is to occur).

that soundboard calls deliver a prerecorded message and, therefore, run afoul of the” TCPA.<sup>14</sup> As Chairman Pai predicted, these actions find legitimate, domestic businesses more profitable targets than the unscrupulous, sham telemarketers operating offshore.<sup>15</sup> In NorthStar’s case, Petitioner notes that a class was recently certified exposing this small home security company serving 50,000 customers to “the prospect of nearly \$400,000,000 in statutory damages.”<sup>16</sup>

The risk of such lawsuits claiming staggering penalties and debilitating statutory damages for engaging in compliant, protected soundboard calls directly harms legitimate American companies and the many industries that rely on soundboard technology to reach their customers in an economical way. And, as Petitioner explains, “the attorneys who file these suits are often the only beneficiaries of such settlements.”<sup>17</sup>

The harm created by an expansive definition is manifest in these myriad lawsuits filed under the TCPA against legitimate companies making compliant soundboard calls. The FCC should consider that the interpretation of the TCPA advanced by class action plaintiffs’ lawyers leads to the destruction of legitimate small businesses.

Further, the FCC should take this opportunity to explain on the record that when Congress has not considered whether the TCPA should be expanded to reach a new technology, such as soundboard, the FCC will not administratively expand the Act to ban that technology. Amending a statute is the role of Congress and not the FCC.

## **VI. Conclusion**

The Soundboard Association respectfully requests the FCC grant NorthStar’s Petition and provide relief for similarly situated companies, holding that 47 U.S.C. § 227(b)(1)(B) does not apply to soundboard technology.

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Respectfully submitted,

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<sup>14</sup> See *NorthStar Petition* at ii-iii.

<sup>15</sup> *Id.* at 1-2.

<sup>16</sup> *Id.* at iii.

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