

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of NorthStar Alarm Services, LLC's)	
Petition for Expedited Declaratory Ruling)	
)	CG Docket No. 02-278
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

COMMENTS OF NORTHSTAR ALARM SERVICES, LLC

NorthStar Alarm Services, LLC (“NorthStar”), by its counsel, submits these Comments in support of its Petition for Expedited Declaratory Ruling seeking clarification of Section 227(b)(1)(B) of the Telephone Consumer Protection Act (hereinafter, the “Petition”). The Petition seeks the Commission’s clarifying ruling on whether soundboard technology is regulated as the use of “an artificial or prerecorded voice to deliver *a message*” under the Telephone Consumer Protection Act (“TCPA” or the “Act”). The Petition sets forth in detail the reasons why the Commission should, as a matter of law and sound policy, hold that the soundboard technology does not offend the TCPA and we will not burden the Commission with a repetition of that discussion. *See* Petition, at 6-11. Rather, the purpose of these Comments is to update the record to reflect developments that have occurred since the Petition was filed and to explain why these developments underscore the need for the Commission to issue promptly the Declaratory Ruling NorthStar has requested.

NorthStar respectfully requests that the Commission issue a ruling as quickly as possible because the certified class action lawsuit against NorthStar – *Braver v. NorthStar Alarm Services, LLC, et al.*, No. 5:17-cv-00383-F (W.D. Okla.) – has not been stayed pending the Commission’s decision on this Petition, and is proceeding to dispositive motions, which are due on May 8, 2019. For the Commission’s decision to have a meaningful influence on the Court, the decision must

issue before dispositive briefing.

The *Braver* litigation is discussed in the Petition. Petition, at 5-6. It bears noting, however, that the plaintiff in that case seeks to hold NorthStar vicariously liable for calls placed by an independent third party, which placed, on average, just one call to each class member (*i.e.*, approximately 253,000 calls to about 240,000 individuals) over the course of just over eight months – hardly the repeated and harassing volume of calls that the TCPA was enacted to address in the first instance. The potential statutory damages will bankrupt NorthStar, as they would most companies. It also bears noting that the plaintiff has unabashedly admitted that one of his primary purposes in filing TCPA lawsuits is to enrich those attorneys who represent him. Braver Dep. Tr., at 93:-8 (“... a lot of the reasons why I was pursuing [TCPA] cases at that time was to help him [the plaintiff’s attorney] and his family out because I was, basically, the ... primary source of income for his family”). Such use of TCPA litigation is the quintessential TCPA “lawsuit abuse” that Chairman Pai and courts have criticized. *In re Rules & Regs. Implementing the TCPA of 1991*, 30 FCC Rcd. 7961, 8073 (2015) (Pai, dissenting); *see also Morris v. Unitedhealthcare Ins. Co.*, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016) (“TCPA suits have, in many instances, been abused by serial litigants”).

NorthStar filed the Petition on January 2, 2019. A subsequent mediation between the parties proved unsuccessful, and on March 6, 2019, the parties appeared before the United States District Court for the Western District of Oklahoma in *Braver* for a hearing on NorthStar’s Motion to Stay Case Pending Declaratory Ruling of the Federal Communications Commission on the Petition. (NorthStar’s Motion to Stay is attached to these Comments as Exhibit “A” for the record.) Although it did not reach a final merits determination on the issue, the Court, nonetheless, denied NorthStar’s Motion to Stay. Critically, the Court found that it did not need to wait for the

Commission to rule on the Petition because, the Court concluded, resolution of the issue of whether the soundboard technology constitutes the prohibited use of “an artificial or prerecorded voice to deliver a message” to a residential landline under TCPA is a matter of interpreting the plain language of the statute, and an issue the Court characterized as “very simpl[e].”¹ Particularly troubling to NorthStar is that the Court appears to read out from the TCPA the singular “to deliver a message” qualifier contained in Section 227(b)(1)(B), even though that is a heavy focus of this Petition.²

The denial of the stay only serves to underscore the importance and time sensitivity of this matter; the Commission should act as promptly as possible to grant the clarification sought by the Petition for the reasons summarized below and more fully detailed in the Petition itself.

I. THE ISSUE PRESENTED BY THE PETITION IS UNIQUELY WITHIN THE FCC’S EXPERTISE

The statutory language at issue is neither clear nor unambiguous.³ We submit, and have

¹ *Braver*, Mar. 6, 2019 Tr. of Hrg. on NorthStar’s Mot. to Stay, at 52:5; *see also id.* at 51:4-24; 54:5-10. A copy of the transcript of the hearing on NorthStar’s Motion to Stay is attached to these Comments as Exhibit “B” for the record.

² *Id.* at 51:4-10 (“What it boils down to is that the overriding issue . . . is as to how the import of a statutory phrase, ‘artificial or prerecorded voice,’ and probably it’s not even that long, it’s probably just ‘prerecorded voice,’ how that statutory phrase stacks up against the way this soundboard technology works.”).

³ Of course, there is absolutely no question that courts need not – and should not for the sake of efficiency – simply refer to an agency questions that are readily resolved on the basis of the unambiguous plain language of a statute. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). But, “there is no statutory definition of ‘an artificial or prerecorded voice,’” especially one used to “deliver a message.” *Chyba v. Bayview Loan Serv’g, LLC*, No. 3:14-cv-01415, 2016 WL 5405557, at *2 (S.D. Cal. Sept. 27, 2016). The Commission, in the past and even now, has been called upon to interpret and has interpreted seemingly straightforward terms, such as “call,” “called party,” “to send,” and “capacity.” *See, e.g., Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 781 F.3d 1245, 1256-57 & n.12 (11th Cir. 2015) (citing FCC’s interpretation of term “send” in 1995 Order, *In re Rules and Regulations Implementing the TCPA of 1991*, 10 FCC Rcd. 12391, 12407 (Aug. 7, 1995) (“This interpretation is consistent with the TCPA’s legislative history . . .”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (noting FCC’s interpretation of the term “call” in 2003 Order, *In re Rules and Regulations Implementing the TCPA of 1991*, 18 FCC Rcd. 14014, 14115 (July 3, 2003)); *In re Rules and Regulations Implementing the TCPA of 1991*, 30 FCC Rcd. 7961, 7974-75, 7999-8001 (July 10, 2015) (interpreting terms “capacity” and “called party”), vacated in part, *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Indeed, by vesting the Commission with the authority to promulgate regulations implementing the TCPA’s restrictions on calls employing prerecorded messages, Congress authorized the Commission to interpret the undefined terms of the statute, such as what constitutes an “artificial or prerecorded voice to deliver a message.”

shown in our Petition, that, indeed, the only sound interpretation of Section 227(b) of the Act compels the conclusion that soundboard technology, or at least as the technology was deployed in this case,⁴ is not proscribed by the FCC's long-standing reading of the language of the Act and was not intended to be proscribed by Congress.

As we have shown in our Petition, the precise terms of Section 227(b) simply do not resolve the question of whether a technology, which is, at worst, a mix of prerecorded message and live operator communication, is covered. This is hardly surprising because the soundboard technology as it exists today did not exist when the Act was passed. Nonetheless, Congress and the FCC were aware in 1991 of a crude version of "mixed" outbound calls where the prerecorded message was introduced by a live operator. The Commission and the courts concluded that these early form of mixed calls were not governed by 227(b), as we have discussed at pages 8 to 10 of the Petition. It follows inevitably that the advanced form of technology at issue in this case does not offend the TCPA.

The question of whether and how much deference may be due to agency interpretations is of course a matter for the courts. But it is clear that the *Braver* Court, users of soundboard technology, as well as NorthStar itself deserve a prompt and decisive explanation of the FCC's position on the applicability of the TCPA to the soundboard technology at issue here. Under 47 U.S.C. § 227(b)(2), it is the purview of the Commission to determine how and if the Act regulates

⁴ As detailed in NorthStar's Motion to Stay in *Braver* (Exh. A hereto, at 5-6), the record evidence and deposition testimony confirm that co-defendant Yodel Technologies, LLC ("Yodel") utilized soundboard technology during some but not all of its lead generation calls. In fact, some of Yodel's calls did not utilize any recorded soundboard snippets. Nonetheless, when Yodel used soundboard calls to generate leads for NorthStar, the technology was deployed strictly in a "one-to-one" manner – *i.e.*, a single soundboard agent handled only one call with a consumer at a time – and the soundboard agent was always available and sometimes did step in with his or her own voice to respond to recipient questions or concerns.

specific technologies such as soundboard.⁵ Significantly, there is no analog to Section 227(b) in the Federal Trade Commission's Telemarketing Sales Rule. That is because Congress plainly understood that these kinds of issues involve an understanding of how communications technology works which is uniquely and exclusively within the expertise of the Commission.

At the same time, the Petition is narrowly and carefully drawn. It only asks the Commission to declare that soundboard technology does not use "an artificial or prerecorded voice to deliver a message," as such terms are used in the Act. As an alternative, the Petition asks the Commission to declare that use of soundboard technology on a one-to-one basis, in which a soundboard agent conducts only one call with one call recipient at a time, does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA. As the Petition makes clear, whatever the ambiguity of the Act, the public interest benefits of soundboard technology produce results that palpably distinguish these calls from "robocalls."

II. THE LANGUAGE, HISTORY, AND PURPOSE OF THE TCPA COMPEL GRANT OF THE CLARIFICATION REQUESTED

The relief that NorthStar seeks is thus carefully confined to matters that are remitted to the Commission under the Act. We do not seek a re-write of the Act or its legislative purpose. 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.⁶ The emphasized terms, which are the core terms at issue in the Petition, are not defined in the statute. The Petition,

⁵ 47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to implement the requirements of this subsection.").

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

thus, presents a question of how the statute should be interpreted to best effectuate the purpose of the TCPA and congressional intent. This question is at the core of the Commission's authority.⁷

Given that the Petition presents a critical and timely question that falls directly within the authority of the Commission, the Commission should declare that the use of soundboard technology is not proscribed by the Act because, as NorthStar explained in its Petition, soundboard technology provides benefits to consumers that exceed those of a live operator, does not tie up phone lines, and allows real-time interaction between caller and recipient, rather than delivering a single, passive message. As a result, soundboard technology does not implicate the concerns the Act was enacted to address.

Particularly given the uncertain meaning of the words of the statute, the public interest considerations underlying the TCPA must be taken into account. Soundboard technology does not preclude the consumer from simply hanging up if he or she is uninterested in the message, but it affords consumers who are uncertain as to whether a particular message is or is not of interest to communicate with a live person to reach an informed decision. At the same time, soundboard technology improves the accuracy of messages conveyed to the consumer because businesses can utilize the audio snippets to ensure that consumers hear the same, consistent message and the risk of unscripted comments is minimized. Soundboard systems are also adaptable. Businesses are able to comply with new regulations more quickly, implement new best practices as they develop, and because soundboard calls are or can be recorded, legitimate businesses are able to – and often do – analyze calls to improve the consumer experience. The experience is often so seamless that many consumers do not recognize the difference between a call using soundboard technology and a traditional call. Soundboard technology, thus, combines the consistency of recorded messages

⁷ 47 U.S.C. § 227(b)(2).

for regulatory and other compliance purposes with the personalized experience of a live operator. The technology also 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.

The nuanced, interactive experience of a soundboard call is the antithesis of the “robocalls” that the Act was designed to prevent. With the typical robocall, the consumer has no choice but to listen to the message or hang up the phone. There is no live operator listening to the call and available to respond to the consumer’s frustration or confusion. And without human intervention in the call, there is no limit to the number and rate of robocalls that can be placed. These negative characteristics featured prominently in the legislative history of the Act.⁸

By contrast, a soundboard call is necessarily limited by the requirement that a live operator be involved in the call. Soundboard agents have a series of nuanced responses to call recipients’ questions or comments, and are ready to step in with their own voices or transfer calls to other agents as needed. Indeed, soundboard technology does not fit the paradigm of “robotic calls by machine” that Congress intended to regulate when it enacted the TCPA.⁹ These calls are not “wholly automated” calls placed by a computer or other machine.¹⁰ Rather, they are placed and overseen by live agents. They do not deliver a single uniform message that plays from start to

⁸ *Moser v. F.C.C.*, 46 F.3d 970, 972 (9th Cir. 1995) (explaining the history of the Act); *see also 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 3-22 (1991) (describing the calls the Act sought to proscribe as “automated . . . not the live conversational solicitations” and “one-way, automated electronic devices”); Petition, at 8-10 (detailing legislative history).

⁹ *See Ashland Hosp. Corp. v. SIEU*, 708 F.3d 737, 743 (6th Cir. 2013) (noting that Congress enacted the TCPA to regulate “robotic calls” placed by computers to deliver millions of identical prerecorded calls simultaneously, and that Congress did not intend to regulate “calls placed by ‘live’ persons”).

¹⁰ *Ashland Hosp.*, 708 F.3d at 743.

finish without the ability for the recipient to interact with the caller. Instead, soundboard agents simply use recorded audio snippets, rather than read the same words with their own voice from a script. The soundboard agent conducting the call interacts with the consumer in all of the same ways that any agent interacts with any consumer. The soundboard agent hears and feels any frustration that the recipient may experience. These soundboard calls do not fill up answering machines, and they hang up when the call is over. In short, none of the problems associated with “a prerecorded message” of which Congress was concerned when enacting the TCPA exist with soundboard calls. The TCPA “is replete” with passages that show Congress’s expectation that regulations would distinguish “what kinds of prerecorded calls are permissible and what kinds of calls are not.”¹¹ Some prerecorded audio technologies violate the TCPA, but some do not. The purpose of the TCPA, as evidenced by congressional intent, demonstrates that soundboard technology does not fall within the Act’s scope, and the Commission should clarify as much.

As we have explained in our Petition, the Commission has previously recognized, in the context of automated telephone dialing systems, that the detriment to the consumer from robocalls was not from the call itself, but rather from the use of a technology that had the virtually unlimited capability to create a nuisance without any recourse for the consumer.¹² Soundboard technology avoids both of these concerns by requiring substantial human involvement and decision-making. The use of a live operator limits the number of calls that can be made and allows a consumer to speak to the live operator if the soundboard technology does not meet the consumer’s needs.

¹¹ *Leyse v. Clear Channel Broadcasting, Inc.*, 545 Fed. Appx. 444, 453 (6th Cir. 2013) (radio station’s prerecorded message to residential telephone number inviting recipients to tune in to win contest did not violate the TCPA), *cert. denied*, 135 S. Ct. 57 (2014).

¹² *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091-93 (July 3, 2003).

CONCLUSION

NorthStar is not seeking to have the Commission create new law. Rather, NorthStar's Petition simply asks that the Commission apply the reasoning behind its previous rulings to soundboard technology, and to do so promptly, so that the Court hearing the case against NorthStar may have the benefit of the Commission's reasoned expertise prior to making a seminal determination. Further, as requested in the Petition, if there is any question about soundboard technology being misused, the Commission may issue a narrow declaratory ruling clarifying that the way in which soundboard was deployed in this case – *i.e.*, in a one-to-one manner in which the soundboard agent can and, as needed, did utilize his or her own voice to respond to call recipient questions or concerns¹³ – does not violate Section 227(b)(1)(B). *See* Petition, at iii, 2, and 12.

We ask that the Petition be granted within the next 60 days.

March 15, 2019

Respectfully Submitted,

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See supra, at n.4.

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

ROBERT H. BRAVER, for himself and
all individuals similarly situated,

Plaintiff,

v.

NORTHSTAR ALARM SERVICES,
LLC, et al.,

Defendants.

Case No.: 5:17-cv-00383-F

**DEFENDANT NORTHSTAR ALARM SERVICES, LLC'S MOTION TO STAY
PENDING DECLARATORY RULING OF THE FEDERAL
COMMUNICATIONS COMMISSION AND INCORPORATED BRIEF IN
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Pursuant to the doctrine of primary jurisdiction and the Court's inherent power to control its docket, Defendant NorthStar Alarm Services, LLC ("NorthStar"), by and through its undersigned attorneys, respectfully requests that the Court stay this litigation pending the Federal Communications Commission's ("FCC" or "Commission") forthcoming decision on NorthStar's recently-submitted petition to the FCC ("the Petition") requesting an expedited declaratory ruling clarifying that "soundboard" or "avatar" calls do not constitute "artificial or prerecorded voice" calls (more commonly referred to as "prerecorded messages") subject to the Telephone Consumer Protection Act's ("TCPA") general prohibition on the delivery of a prerecorded message that deliver a call without the consumer's prior express consent. As detailed below, a stay is necessary to allow the Commission, the federal agency charged with construing and enforcing the TCPA, to provide clarity on the issue based on its well-established expertise and authority.

I. INTRODUCTION

The first and cornerstone allegation in Plaintiff's First Amended Complaint ("FAC") (doc. no. 7) is that Defendants "delivered a prerecorded telemarketing message without [Plaintiff's] or the class' prior express written consent" in violation of the TCPA. FAC, ¶ 58 (Count I). Count I is the only Count upon which Plaintiff sought (doc. no. 42, at 1) and to which the Court granted class certification (doc. no. 72). Given the primacy of the allegation, it is crucial to note from the outset that the TCPA and its implementing regulations generally prohibit telemarketers from initiating solicitations calls to residential telephone numbers that use "an artificial or prerecorded voice to deliver a message" other than calls made with the recipient's prior express written consent. 47 C.F.R. §

64.1200(a)(3); 47 U.S.C. § 227(b)(1)(B). But it is not a violation of the TCPA to place unsolicited calls that do not deliver a prerecorded message (assuming those calls are not autodialed). Thus, the determination of whether Defendant Yodel Technologies, LLC's ("Yodel") use of soundboard technology constitutes the prohibited use of an "artificial or prerecorded voice to deliver a message" under the TCPA likely will be dispositive in this action. However, "there is no statutory definition of 'an artificial or prerecorded voice.'" *Chyba v. Bayview Loan Serv'g, LLC*, No. 3:14-cv-01415, 2016 WL 5405557, at *2 (S.D. Cal. Sept. 27, 2016). Nor has the FCC previously issued an order addressing whether soundboard calls constitute "artificial or prerecorded voices." It is an open question as to whether soundboard calls constitute the prerecorded message calls that the TCPA contemplates, and absent a stay, this Court will be deciding an issue of first impression without clear guidance from the FCC.

Yet, the FCC is poised to eliminate much of that uncertainty as it currently is considering NorthStar's Petition, which seeks an expedited declaratory ruling that addresses this precise issue. Specifically, the Petition requests that the Commission confirm that the utilization of soundboard technology does not fall within the TCPA's general prohibition on the use of artificial or prerecorded voices to deliver a message. *See Petition for Expedited Declaratory Ruling*, NorthStar Alarm Services, LLC, CG Docket 02-278, at iii, 2, 12 (FCC Jan. 2, 2018) (Exh. "1").¹ A favorable ruling on this request will

¹ A petition for declaratory ruling pending before the FCC is a public document of which this Court may take judicial notice. *Gusman v. Comcast Corp.*, No. 13CV1049, 2014 WL 2115472, at *5 (S.D. Cal. May 21, 2014).

render conclusive that the calls that Yodel made to Plaintiff and the Class were not made using a prerecorded message and, thus, do not constitute violations of the TCPA. In short, a favorable ruling from the FCC means this case is effectively over.

As detailed below, there is ample support for granting NorthStar's Motion to Stay. But, the Court need not look any further than the Court's decision entered in *Cox Okla. Telcom, LLC v. Corp. Comm'n of Okla.*, in which Judge Leonard stayed a litigation under the primary jurisdiction doctrine to allow the FCC time to consider the defendant's petition for declaratory ruling – submitted after the lawsuit was commenced – on the precise legal question at issue in the litigation. No. 5:04-cv-01282-M, Order (doc. no. 37), at 4-5 (W.D. Okla. Order entered Jan. 18, 2005) (hereinafter, "*Cox Okla. Telcom Stay Order*") (Exh. "2") ("[T]here is no doubt that the precise issue [raised in the case] is currently pending before the FCC. 'There is therefore a real possibility that a decision by this court prior to the FCC's response to [Cox's] petition would result in conflicting decisions.'") (quoting *Mical Commc'ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1040 (10th Cir. 1993)).²

Because the FCC has been designated by Congress as the agency responsible for interpreting the TCPA, and because the FCC is in the middle of doing just that, the Court should exercise its discretion to stay this litigation under the primary jurisdiction doctrine pending the FCC's resolution of NorthStar's Petition. Alternatively, the Court should stay this case pursuant to its inherent powers to control its docket. If this case proceeds before

² Judge Leonard subsequently denied the plaintiff's motion to vacate the stay. 2007 WL 895227, at *1-3 (W.D. Okla. Mar. 22, 2007).

the FCC issues its decision, the Court risks entering an order contrary to the FCC's ruling and which, thus, would be wrong as a matter of law under the TCPA.

II. BACKGROUND

A. 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 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 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 for more than 15 years 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. 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.

B. Yodel's Use of Soundboard Technology

In or about January 2016, NorthStar hired Yodel to generate leads for it. As part of its lead generation efforts, Yodel placed telemarketing calls and utilized soundboard technology during some but not all of these calls. *See* Order Certifying Class, Including

Findings of Fact and Conclusions of Law (doc. no. 72), at 5; *see also* Dec. 20, 2017 Kyle Wood Dep. Tr. (Exh. “3”), at 57:15-60:17; 70:21-71:2; 73:6-9. In fact, some of Yodel’s calls did not utilize *any* of the recorded soundboard snippets that underlie Plaintiff’s FAC. *Id.* Moreover, when Yodel used soundboard calls to generate leads for NorthStar, the technology was deployed strictly in a “one-to-one” manner – *i.e.*, a single soundboard agent handled only one call with a consumer at a time. *Id.* at 16:8-22.

III. LEGAL ARGUMENT

A. Staying This Litigation is Appropriate Under the Primary Jurisdiction Doctrine

A district court has the authority to stay proceedings as part of its inherent authority “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants . . . [how] this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Utd. Steelworkers v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1227 (10th Cir. 2003). A court’s power to stay proceedings is a well-established component of its broad discretion to manage and dispose of cases on its own docket. *Comprehensive Health Care Sys. of Palm Beaches, Inc. v. M3 USA Corp.*, No. 16-cv-80967, 2017 WL 4868185, at *1 (S.D. Fla. 2017) (staying putative TCPA class action pending FCC determination of defendant’s petition for declaratory ruling). A properly granted stay conserves party and judicial resources, and avoids inconsistent procedural and legal rulings. *Lee v. loanDepot.com, LLC*, No. 14-1084, 2014 WL 4145504, at *1-2 (D. Kan. Aug. 20, 2014) (staying TCPA litigation pending FCC declaratory rulings to allow

the agency to apply its own “experience and technical expertise to the specific question” at issue, and to avoid “conflicting decisions [and] help to ensure uniformity in the future decisions of this court”); *see also M3 USA*, 2017 WL 4868185, at *1.

To that end, the Supreme Court developed the primary jurisdiction doctrine, which permits a court to stay proceedings pending agency guidance when a claim presents an “issue within the special competence of an administrative agency.” *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993); *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956); *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1205 (W.D. Okla. 2017) (Friot, J.). “The doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.” *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996) (quoting *W. Pac. R.R.*, 352 U.S. at 63). The doctrine applies “in situations where the courts have jurisdiction over the claim from the outset but it is likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body.” *Mical Commc’ns*, 1 F.3d at 1038 (citation omitted). The Tenth Circuit has explained:

The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the “conventional experiences of judges” or “falling within the realm of administrative discretion” to an administrative agency with more specialized experience, expertise, and insight. Specifically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency.

Williams Pipe Line, 76 F.3d at 1496 (citation omitted); *see also Sierra Club*, 248 F. Supp. 3d at 1205. When primary jurisdiction is invoked, “the judicial process is suspended

pending referral of such issues to the administrative body for its views.” *W. Pac. R.R.*, 352 U.S. at 64; *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1239 (10th Cir. 2007). In short, the doctrine both promotes the use of agencies’ experience and expertise as to questions outside the conventional expertise of judges, and ensures uniformity and consistent decisions. *W. Pac. R.R.*, 352 U.S. at 64; *Williams Pipe Line*, 76 F.3d at 1496; *Freeman v. Specialty Retailers, Inc.*, No. 14-2691, 2015 WL 12804530, at *2 (E.D. Tex. Jan. 20, 2015).

“The purpose of the doctrine is to ‘allow agencies to render opinions on issues underlying and related to the cause of action.’” *TON Servs.*, 493 F.3d at 1238 (quoting *Crystal Clear Commc’ns, Inc. v. Sw. Bell Tel. Co.*, 415 F.3d 1171, 1179 (10th Cir. 2005)). Application of the doctrine is particularly appropriate “when the regulatory agency has actions before it which may influence the instant litigation.” *TON Servs.*, 493 F.3d at 1239 (citing *Mical Commc’ns*, 1 F.3d at 1037-38); *Freeman*, 2015 WL 12804530, at *2 (staying TCPA action pending FCC’s resolution of defendant’s petition because “[t]he FCC has not yet decided the issue” and the FCC’s decision on the issue “will clarify or resolve this lawsuit, and will help focus any unnecessary discovery”); *Higginbotham v. Diversified Consultants, Inc.*, No. 13-2624, 2014 WL 1930885, at *2-3 (D. Kan. May 14, 2014) (staying TCPA action alleging autodialed and prerecorded message calls to allow FCC to rule on defendant’s petition and clarify “unclear” term within statute). At bottom, the primary jurisdiction doctrine “seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency’s specialized knowledge, expertise, and central position within a regulatory regime.” *Pharm. Research & Mfrs. of Am. v. Walsh*,

538 U.S. 644, 673 (2003); *Passero v. Diversified Consultants, Inc.*, 13–CV–338, 2014 WL 2257185, at *1 (W.D.N.Y. May 28, 2014) (staying TCPA action pending FCC ruling on whether defendant’s calling platform falls within statutory prohibition).

Although “[n]o fixed formula exists for applying the doctrine of primary jurisdiction,” the Tenth Circuit has articulated the primary jurisdiction standard as a three-factor test: “whether the issues in the case: (1) are not within the conventional experience of judges; (2) require the exercise of administrative discretion; or (3) require uniformity and consistency in the regulation of the business entrusted to the particular agency.” *TON Servs.*, 493 F.3d at 1239 (quoting *Crystal Clear Commc’ns*, 415 F.3d at 1179).

Under this framework, staying an action on primary jurisdiction grounds is appropriate while an agency considers petitions for declaratory relief. *TON Servs.*, 493 F.3d at 1239 (citing *Mical Commc’ns*, 1 F.3d at 1037-38); *Cox Okla. Telecom Stay Order*, 4-5. “[C]ourts should be especially solicitous in deferring to agencies that are simultaneously contemplating the same issue.” *Ellis v. Tribune Television Co.*, 443 F.3d 71, 88 (2d Cir. 2006); *see also id.* at 92 (“the district court should have invoked the primary jurisdiction doctrine and allowed the FCC to address this licensing matter in the first instance. Such an approach would have avoided the subsequent inconsistent rulings and allowed the FCC to exercise its expertise and discretion”). “Because an agency ‘is currently conducting an investigation into the lawfulness of the [practice] under attack,’ ‘to permit the court below initially to determine [the issue] would invite the very disruption . . . that the doctrine is meant to discourage.’” *Id.* (citation omitted).

In that regard, the number of courts staying or dismissing TCPA and other

telecommunications-related actions pending FCC resolution of petitions for declaratory rulings filed by the litigants in those cases is legion. *See, e.g., Eric B. Fromer Chiropractic v. Inovalon Holdings, Inc.*, 329 F. Supp. 3d 146, 154-55 (D. Md. 2018); *M3 USA*, 2017 WL 4868185, at *2-3; *Suzanne Degnen, D.M.D., P.C. v. Dental Fix RX, LLC*, No. 4:15-CV-1372, 2016 WL 4158888, at *3 (E.D. Mo. Aug. 5, 2016); *Suzanne Degnen, D.M.D., P.C. v. Gerzog*, No. 4:15-cv-1103, 2015 WL 9645986, at *1-2 (E.D. Mo. Aug. 5, 2015); *Freeman*, 2015 WL 12804530, at 2-3; *Barron's Outfitters Inc. v. Big Hairy Dog Info. Sys. & Retail Pro Int'l, LLC*, No. 14-04335, Order (doc. no. 30) (D.S.C. order entered June 19, 2015) (Wooten, C.J.); *Physicians Healthsource Inc. v. Masimo Corp.*, No. 8:14-cv-0001, Order Granting Def.'s Mot. to Stay (doc. no. 47), at 2-4 (C.D. Cal. order entered May 22, 2014); *Lucas*, 2014 WL 3845893, at *4; *Matlock v. United Healthcare Servs., Inc.*, No. 2:13-cv-02206, 2014 WL 1155541, at *1-2 (E.D. Cal. Mar. 20, 2014); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 3:12-CV-1208, 2014 WL 518992, at *3-4 (D. Conn. Feb. 3, 2014); *Barr v. Futuredontics, Inc.*, No. 13-61982, 2014 WL 12770094, at *4-5 (S.D. Fla. Feb. 2, 2014); *St. Louis Heart Ctr. v. Gilead Palo Alto, Inc.*, No. 4:13-CV-958, 2013 WL 5436651, at *1-2 (E.D. Mo. Sept. 27, 2013); *Nack v. Walburg*, No. 4:10CV00478, 2013 WL 4860104, at *1 (E.D. Mo. Sept. 12, 2013); *St. Louis Heart Ctr. v. Forest Pharms., Inc.*, No. 4:12CV2224, 2013 WL 3988671, at *1 (E.D. Mo. July 17, 2013); *Cohen v. Global Tel Link Corp.*, No. 2:12-cv-05447, Order Granting Def.'s Mot. to Stay Matter Pending Action by the Fed. Commc'ns Comm'n (doc. no. 22) (C.D. Cal. order entered Sept. 27, 2012); *Twin Valley*, 2007 WL 3010352, at *2-3; *Cox Okla. Telcom Stay*

Order, 4-5; *Self v. Bellsouth Mobility*, 111 F. Supp. 2d 1169, 1172-73 (N.D. Ala. 2000).³

The Court should exercise its broad discretion to stay this litigation pending the FCC's resolution of NorthStar's Petition. As described more fully below, a stay will promote all of the aforementioned interests, is supported by proper application of the primary jurisdiction doctrine, and would constitute a sound exercise of the Court's inherent discretion to control its docket.

1. Whether Soundboard Calls Fall Within the TCPA's General Prohibition on the Use of Artificial or Prerecorded Voices to Deliver a Message is Not Within The Conventional Experience of Judges, and Requires the FCC's Unique Complex Technical and Policy Expertise

The first and second primary jurisdiction factors easily support the issuance of a stay here. "The TCPA . . . [is a] comprehensive regulatory scheme" governing, among other things, the use of artificial or prerecorded voices to deliver a message to a residential telephone number. *M3 USA*, 2017 WL 4868185, at *2 (citation omitted). The core issue

³ Equally numerous are decisions granting stays in TCPA cases under the primary jurisdiction doctrine pending FCC decisions on petitions filed by non-parties, which bear upon one or more of the core issues in the litigations. *See, e.g., Zannini v. Xpress Urgent Care, LLC*, No. 2:18-cv-14388, Order Staying Case (doc. no. 17) (S.D. Fla. Nov. 20, 2018); *Thomas v. Smith-Palluck Assocs. Corp.*, No. 2:17-cv-02001, 2018 U.S. Dist. LEXIS 152211, at *3-5 (D. Nev. Sept. 6, 2018); *Buhr v. ADT LLC*, No. 9:18-cv-80605, Order (doc. no. 40) (S.D. Fla. order entered July 25, 2018); *Scoma Chiropractic, P.A. v. Dental Equities, LLC*, No. 2:16-cv-41, 2018 WL 2455301, at *3-4 (M.D. Fla. June 1, 2018); *Stewart v. T-Mobile USA, Inc.*, No. 4:14-cv-02086, 2014 WL 12614418, at *3-6 (D.S.C. Oct. 8, 2014); *Pickens v. Am. Credit Acceptance, LLC*, No. 2:14-00201, 2014 WL 4662512, at *2-3 (S.D. Ala. Sept. 19, 2014); *Lee*, 2014 WL 4145504, at *1-2; *Passero*, 2014 WL 2257185, at *2-3; *Gusman*, 2014 WL 2115472, at *1-5; *Diversified Consultants*, 2014 WL 1930885, at *1-4; *Barrera*, 2014 WL 1942829, at *2-4; *Matlock*, 2014 WL 1155541, at *1-2; *Mendoza v. Unitedhealth Grp. Inc.*, No. C 13-1553, 2014 WL 722031, at *2 (N.D. Cal. Jan. 6, 2014); *Fried v. Sensia Salon, Inc.*, No. 4:13-cv-00312, 2013 WL 6195483, at *4-6 (S.D. Tex. Nov. 27, 2013); *Glauser v. Twilio, Inc.*, No. C 11-2584, 2012 WL 259426, at *1-3 (N.D. Cal. Jan. 27, 2012).

that will require resolution in this case – whether Yodel used a prohibited “artificial or prerecorded voice” when it placed the telemarketing calls of which Plaintiff and the Class complain – falls squarely within the TCPA’s complex and complicated regulatory scheme. “[T]here is no statutory definition of ‘an artificial or prerecorded voice.’” *Chyba*, 2016 WL 5405557, at *2. Nor has the FCC definitively interpreted the meaning of the phrase. Indeed, few courts have even had occasion to address the definition and virtually none have been presented with the definition’s application to the soundboard technology at issue in this case. Put simply, “[t]his case is not the sort that a court routinely considers.” *Sierra Club*, 248 F. Supp. 3d at 1206.

“The TCPA vests the FCC with the authority to ‘prescribe regulations to implement the requirements of [the statute].’ This includes issuing rules clarifying and interpreting the TCPA, as well as addressing petitions like” NorthStar’s Petition. *M3 USA*, 2017 WL 4868185, at *2 (citations omitted). “The implementation and interpretation of the TCPA have been placed squarely within the jurisdiction of the FCC.” *Freeman*, 2015 WL 12804530, at *2 (citation omitted). By vesting the Commission with the authority to promulgate regulations implementing the TCPA’s restrictions on calls employing prerecorded messages, Congress authorized the Commission to interpret the undefined terms of the statute, such as what constitutes an “artificial or prerecorded voice.” *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 781 F.3d 1245, 1256-57 & n.12 (11th Cir. 2015) (regarding FCC’s interpretation of term “to send”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (regarding FCC’s interpretation of the term “call”); *Lee*, 2014 WL 4145504, at *5 (regarding FCC’s interpretation of term “called party”); 47 U.S.C.

§ 227(b)(2). And, the FCC's orders and rulings interpreting the TCPA are binding on district courts. *Keim v. ADF Midatlantic, LLC*, 199 F. Supp. 3d 1362, 1368 n.4 (S.D. Fla. 2016) (citing *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119-21 (11th Cir. 2014)); *Chavez v. Advantage Grp.*, 959 F. Supp. 2d 1279, 1282 (D. Colo. 2013) (citing cases).

“[T]he Federal Communications Commission has a special understanding about matters involving communications” *Hoxhallari v. Gonzales*, 468 F.3d 179, 186 (2d Cir. 2006); *Fried*, 2013 WL 6195483, at *4. Determining whether new technologies fall within the TCPA's prescriptions requires a high degree of “technical and technological knowledge not necessarily available to this Court,” and “[t]he FCC is in prime position to determine whether the use of this technology violates the TCPA.” *Fried*, 2013 WL 6195483, at *4 (staying TCPA action under primary jurisdiction doctrine).⁴ For those reasons, courts have stayed TCPA actions to allow the FCC time to issue declaratory

⁴ Even where the relevant legal issue “plainly does not require the technical expertise of the [FCC],” courts stay TCPA litigations under the primary jurisdiction pending FCC rulings on litigants’ petitions due to important policy considerations. *Lucas v. Telemarketer Calling From (407) 476-5680*, No. 1:12-cv-00630, 2014 WL 3845893, at *4 (S.D. Ohio Aug. 5, 2014) (granting stay in TCPA prerecorded message case to allow FCC to decide non-technical issue of “first impression and wide-reaching consequence” raised in plaintiff’s petition to agency after the magistrate judge had issued her report and recommendation that defendants’ motion to dismiss be granted); *Twin Valley Tel., Inc. v. Universal Serv. Administrative Co.*, No. 07-2172, 2007 WL 3010352, at *2-3 (D. Kan. Oct. 15, 2007) (granting stay even though the determination of the effective date of an FCC order “is not one that is so technical that it falls outside conventional judicial experiences,” because “[t]he FCC is in the best position to interpret its own ruling,” “[t]he FCC’s ‘[e]xpertise . . . is not merely technical but extends to the policy judgments needed to implement the agency’s mandate,” and “one of the key purposes of the primary jurisdiction doctrine is to promote regulatory uniformity”) (citations omitted).

rulings clarifying the meaning of various words and phrases set forth in the Act, such as “called party” and “prior express consent.” *See, e.g., Freeman*, 2015 WL 12804530, at *2; *Lee*, 2014 WL 4145504, at *1-2; *Matlock*, 2014 WL 1155541, at *1-2. In fact, the FCC itself filed an amicus brief in the appeal of a decision construing the undefined phrase “residential telephone line” as used in the TCPA’s restrictions on unconsented-to calls using an artificial or prerecorded voice to “any residential telephone line,” arguing that the Second Circuit should stay the appeal under the primary jurisdiction doctrine pending the agency’s disposition of the appellant’s own petition on that very issue. *Bank v. Indep. Energy Grp LLC*, No. 15-2391, Br. for FCC as Amicus Curiae (doc. no. 97), at 12-16 (2d Cir. Apr. 6, 2016) (Exh. “4”).⁵

Here, the cornerstone issue in this dispute – whether soundboard calls are calls that utilize artificial or prerecorded voices to deliver a message – is a complex, technical, and policy-driven question within the FCC’s discretion. *Charvat v. Echostar Satellite LLC*, 630 F.3d 459, 467 (6th Cir. 2010) (holding that district court should have invoked the doctrine of primary jurisdiction to allow FCC to address issues involved in litigation; “Only the FCC can disambiguate the word[s]” in the TCPA and “all we can do is make an educated guess”); *United States v. Dish Network, LLC*, No. 09-3073, 2011 WL 475067, at *2 (C.D. Ill. Feb. 4, 2011) (granting stay pending FCC determination regarding the vicarious liability standard under the TCPA; “the FCC has comparatively greater expertise

⁵ As of the date of this Motion, the Second Circuit has neither ruled on the merits of the appeal or the FCC’s stay request.

than courts for addressing the meaning and bounds the statute's language"). The FCC has technical, TCPA-related expertise that is perfectly suited for evaluating complicated and ever-changing technology deployed in telemarketing calls, such as the soundboard calls that underlie Plaintiff's FAC. *Charvat*, 630 F.3d at 467; *Dish Network*, 2011 WL 475067, at *2. Further, the FCC is accustomed to considering these technological issues. *Charvat*, 630 F.3d at 467 ("The agency, no surprise, is familiar with the regulations *it* prescribed, and possesses expertise over the statute it implements[.]") (emphasis in original); *Pickens*, 2014 WL 4662512, at *2 (FCC "has expertise in the telecommunications area due to the fact that the TCPA . . . ha[s] been entrusted to its care for interpretation and implementation"); *Stewart*, 2014 WL 12614418, at *4 ("It is virtually without dispute that the FCC has comparative expertise with regard to the TCPA.").

As discussed above, NorthStar filed its Petition with the FCC requesting an expedited ruling that the soundboard technology used by Yodel to place calls to Plaintiff and the Class does not fall within the TCPA's definition of "artificial or prerecorded voice." In such situations where the FCC's pending ruling applies to the exact issue presented in the litigation, the primary jurisdiction doctrine is especially applicable. *See, supra*, at 3, 7; *Hart v. Comcast of Alameda*, No. 07-6350, 2008 WL 2610787, at *2 (N.D. Cal. June 25, 2008) (staying TCPA case where the FCC was considering petitions on "the precise issue raised by plaintiff" and, thus, "is already using its recognized expertise to consider some of the exact questions placed before the court here, in an effort to promote uniformity in .

... regulation”).⁶ Because the FCC currently is considering the precise soundboard issue involved in this case, the Court should stay this action on primary jurisdiction grounds.

2. Uniformity and Consistency in Applying the TCPA to Soundboard Calls is Required

The third and final primary jurisdiction factor also weighs heavily in favor of a stay. “[T]he TCPA *is* intended to have uniform application” and construed consistently amongst the courts. *Gomez v. Campbell-Ewald Co.*, No. CV 10–02007, 2013 WL 655237, at *3 (C.D. Cal. Sept. 19, 2013) (emphasis in original and citing *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012)), *vacated on other grounds*, 768 F.3d 871 (9th Cir. 2014)); *Diversified Consultants*, 2014 WL 1930885, at *3 (“It is proper for the FCC to make this determination [the interpretation of ‘capacity’ within the TCPA] in the first instance, such that uniformity and consistency in the application of the TCPA can be accomplished.”). To that end, “Congress has placed the uniform interpretation and comprehensive enforcement of the TCPA within the primary jurisdiction of the FCC.” *Barrera v. Comcast Holdings Corp.*, No. 14-cv-00343, 2014 WL 1942829, at *2 (N.D. Cal. May 12, 2014) (granting stay). “The main justifications for the rule of primary jurisdiction are the expertise of the agency deferred to and the need for a uniform interpretation of a statute or regulation.” *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000); *see also Sierra Club*, 248 F. Supp. 3d at 1207 (“One of the purposes of the primary jurisdiction doctrine is [to] promote uniformity and consistency in the regulation of the

⁶ *Cf. Bush v. Mid Continent Credit Servs., Inc.*, No. CIV-15-112-L, 2015 WL 5081688, at *3 (W.D. Okla. July 28, 2015) (denying motion to stay because FCC already had ruled on and “made [] clear” the exact issue raised by defendant in its motion).

business entrusted to the administrative agency.”). Indeed, the primary jurisdiction doctrine “seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency’s specialized knowledge, expertise, and central position within a regulatory regime.” *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003); *Passero*, 2014 WL 2257185, at *1.

Although the few courts that already have considered the issue have suggested strongly that soundboard calls are not artificial or prerecorded voices that deliver a message under the TCPA,⁷ the issue has not squarely been decided. It is very much one of first impression. Thus, NorthStar’s Petition is of particular import here. “[A]waiting the FCC’s forthcoming pronouncement[] will further clarify the law that Plaintiff relies upon and seeks to enforce in the present action, thereby ensuring that the TCPA is applied in a uniform manner.” *Stewart*, 2014 WL 12614418, at *5 (“Therefore, the Court concludes that the interests of uniform application of the TCPA, as well as judicial economy, are better served by abstaining from issuing a decision that may be undercut by an anticipated ruling from the FCC.”).

⁷ See, e.g., *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1995) (noting Congressional concern that “[c]ustomers who wanted to remove their names from calling lists were forced to wait until the end of taped messages to hear the callers’ identifying information. Prerecorded messages cluttered answering machines, and automated devices did not disconnect immediately after a hang up,” but noting that “prerecorded messages may be used [under the TCPA] if a live operator introduces the message”); *Fitzhenry v. ADT Corp.*, No. 14–80180, 2014 WL 6663379, at *6 (S.D. Fla. Nov. 3, 2014) (denying certification to class in action alleging that defendants’ soundboard calls constituted prerecorded messages on grounds that court would have to conduct individualized inquiry to determine whether each call utilized exclusively prerecorded snippets or whether some calls had a “mix of prerecorded and live messages”).

Indeed, the FCC's ruling will materially aid the Court in resolving this dispute, because, among other reasons, a ruling in favor of NorthStar effectively end this lawsuit. *See M3 USA*, 2017 WL 4868185, at *2 (primary jurisdiction test met because "the Court will inevitably benefit from the FCC's guidance" on the central – and possibly dispositive – issue" in the litigation); *Barrera*, 2014 WL 1942829, at *2 (granting stay because pending FCC petitions "address whether there is liability under the TCPA for the same conduct for which Plaintiff seeks to hold Defendant liable"). Specifically, while the FCC's determination need not be dispositive of the case in order for a stay to be granted, *see Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, 205 (1st Cir. 2000), in this instance, the FCC's ruling will likely resolve Plaintiff's and the Class's prerecorded message TCPA claim, and "it is more efficient to simply wait for the FCC to do what it has already been asked to do," than for this Court to proceed further with this litigation before the FCC's forthcoming ruling. *Gensel v. Performant Techs., Inc.*, No. 13-C-1196, 2015 WL 402840, at *3 (E.D. Wis. Jan. 28, 2015) (granting motion to stay pending FCC ruling on several petitions; "[t]he Court will be in a better position to proceed to judgment with definitive guidance from the FCC"). This is a practical and sensible outcome, which will conserve judicial and party resources, and promote clarity and uniformity. *Sierra Club*, 248 F. Supp. 3d at 1207 ("the court finds that defendants could be subjected to conflicting orders of both the court and the [agency], should the court rule in plaintiff's favor"); *Freeman*, 2015 WL 12804530, at *2 ("To avoid piecemeal and potentially inconsistent interpretations [of the TCPA], this Court has the discretion to promote clarity and uniformity by allowing the FCC to address the issue in the first instance.").

Given that the FCC is considering a core issue that not only needs to be decided in this litigation, but likely is dispositive of Plaintiff's and the Class's prerecorded message claim, and will require uniform application across the judiciary, the final primary jurisdiction doctrine factor weighs heavily in favor of a stay. "[A]llowing the FCC to resolve the foregoing issues prior to adjudicating the issues in the present action, in order to obtain the benefit of the FCC's guidance, is appropriate." *Glauser*, 2012 WL 259426, at *3 (staying putative TCPA class action because "the benefit to be provided by FCC guidance on potentially dispositive issues in this litigation outweighs the benefit to plaintiff in allowing the action to proceed").

B. The Court Can and Should Stay This Litigation in the Exercise of Its Own Discretion

While, as detailed above, a stay is well-warranted under the primary jurisdiction doctrine, the Court also has independent authority to stay this case pursuant to its inherent powers to control its docket. *Utd. Steelworkers*, 322 F.3d at 1227. As the Supreme Court has explained, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254.

A stay would promote judicial economy, conserve both the Court's and parties' resources, and promote uniformity of decision. As explained above, absent a stay, the Court risks issuing a decision that conflicts with, and is preempted by, the FCC's forthcoming ruling on the soundboard issue raised by NorthStar's Petition. *See Keim*, 199 F. Supp. 3d at 1368 n.4; *Murphy v. DCI Biologicals Orlando, LLC*, No. 6:12-cv-1459, 2013

WL 6865772, at *8 (M.D. Fla. Dec. 31, 2013); *Chavez*, 959 F. Supp. 2d at 1282; *see also* 28 U.S.C. § 2342(1) (federal Courts of Appeals have the “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the FCC” made reviewable by 47 U.S.C. § 402(a)). It cannot be disputed that “[t]he Court will be in a better position to proceed to judgment with definitive guidance from the FCC.” *Gensel*, 2015 WL 402840, at *3.

A stay pending the FCC’s rulings also would be in line with other courts that have stayed TCPA litigations based on their inherent powers to control their dockets. *See, e.g., Miller v. Directv, LLC*, No. 14-07579, 2015 WL 12656912, at *3 (C.D. Cal. Jan. 8, 2015) (“In the interests of conserving the parties’ and the Court’s resources and preventing inconsistent rulings and requests for reconsideration that may ensue, the Court instead *sua sponte* exercises its prudential authority to stay the action pending the FCC’s resolution of the . . . Petitions”); *Fontes v. Time Warner Cable Inc.*, No. 14-cv-02060, 2014 WL 2153919, at *2 (C.D. Cal. May 19, 2014) (“A stay is appropriate because it increases the likelihood that the Court will be able to address the parties’ arguments after the FCC has acted on the Petitions.”).

CONCLUSION

For the foregoing reasons, the Court should grant NorthStar’s Motion and stay this litigation pending the FCC’s ruling on NorthStar’s Petition.

Dated: January 3, 2019 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2019, a copy of the foregoing document was served upon all counsel of record via CM/ECF.

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Filer(s): NorthStar Alarm Services, LLC

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of NorthStar Alarm Services, LLC's
Petition for Expedited Declaratory Ruling

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CG Docket No. _____

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

**PETITION FOR EXPEDITED DECLARATORY RULING
CLARIFYING 47 U.S.C. § 227(b)(1)(B) OF
THE TELEPHONE CONSUMER PROTECTION ACT**

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January 2, 2019

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 Red. 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

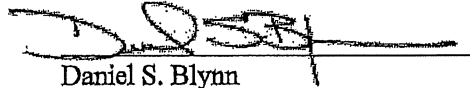
For the reasons expressed above, NorthStar respectfully asks that the Commission issue a

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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EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

COX OKLAHOMA TELECOM,
L.L.C.,

Plaintiff,

v.

No. CIV-04-1282-L

CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA,
and SOUTHWESTERN BELL
TELEPHONE, L.P., d/b/a SWBT
OKLAHOMA,

Defendants.

ORDER

On November 5, 1999, the Federal Communications Commission ("FCC") issued an order declaring that incumbent local exchange carriers must make their inside wire subloops available to competitive local exchange carriers.¹ Inside wire subloops consist of a pair of wires that run from a terminal, which is typically mounted on the outside wall of a building, to the first telephone jack in the customer's office or apartment. The rates, terms, and conditions for a competitor's access to an incumbent's telecommunications network, including the inside wire subloops, are governed by interconnection agreements between the carriers. If the parties cannot negotiate an agreement, they may petition for arbitration before the

¹Defendant Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma ("SWBT") is an incumbent local exchange carrier; plaintiff, Cox Oklahoma Telecom, L.L.C. ("Cox"), is a competitive local exchange carrier.

relevant state commission. 47 U.S.C. § 252. Cox and SWBT entered into negotiated agreements in 1997 and 2002; neither agreement, however, included any provisions for the lease of inside wire subloops at multiple tenant environments.²

On March 24, 2003, Cox filed an application before the Oklahoma Corporation Commission ("OCC") requesting that the OCC arbitrate the subloop lease issue. *See In re Application of Cox Oklahoma Telcom, L.L.C. for Arbitration of Open Issues Concerning Unbundled Network Elements*, Report and Recommendation of the Arbitrator at 1 (April 2, 2004). Cox argued that it should be granted direct physical access to SWBT's inside wire subloops, which it defined as access to SWBT terminals by its technicians without the involvement of SWBT technicians. *Id.* at 45. After a hearing, the arbitrator issued a recommended decision denying Cox's request. *Id.* at 45-47. The OCC adopted the arbitrator's decision with minor modifications on June 28, 2004. *In re Application of Cox Oklahoma Telcom, L.L.C. for Arbitration of Open Issues Concerning Unbundled Network Elements*, Order No. 491645 (June 28, 2004).

On October 6, 2004, Cox filed this action seeking to overturn the OCC's decision. Shortly thereafter, Cox filed a petition before the FCC for a declaratory ruling on the direct-access issue. The same date, Cox filed a motion in this court to stay these proceedings based on the primary jurisdiction of the FCC. On November 4, 2004, the FCC issued a Public Notice seeking comments on Cox's petition; the

²Multiple tenant environments include multi-unit apartment and office buildings.

comment period closed on December 21, 2004. The court held a hearing on Cox's motion to stay on January 6, 2005. At the hearing, the comments received by the FCC were made part of the record and the court reviewed the comments before reaching its decision on the motion to stay.

The Court of Appeals for the Tenth Circuit spoke at length on the doctrine of primary jurisdiction in Williams Pipe Line Co. v. Empire Gas Corp., 76 F.3d 1491 (10th Cir. 1996).

"The doctrine of primary jurisdiction ... is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." In essence, the doctrine represents a determination that administrative agencies are better equipped than the courts to handle particular questions, and that referral of appropriate questions to an agency ensures desirable uniformity of results. Put more concretely,

The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the "conventional experiences of judges" or "falling within the realm of administrative discretion" to an administrative agency with more specialized experience, expertise, and insight. Specifically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency.

The Supreme Court has clarified that the courts invoke the doctrine of primary jurisdiction when its twin purposes are served. The purposes of the doctrine are to: (1) ensure desirable uniformity in determinations of certain administrative questions, and (2) promote resort to agency experience and expertise where the court is presented with a question outside its conventional experience.

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Thus, while the court is ultimately the appropriate body to declare a tariff practice void as against public policy, it should nonetheless refer the initial determination to the regulatory agency where it may benefit from the agency's expertise and insight, and to ensure uniformity. . . . On the other hand, the Court has made clear that there is no need "to refer the matter of construction to the [agency] if that body has already construed the particular tariff at issue or has clarified the factors underlying it." Whenever the doctrine applies, "the judicial process is suspended pending referral of such issues to the administrative body for its views."

Id., at 1496-97 (citations omitted).


Based on these standards, the court finds that a limited stay of this matter is warranted. While the parties vehemently dispute whether the OCC's ruling comports with prior FCC precedent,³ there is no doubt that the precise issue of direct access to inside wire subloops in multiple tenant environments is currently pending before the FCC. "There is therefore a real possibility that a decision by this court prior to the FCC's response to [Cox's] petition would result in conflicting decisions". Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1040 (10th Cir. 1993).

³This dispute is not limited to this forum as the comments before the FCC attest.

As the OCC's decision remains in effect during the pendency of this appeal, none of the parties will be prejudiced by a limited stay to permit the FCC to rule on Cox's petition.

The Motion to Stay Based on Primary Jurisdiction of the Federal Communications Commission (Doc. No. 19) is GRANTED. This matter is STAYED until the FCC issues a dispositive ruling on Cox's October 27, 2004 Petition for Declaratory Ruling. Cox shall notify the court within **ten (10) days** of receipt of a decision from the FCC, at which point the court will lift the stay and set this matter for a scheduling conference.

It is so ordered this 18th day of January, 2005.



TIM LEONARD
United States District Judge

EXHIBIT 3

Kyle Wood
December 20, 2017

30(b)(6)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

-oOo-

1. ROBERT H. BRAVER, for)
himself and all individuals)
similarly situated,)

Plaintiff,)

v.)

1. NORTHSTAR ALARM SERVICES,)
LLC, a Utah Limited Liability)
Company;)

2. YODEL TECHNOLOGIES, LLC;)

3. DOES 2-10, UNKNOWN)
INDIVIDUALS,)

Defendants.)

Civil No. 5:17-cv-00383-F

Judge Stephen P. Friot

30(b)(6) DEPOSITION OF KYLE WOOD

Taken on December 20, 2017

at 8:11 a.m.

At the Offices of Alpine Court Reporting
243 East 400 South, Suite B101
Salt Lake City, Utah 84111

Reported by: Michelle Mallonee, RPR, CSR

Alpine Court Reporting
801-691-1000

Kyle Wood
December 20, 2017

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P R O C E E D I N G S

KYLE WOOD,

having been first duly sworn,
was examined and testified as follows:

EXAMINATION

BY MR. SOSTRIN:

Q. Good morning.

A. Morning.

Q. Could you please state and spell your name for
the record.

A. Kyle Wood, K-Y-L-E, W-O-O-D.

Q. Mr. Wood, you were deposed yesterday in your
individual capacity, right?

A. That's correct.

Q. Okay. This deposition today is noticed under
Rule 30(b)(6) of the Federal Rules of Civil Procedure.

You understand that you're still under oath?

A. Yes.

Q. And you understand that your testimony today is
on behalf of the company, Yodel Technologies?

A. Yes.

Q. Throughout the deposition, I might ask you some
questions about you as an individual, but I'll try to
clarify when I'm doing that, okay?

A. Okay.

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1 A. Yeah. I mean, that's -- that's a good reason
2 why they would increase agents is the affordability of
3 it.

4 Q. Okay. Are there any restrictions in the call
5 center where these calls are placed out of in India as to
6 how many calls one soundboard agent can handle at the
7 same time?

8 A. The soundboard agent only handles one call at
9 one time, and so it completely depends on that particular
10 agent's capability. They're never given another call
11 until they've moved past the last call.

12 Q. And how do you know that? Have you ever visited
13 the call center?

14 A. The technology is built -- they can't get more
15 than one call at a time.

16 Q. What if they had two phones that connected to
17 their -- phone lines that they could connect to at their
18 computer?

19 A. A computer can't really do that. You can't have
20 two cell phones on a computer running at the same time
21 and be able to run it. It's just -- it's not really -- I
22 mean, our system doesn't allow them to do that.

23 Q. Okay. Did NorthStar Alarm Services keep track
24 of the number of sales it made as a result of the Yodel
25 soundboard calls?

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1 y'all provided. And we heard from counsel that may not
2 be the case just based on how Exhibit 5 was compiled.
3 But, for example, if, in fact, 45 and 46 are duplicates,
4 then that's an issue in the export data that we have.

5 Is there -- is there any quick and easy way to
6 figure out where other duplicates may have occurred?

7 A. Without just diving into the data itself to
8 check for duplicates. That would be the only thing I can
9 think of.

10 Q. Okay. There wouldn't be some way in Yodel's
11 system to quickly identify duplicates?

12 A. No, not without a process being involved.

13 Q. Okay. Would that be a human process?

14 A. Yes.

15 Q. Are you aware of any instances where calls
16 reflected in the logs and reports produced by Yodel where
17 no soundboard or preordered voice snippets would have
18 been played?

19 A. Yes.

20 Q. Can you tell me where that might be, where that
21 might be the case?

22 A. I wouldn't be able to tell you by way of this
23 file, no. I can only say that by way of reports and
24 things of that nature that we've heard from quality
25 control agents and things like that that have listened to

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1 calls.

2 Q. Okay. And that would just be kind of across
3 Yodel's business. These are -- you're aware of
4 situations that occur in various campaigns that Yodel
5 carries out where calls happen where prerecorded voices
6 or messages aren't played?

7 A. Well, the only thing I can really think of is
8 if -- and this has happened -- the agents are new, they
9 get a call in, and instead of running the script that
10 they're supposed to run, they'll just transfer it to a --
11 to another agent. That happens from time to time.

12 Q. Okay. And there, you're referring to a
13 soundboard agent?

14 A. No, a live agent.

15 Q. Okay. So a live agent outbounds a call, and
16 there's no -- this is a live Yodel agent?

17 A. Soundboard agent.

18 Q. Okay. Yeah, well, now I'm really confused.

19 So this is an instance where a Yodel soundboard
20 agent initiates a call and, before playing any
21 prerecorded message, transfers it to a live agent?

22 A. Right.

23 MR. SOSTRIN: Object to misstates testimony.
24 Assumes facts.

25 Q. (BY MR. BEATY:) Okay. Mr. Wood, did the

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1 question that I just put on the floor, does that
2 adequately reflect what you were getting at a few minutes
3 ago?

4 A. Yeah. There are cases where agents will not
5 play any prerecorded prompts and they'll just transfer to
6 a live agent, yes.

7 Q. Okay. And thinking about the logs and the
8 reports that Yodel's produced in the case, is there --
9 short of listening to the audio recordings, is there any
10 way of finding out which calls that may have occurred on
11 in the NorthStar campaign?

12 A. No, not without listening to the recordings.

13 Q. All right. Yesterday, we talked a little bit
14 about one stage of the NorthStar campaign where a
15 soundboard agent began a call and then, assuming things
16 went well, the call was transferred on a Yodel live
17 agent. And assuming that went well, the call was then
18 transferred to a NorthStar agent.

19 Do you remember that --

20 A. Yep.

21 Q. -- general scenario?

22 A. Yes.

23 Q. Would it be possible for a call to have made it
24 to the Yodel live agent and then been dropped for some
25 reason, and that agent, that live agent, do an outbound

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1 call to start the process over again?

2 A. Yeah, that happens a lot.

3 Q. And that outbound call would be initiated by a
4 Yodel live agent, correct?

5 A. By a live agent, yeah.

6 Q. And in that situation, no prerecorded sound
7 snippets would be played?

8 A. Correct.

9 Q. Okay. And would those types of calls show up in
10 the logs and records and reports that y'all produced in
11 this case?

12 A. They would be inside of the outbound datalogs,
13 yeah.

14 Q. Okay. And would there be a way to identify
15 those calls versus the ones initiated by the soundboard
16 agents other than listening to the calls?

17 A. Not that I can think of, no.

18 Q. If you could dig through that pile and find
19 Exhibit 13, I would appreciate it. It's the Wells Fargo
20 activity summary. I don't know if that helps you or not.

21 (Exhibit-13 was shown to the witness.)

22 A. I got it, yeah.

23 MR. SOSTRIN: What did we say, 13?

24 MR. BEATY: Yes, sir.

25 Q. (BY MR. BEATY:) And do you have that in front

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1 A. I know that Red Dot does work in consent data,
2 and so it's possible -- it was possible that some of that
3 data was consent data. I don't know.

4 Q. Okay. I understand that contention, but what
5 I'm asking is: Did Red Dot ever make a specific
6 representation as to consent with respect to the data it
7 provided for the NorthStar campaign?

8 A. I don't know. I can't recall. It was a
9 conversation that happened years ago, so I'm not sure.

10 Q. Column L in Exhibit 5, "cc_agent"?

11 A. Yes.

12 Q. That refers to -- if that's populated, that
13 means that a soundboard agent came onto the call after it
14 was placed, correct?

15 A. Correct.

16 Q. Okay. And it's their job to use the soundboard
17 to play the prerecorded messages?

18 MR. ALLEN: Object to form.

19 Q. (BY MR. SOSTRIN:) Right?

20 A. That is what they are supposed to do, yeah.

21 Q. Okay. Are you aware of any specific instances
22 in the call data produced in this case where a soundboard
23 file -- where there is a record of a CC agent coming on
24 the line where a soundboard file was not played?

25 A. Not that I could specifically point out right

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1 now. But to say that there is that in there is, yeah,
2 that's definitely in there somewhere.

3 Q. The hang-up time, what's the typical -- at the
4 time a -- when the -- excuse me.

5 The bridge_time in Column O that we discussed,
6 that's the time at which the CC agent came on the line,
7 right? The soundboard agent?

8 A. Yes.

9 Q. Okay. What's the typical amount of time from
10 when a soundboard agent comes on the phone to the time
11 that the first prompt is played?

12 MR. BEATY: Objection. Form.

13 MR. ALLEN: I'll join.

14 THE WITNESS: Typically, I would say -- that's
15 very subjective, I will say that first. But under normal
16 circumstances where you would connect to a person and it
17 does pick up and everything flows as it should and
18 there's somebody on the phone, then it would probably be
19 about five to six seconds.

20 Q. (BY MR. SOSTRIN:) Okay. And, in fact, you
21 would be -- if it was taking longer than that, then you
22 would think that this is not working properly and this
23 is something we would need to address because this is
24 not how you're designing the system to work, right?

25 MR. ALLEN: Object to form.

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1 A. Okay.

2 FURTHER EXAMINATION

3 BY MR. BEATY:

4 Q. Just two clarifications, just so I'm on the same
5 page as everybody else apparently.

6 During the NorthStar campaign, could a live
7 agent in India use the Yodel dialer to make or place an
8 outbound call?

9 A. Yes. Yeah.

10 Q. Okay. And any such calls like that would be
11 contained in the outbound lead logs that have been
12 produced by Yodel?

13 A. Yes, if it was on the Yodel dialer, it would be
14 inside of here.

15 Q. Okay.

16 A. Inside of Exhibit A [sic].

17 Q. And if a call is made using Yodel's dialer, does
18 the Column R on Exhibit 5, the switch column, does it
19 populate that with the Yodel server?

20 A. Column R is a server. It doesn't represent what
21 they were doing necessarily or anything like that, just
22 where the agent was. And any agent can be on any server,
23 depending on how we -- how the system routes it. It's
24 a -- it's kind of a load balancing system.

25 Q. Okay. So if a call is made using the Yodel

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CERTIFICATE

State of Utah)
 ss.
County of Salt Lake)

I hereby certify that the witness in the foregoing proceeding was duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken at the time and place herein named;

That the deposition is a true record of the witness' testimony;

That the testimony of said witness was reported by me in stenotype and thereafter transcribed into typewritten form;

I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action, and that I am not interested in the event thereof.

Michelle Mallonee

Michelle Mallonee, RPR, CSR
Utah CSR #267114-7801
Expires May 31, 2018

EXHIBIT 4

15-2391

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION
AS AMICUS CURIAE

IN THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

TODD C. BANK,

PLAINTIFF-APPELLANT,

v.

INDEPENDENCE ENERGY GROUP LLC and
INDEPENDENCE ENERGY ALLIANCE LLC,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

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ADMINISTRATIVE DECISIONS

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OTHER AUTHORITIES

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<i>Petition for Declaratory Ruling to Clarify the Scope of Rule 64.1200(a)(2), CG Docket No. 02-278, filed by Todd C. Bank on Mar. 7, 2016</i>	<i>2, 7, 12, 15, 17</i>
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PRELIMINARY STATEMENT

This brief is submitted in response to this Court's March 8 order requesting that the Federal Communications Commission file an *amicus curiae* brief in the above-captioned appeal.

The underlying suit was brought by plaintiff Todd C. Bank against defendants Independence Energy Group LLC and Independence Energy Alliance LLC (collectively, Independence) under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 because Independence placed a call to a phone at Bank's home without his consent and using an artificial or prerecorded voice. The appeal turns on the meaning of the term "residential telephone line" as used in the TCPA's restrictions on unconsented-to calls using an artificial or prerecorded voice to "any residential telephone line." *See* 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3). The district court (Gleeson, J.) found that the TCPA's artificial/prerecorded voice call restrictions did not apply to Plaintiff's telephone number, which, although registered with a telephone company as a residential line, was held out for business purposes.

The TCPA and the Commission's regulations do not define the term "residential telephone line," and the Commission has never definitively interpreted that phrase as used in the TCPA. Nor has the Commission resolved the question of

whether, or under what circumstances, a telephone line in a home can support business activities and remain a “residential” line.

Implicitly recognizing that the interpretation of the term “residential telephone line” has not been definitively settled by the FCC, Bank has filed a petition for a declaratory ruling with the agency, asking it to clarify that the TCPA’s restrictions on artificial or prerecorded voice calls apply to calls made to a telephone line used for a home business so long as the line is registered with the service provider as a residential line.¹ At the same time, Bank has asked this Court to stay this appeal pending the FCC’s resolution of his petition for a declaratory ruling. On March 31, 2016, the Commission issued a public notice seeking comment on Bank’s petition for declaratory ruling.²

In the Commission’s view, the proper course is for this Court to grant Bank’s motion for a stay and, consistent with the doctrine of primary jurisdiction, hold this case in abeyance pending the Commission’s disposition of the petition. The term “residential telephone line” is a fundamental element of the restrictions

¹ See *Petition for Declaratory Ruling to Clarify the Scope of Rule 64.1200(a)(2)*, CG Docket No. 02-278, filed by Todd C. Bank on Mar. 7, 2016 (Petition).

² See *Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by Todd C. Bank Regarding the TCPA’s Provision Concerning Prerecorded Calls*, DA 16-341 (Mar. 31, 2016) (Public Notice) (Attachment A).

on artificial or prerecorded voice calls contained in the TCPA, a statute that the Commission implements and administers. It is accordingly appropriate for this Court to stay its hand to give the Commission an opportunity to address the meaning and scope of the term (as Bank has now requested) in the first instance.

STATEMENT OF INTEREST OF AMICI CURIAE

The Commission has primary responsibility for implementing and interpreting the TCPA. The Commission also has an interest in ensuring that the TCPA, a federal statute, is given a uniform interpretation by the courts and that it is applied in a manner that furthers one of its principal goals – “protect[ing] residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.” 47 U.S.C. § 227(c)(1). The Court specifically requested that the Commission file an *amicus* brief in this case.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The TCPA regulates, among other things, the use of telemarketing – the marketing of goods or services by telephone. In 1991, Congress found that telemarketing had grown substantially and that calls seeking to sell products and services “can be an intrusive invasion of privacy.” Pub. L. No. 102-243, §§ 2(4), 2(5), 105 Stat. 2394 (1991). *See* 47 U.S.C. § 227 note. Congress further found that “[o]ver half the States now have statutes restricting various uses of the telephone

for marketing, but telemarketers can evade their prohibitions through interstate operations.” TCPA § 2(7). “Under the circumstances,” a congressional committee explained, “federal legislation [was] needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards.” H.R. Rep. 102-317 (1991), at 10. Congress accordingly enacted the TCPA to give the FCC the authority to regulate interstate and intrastate telemarketing and other types of calling. *See generally* 47 U.S.C. § 227. And the Commission is explicitly vested with the power to “prescribe regulations to implement” the statute’s provisions. *E.g.*, 47 U.S.C. §§ 227(b)(2), 227(c)(2).

Among its other provisions, the TCPA generally makes it unlawful for any person within the United States to “initiate any telephone call to any residential telephone line using an artificial or prerecorded voice . . . without the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(B). *Accord* 47 C.F.R. § 64.1200(a)(2) (implementing statutory prohibition). The statute also authorizes the Commission to establish a “do-not-call” registry that “residential telephone subscribers” can use to notify telemarketers that they object to receiving telephone solicitations. 47 U.S.C. § 227(c)(1)-(4). Under the Commission’s regulations establishing such a registry, no person or entity is permitted to “initiate any telephone solicitation . . . to [any] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry.” 47

C.F.R. § 64.1200(c)(2). In addition, no telemarketer may call a residential telephone subscriber unless the telemarketer has procedures for maintaining a list of persons who do not wish to be called by it. 47 C.F.R. § 64.1200(d).

Along with empowering the FCC to enforce the statute, *see* 47 U.S.C. §§ 503(b)(1)(B); 227(e)(5), the TCPA permits enforcement by state authorities, 47 U.S.C. § 227(e)(6), and establishes a private right of action allowing a person or entity to bring an action based on a violation of the TCPA's telemarketing provisions, and to recover the actual monetary loss or \$500 for each such violation, whichever is greater. 47 U.S.C. §§ 227(b)(3), (c)(5).

II. THIS LITIGATION

Bank commenced this action against Independence in the United States District Court for the Eastern District of New York. In his complaint, Bank asserted that Independence violated the TCPA by placing a call using an artificial or prerecorded voice to one of the three telephone lines in Bank's residence. Complaint ¶¶8, 13 (SPA-6, SPA-7); Plaintiff's Responses to Defendants' First Set of Interrogatories (SPA-19).

Independence moved to dismiss Bank's claims. The company argued that its call did not violate the TCPA because it was made to a telephone line that Bank used for business purposes and therefore was not a residential telephone line subject to the protections of the TCPA. *Bank v. Indep. Energy Grp., LLC*, No. 12

Civ. 01369 (E.D.N.Y. July 23, 2015), ECF No. 34. The court denied the motion to dismiss, holding that it lacked “sufficient evidence . . . to determine whether the telephone line at issue is ‘residential.’” A-21.

After the parties engaged in discovery, Independence filed a motion for summary judgment. *Bank v. Indep. Energy Grp., LLC*, No. 12 Civ. 01369 (E.D.N.Y. July 23, 2015) ECF No. 58. In its motion, Independence again argued that Bank’s number, which he used for his law practice, was not a residential line, and therefore not covered by the TCPA’s pre-recorded call restrictions. *Id.* As support, Independence relied on facts gained through discovery: The evidence demonstrated that Bank used this number (a) as his law office telephone number in pleadings and court filings, in professional correspondence, on his business card, and on his attorney registration form with the New York State Unified Court System; (b) as his contact number on Avvo, a directory of attorneys; and (c) as an identifying number on tax returns for his law practice. *Id.*

The court granted the motion for summary judgment, holding that “no reasonable juror could find that the [telephone number] is residential.” A-38. In support of its ruling, the court found that “Bank held out the [telephone number] to the public as a business line.” *Id.* The court noted that Bank did not dispute that he “provides the [telephone] number on his business card, professional letterhead for his law practice, and in pleadings and court filings, and he provides it to clients,

prospective clients, other attorneys, and business contacts.” *Id.* Accordingly, the district court ruled that the call was not made to a residential line under the TCPA. *Id.*

Bank appealed the grant of summary judgment to this Court, and the case was argued on March 2, 2016. On March 7, Bank filed a petition for declaratory ruling with the FCC, asking the agency “[to] issue a declaratory ruling clarifying that the restrictions of the [TCPA] . . . apply to calls made to home-business telephone lines that are registered with the telephone-service provider as residential lines.” *Id.* at 10.³ The same day, he filed a motion with this Court seeking a stay of this appeal pending the FCC’s resolution of his petition. ECF No. 83, Exh. A. Independence has filed an opposition to Bank’s petition for declaratory ruling, but has not filed a response to Bank’s motion for a stay by this Court.

On March 31, 2016, the Commission issued a public notice seeking comment on Bank’s petition for a declaratory ruling. Public Notice. Under the schedule set forth in the notice, comments on the petition are due May 2; reply

³ In his petition, Bank cited section 64.1200(a)(2) of the Commission’s rules, but the Commission assumes Bank was referring to the current section 64.1200(a)(3), which currently governs artificial or prerecorded voice calls to residential lines. The Commission’s relevant rule was amended and renumbered in February 2012, *see Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830 (2012), after the call at issue in Bank’s underlying litigation. Complaint ¶8 (SPA-6) (Bank received call at issue on Jan. 17, 2012).

comments are due May 17. After that date, Bank's petition for declaratory ruling will be ripe for disposition by the Commission.

ARGUMENT

The FCC has never interpreted the term "residential telephone line" for purposes of the TCPA's restrictions on calls using an artificial or prerecorded voice. This Court should defer resolution of this appeal to allow the Commission the opportunity to do so.

I. THE COMMISSION HAS NOT YET DEFINED THE TERM "RESIDENTIAL TELEPHONE LINE."

The TCPA prohibits any person from initiating a telephone call "to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior . . . consent of the called party, unless the call is initiated for emergency purposes . . . or is exempted by rule or order by the Commission" 47 U.S.C. § 227(b)(1)(B). The Commission's implementing rules likewise impose the same general prohibition on calls using an artificial or prerecorded voice (although the rules use the term "residential line" rather than "residential telephone line"). 47 C.F.R. § 64.1200(a)(3). The TCPA does not define the term "residential telephone line," and the Commission has never provided a definitive

interpretation—through a formal rule or otherwise—either of that term or of the term “residential line” used in its rules.⁴ Dway

And while the Commission has the statutory authority to extend the ban on artificial/prerecorded voice calls to business lines, *see* 47 U.S.C. § 227(b)(2)(A), it has not done so. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8756 n.7 (1992) (concluding that “additional prohibitions on prerecorded voice messages calls” were not “necessary at this time”).

Although the Commission has not interpreted the terms “residential telephone line” or “residential line” for purposes of the statutory and regulatory restriction on calls using an artificial or prerecorded voice, it has on two occasions touched upon the issue of who is a “residential telephone subscriber[.]” under the Commission’s do-not-call rules. Neither discussion, however, clearly resolves the issue in this appeal.

⁴ The Commission has by rule exempted certain categories of calls from the TCPA’s prohibition on calls using an artificial or prerecorded voice to residential lines, but in so doing did not interpret what qualified as a “residential line.” *See* 47 C.F.R. § 64.1200(a)(3)(i)-(v) (exempting calls made for emergency purposes, noncommercial calls, calls not involving advertisements or telemarketing, calls on behalf of tax-exempt organizations, and calls delivering certain health care messages).

In 2005, the Commission acknowledged that there was nothing to preclude someone from adding a business or “home-based business[]” number to the national do-not-call registry. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd 3788, 3793 ¶ 14 (2005). The do-not-call registry is available to “residential telephone subscribers” who do not wish to receive telephone solicitations. *See* 47 C.F.R. § 64.1200(c)(2). The Commission explained that because the do-not-call registry applies to “residential subscribers,” it “does not preclude calls to businesses.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Fcd at 3793 ¶ 14. Thus, “[t]o the extent that some business numbers have been inadvertently registered on the national registry,” the agency explained, “calls made to such numbers will not be considered violations of our rules.” *Id.* With respect to calls to “home-based businesses,” however, the Commission said only that it would “review such calls as they are brought to our attention to determine whether or not the call was made to a residential subscriber.” *Id.* The FCC nowhere outlined the facts and circumstances it would take into consideration in conducting such a review, and has not since then had occasion to elaborate further on the analysis it might employ in determining whether or not a so-called “home-based business” qualifies as a “residential subscriber” for purposes of the do-not-call rules.

Two years earlier, the Commission exercised its authority to establish a national “do-not-call” database of “residential telephone subscribers” who object to receiving telephone solicitations. *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003). See 47 U.S.C. §227(c)(1), (3). But that action also sheds no light on the issue in this appeal.

In adopting the do-not-call registry, the Commission concluded that the do-not-call database “should allow for the registration of wireless telephone numbers.” *Id.* at 14037-38 ¶¶ 33-35. In so doing, the Commission “presume[d]” that “wireless subscribers who ask to be put on the national do-not-call list” are “‘residential subscribers,’” noting that “[a]s a practical matter . . . determining whether any particular wireless subscriber is a ‘residential subscriber’ may be more fact-intensive than making the same determination for a wireline subscriber.” *Id.* at 14039 ¶ 36. But the Commission stressed that “[s]uch a presumption . . . may require a complaining wireless subscriber to provide further proof of the validity of that presumption should we need to take enforcement action.” *Id.* Again, the Commission did not elaborate on the considerations it would take into account in determining whether a wireless telephone subscriber is a “residential” subscriber for purposes of the do-not-call rules, and has had no occasion to do so since.

**II. THIS CASE SHOULD BE HELD IN ABEYANCE PENDING
THE FCC'S DISPOSITION OF BANK'S PENDING PETITION
FOR DECLARATORY RULING.**

Effectively recognizing that the Commission has not definitively interpreted the meaning of the term “residential telephone line” for purposes of the TCPA’s restrictions on calls using an artificial or prerecorded voice, Bank has filed a petition for declaratory ruling with the Commission to clarify the scope of its rules, and has asked this Court to stay this appeal pending the FCC’s disposition of that petition. *See* ECF 83 (motion for stay) & Attachment A (petition for declaratory ruling).

The Commission has issued a public notice requesting comment on Bank’s petition. In that public notice, the Commission asks, among other things, whether it should clarify the statute and its rules to “(1) establish . . . a bright-line test for identifying a ‘residential line’ under the prohibition against unconsented-to calls using an artificial or pre-recorded voice, (2) adopt some other bright-line test to identify such lines, or (3) identify some other method, such as a multi-factor analysis, for determining whether a telephone line is a ‘residential line’ for purposes of the artificial prerecorded voice call prohibition.” Public Notice at 2.

By vesting the Commission with the authority to promulgate regulations implementing the TCPA’s restrictions on calls employing an artificial or prerecorded voice, Congress authorized the Commission to interpret the undefined

terms of the statute. *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 781 F.3d 1245, 1256-57 (11th Cir. 2015); *Satterfield v. Simon & Schuster*, 569 F.3d 946, 953 (9th Cir. 2009). There is no reason for this Court to address this open issue of statutory and regulatory interpretation before the Commission has a reasonable opportunity to resolve Bank's pending petition for declaratory ruling. Under the schedule set forth in the Public Notice, the Commission will have the issue before it for disposition in the normal course by May 17, 2016.⁵

In addition, the primary jurisdiction doctrine permits the federal courts to postpone the consideration of issues within "the special competence of an administrative body" while the issues are presented to the appropriate administrative agency for its consideration. See *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956); *Reiter v. Cooper*, 507 U.S. 258, 268 (1993); *Tassy v. Brunswick Hospital Center, Inc.*, 296 F.3d 65, 73 (2d Cir. 2002). In such case, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.*

⁵ Because the Commission has requested public comment on Bank's petition for declaratory ruling, Commission counsel are not in a position to prejudge the Commission's ultimate disposition of this question in an *amicus* brief.

The primary jurisdiction doctrine thus provides a mechanism for federal courts to “obtain the benefit of the expertise and experience” of an administrative agency regarding issues within the agency’s regulatory jurisdiction, *ALLTEL Tennessee, Inc. v. Tennessee Pub. Serv. Comm’n*, 913 F.2d 305, 309 (6th Cir. 1990), while at the same time promoting “[u]niformity and consistency in the regulation of business entrusted to a particular agency.” *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *ALLTEL*, 913 F.2d at 309. *See generally Charvat v. Echostar Satellite, LLC*, 630 F.3d 459 (6th Cir. 2010) (referring TCPA issue to FCC under primary jurisdiction doctrine).

While there is no “fixed formula” for application of the doctrine of primary jurisdiction, this Court’s analysis has “generally focused on four factors”: (1) whether the matter involves technical or policy consideration with the agency’s particular expertise; (2) whether the question is particularly within the agency’s discretion; (3) whether there exists a substantial danger of inconsistent rulings, and (4) whether a prior application has been made to the agency. *See Ellis v. Tribune Television Co.*, 443 F.3d 71, 82-83 (2d Cir. 2006).

All four factors weigh in favor of the application of the primary jurisdiction doctrine here. First, the issue arises under the TCPA, which the FCC administers, and, as this Court has recognized, “the Federal Communications Commission has a special understanding about matters involving communications by radio,

television, wire, satellite, and cable.” *Hoxhallari v. Gonzales*, 468 F.3d 179, 186 (2d Cir. 2006).

Second, there can be no dispute that the question presented in this case falls within the scope of the Commission’s congressional mandate. The TCPA was enacted to create a “uniform regulatory scheme” for telemarketing and other calling practices. *2003 Order*, 18 FCC Rcd at 14064 ¶ 83 (discussing the TCPA’s legislative history). To that end, Congress authorized the FCC to regulate both interstate and intrastate telemarketing and other calling practices, and directed the Commission to promulgate the regulations required to implement its provisions. 47 U.S.C. §§ 227(b)(2), (c)(1)-(4). The Commission is therefore well suited to decide the proper interpretation of that statute.

Third, allowing the Commission to dispose of Bank’s petition for declaratory ruling will give the agency an opportunity to adopt an interpretation of the TCPA’s provisions to which this Court can defer, thereby reducing the possibility that this Court and the Commission might analyze or apply the TCPA in an inconsistent manner.

Finally, although this lawsuit predated Bank’s application to the agency, he has now asked the agency to clarify the scope of its rules in a manner that might well resolve this appeal.

In the end, as this Court has recognized, “[C]ourts should be especially solicitous in deferring to agencies that are simultaneously contemplating the same issues.” *Ellis*, 443 F.3d at 88. “A federal agency and a district court are not like two trains, wholly unrelated to one another, racing down parallel tracks towards the same end.... [I]t is desirable that the agency and the court go down the same track—although at different times—to attain the statute’s ends by their coordinate action.” 443 F.3d at 92 (citing *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994)).

* * *

In sum, we agree with Bank that it would be appropriate for this Court to stay this appeal pending the disposition of the pending petition for declaratory ruling. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Once the FCC has addressed the petition, the appeal can then resume before this Court with the benefit of the Commission’s interpretation of the TCPA and its implementing regulations.

CONCLUSION

This case should be stayed pending the disposition of Bank's petition for declaratory ruling, filed on March 7, 2016, and now pending before the FCC in CG Docket No. 02-278.

Respectfully submitted,

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/s/ Jacob M. Lewis

Lily S. Farel
Counsel

Federal Communications
Commission
Washington, D.C. 2055440

April 6, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

TODD C. BANK,

PLAINTIFF-APPELLANT,

v.

INDEPENDENCE ENERGY GROUP LLC AND
INDEPENDENCE ENERGY ALLIANCE LLC,

DEFENDANTS-APPELLEES.

No. 15-2391

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby
certify that the accompanying Brief for Respondents in the captioned case
contains 3,629 words.

This brief also complies with the typeface requirements of Fed. R.
App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6)
because this brief has been prepared in a proportionally spaced typeface using
Microsoft Word 2013 in 14-point Times Roman font.

/s/ Jacob M. Lewis

Jacob M. Lewis
Associate General Counsel
Federal Communications Commission

Attachment A



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 16-341

Released: March 31, 2016

**CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON
PETITION FOR DECLARATORY RULING FILED BY TODD C. BANK
REGARDING THE TCPA'S PROVISION CONCERNING PRERECORDED CALLS**

CG Docket No. 02-278

Comment Date: May 2, 2016

Reply Comment Date: May 17, 2016

With this Public Notice, we seek comment on a petition for declaratory ruling filed by Todd C. Bank (Bank)¹ asking the Commission to clarify whether a telephone line in a home that is used for business purposes can be considered a "residential" line under the Telephone Consumer Protection Act (TCPA)² and the Commission's implementing rules. The Commission's rules require in pertinent part that a caller obtain prior express consent from the called party before initiating a telemarketing call to a residential telephone line using an artificial or prerecorded voice.³

Bank is an attorney with a law practice based in his home.⁴ The telephone number that Bank uses for his business is listed publicly as both a business and a residential number.⁵ Bank asks the Commission to clarify the scope of its rules to establish a "bright-line" test that when a telephone line is

¹ See *Petition for Declaratory Ruling to Clarify the Scope of Rule 64.1200(a)(2)*, CG Docket No. 02-278, filed by Todd C. Bank on Mar. 7, 2016 (*Petition*).

² The TCPA is codified as 47 U.S.C. § 227. The Commission's implementing rules are codified as 47 CFR § 64.1200.

³ 47 CFR § 64.1200(a)(3). We note that although the petitioner cites section 64.1200(a)(2) of the Commission's rules in his petition, he appears to be referring to the current section 64.1200(a)(3), which concerns artificial or prerecorded voice calls to residential lines. The Commission's relevant rule was amended and renumbered in February 2012, see *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012), after the call at issue in the petitioner's underlying litigation, see *Petition* Ex. A at 2 (Bank received call at issue on Jan. 17, 2012).

⁴ *Petition* at 1.

⁵ *Id.* at 1.

provided as “residential” service by the telephone service provider, it is subject to the Commission’s rules prohibiting calls using an artificial or prerecorded voice to a “residential line.”⁶

We seek comment on whether the Commission should, as a matter of clarifying the statute and its rules, (1) establish such a bright-line test for identifying a “residential line” under the prohibition against unconsented-to calls using an artificial or pre-recorded voice, (2) adopt some other bright-line test to identify such lines, or (3) identify some other method, such as a multi-factor analysis, for determining whether a telephone line is a “residential line” for purposes of the artificial/prerecorded voice call prohibition. We seek comment on which factors should be considered by the Commission were it to adopt a multi-factor approach. We also seek comment on any other issues raised in the *Petition*.

Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁷ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation

⁶ 47 CFR § 64.1200(a)(3) (implementing 47 U.S.C. § 227(b)(1)(B)).

⁷ 47 CFR §§ 1.1200 *et seq.*

must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

FOR FURTHER INFORMATION CONTACT: Robert Finley, Consumer and Governmental Affairs Bureau, Federal Communications Commission, (202) 418-7835 or Robert.Finley@fcc.gov.

-FCC-

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TODD C. BANK,

Plaintiff-Appellant,

v.

INDEPENDENCE ENERGY GROUP LLC,
and INDEPENDENCE ENERGY ALLIANCE
LLC,

Defendants-Appellees.

No. 15-2391

CERTIFICATE OF SERVICE

I, Jacob M. Lewis, hereby certify that on April 6, 2016, I electronically filed the foregoing Brief for Federal Communications Commission as Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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/s/ Jacob M. Lewis

EXHIBIT B

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF OKLAHOMA

3
4 ROBERT H. BRAVER,

5 Plaintiff,

6 vs.

Case No. CIV-17-383-F

7 NORTHSTAR ALARM SERVICES, LLC,
8 and YODEL TECHNOLOGIES, LLC,

9 Defendants.

10
11
12 TRANSCRIPT OF MOTION HEARING
13 BEFORE THE HONORABLE STEPHEN P. FRIOT
14 UNITED STATES DISTRICT JUDGE

15 MARCH 6, 2019

16 2:30 P.M.
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25 Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

Tracy Thompson, RDR, CRR
United States Court Reporter
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1 (PROCEEDINGS HAD MARCH 6, 2019.)

2 THE COURT: Good afternoon. We're here in Civil
3 17-383, Robert Braver v. Northstar Alarm Services and Yodel
4 Technologies, for a motion hearing.

5 Counsel will please give your appearances.

6 MR. CATALANO: Paul Catalano for the plaintiff, Your
7 Honor. And Mr. Braver is also here with me.

8 THE COURT: Okay. Thank you.

9 Don't all talk at once.

10 MS. ZACHRITZ: Anne Zachritz for Yodel Technologies.

11 MR. MATULA: Brian Matula for Northstar.

12 MR. FREELAND: Stephen Freeland, also for Northstar,
13 Your Honor.

14 THE COURT: Okay. Thank you.

15 So that we're all together as to where we stand as we
16 speak, I certainly do have the benefit of some good briefing on
17 the motion to stay, which is the matter before the Court this
18 afternoon. I've got the motion to stay at Docket Entry Number
19 88.

20 And, now, Yodel -- is that the right pronunciation? Is it
21 Yodel or Yodel or what?

22 MS. ZACHRITZ: I believe it's Yodel, Your Honor.

23 THE COURT: Yodel. Forgive me if I lapse on that.

24 Yodel filed a motion for joinder, I don't know if that's
25 docketed as a motion or not, but if it's docketed as a motion,

1 then it's granted. I take it simply as being Yodel's joinder,
2 if you will, self-executing joinder in the motion.

3 We also have plaintiff's response at Docket Entry Number
4 96, a reply brief at 97, a supplemental brief at 99, and
5 plaintiff's supplemental brief at 102, so the matter has been
6 briefed to a fare-thee-well.

7 I think I have a pretty decent understanding of how it
8 shapes up, but it seems like sometimes the longer I study it,
9 the more questions I have, which is why I have set the matter
10 for hearing.

11 I think perhaps the best way to proceed is for me to
12 simply invite the defendant to present the motion and I'll ask
13 my questions as we go.

14 MR. FREELAND: Thank you, Your Honor. And thank you
15 for your time this afternoon on this motion. Obviously, it's
16 of great importance to my client, Northstar.

17 As I said, I'm Steve Freeland from the Venable Law Firm
18 here on Northstar's behalf.

19 And one of the things I wanted to address at the outset,
20 Your Honor, I don't know if this is on your list of questions,
21 but I want to jump right into it and deal with it at the
22 outset, which is the reason for why we filed the petition with
23 the FCC and the instant motion to stay with Your Honor some 21
24 months after the litigation was filed.

25 There's no question that there was some delay there, but

1 I'd like to explain -- give a little bit more flavor for the
2 reason for the delay.

3 So up until Your Honor's ruling certifying the class,
4 which was on October 15th of last year, this was a case that
5 was worth about \$1,000. The plaintiff, Mr. Braver, alleges
6 only two calls in his complaint; the TCPA provides for \$500 per
7 call for actual damages. He's not seeking actual damages so we
8 assume he's seeking the \$500 per call. Up until that point,
9 the case was worth only about \$1,000.

10 After that point, and given the size of the class, the
11 case became worth potentially over a hundred million dollars.
12 That's before trebling under the TCPA.

13 THE COURT: Whether it was a \$1,000 case or a \$100
14 million case, it still would have required me, as it may yet,
15 to make some rulings that would be of considerable consequence
16 to the defendants; am I right about that?

17 MR. FREELAND: Without question, that's correct, Your
18 Honor.

19 THE COURT: So in my former life, I had some cases
20 that on paper didn't involve a whole pile of money, but my
21 client regarded the issues as being of surpassing importance.
22 Why is this -- why has this not been that case from your
23 perspective from day one?

24 MR. FREELAND: Sure, Your Honor.

25 So my firm didn't get involved in the case until December

1 of last year. I'm not sure what the strategy calls were by
2 prior counsel in the case. I do know that up until that point,
3 and as Your Honor points out in the order certifying the class,
4 my client, Northstar, didn't make any other calls at issue
5 here, and so the only way that my client could be held liable
6 is under vicarious liability theory through principal-agent.

7 Again, I'm just guessing here, but one of the things prior
8 counsel may have considered is there's a lot of cost that goes
9 into filing a petition with the FCC and then submitting
10 comments with the FCC and then submitting reply comments, which
11 I can talk about a little bit more specifically here in a
12 second, and they may have said, you know, we've got a good
13 vicarious liability case, we can just proceed on that. You
14 know, since the case is only worth \$1,000, why incur tens of
15 thousands of dollars to go to the FCC if there isn't that much
16 exposure.

17 Obviously, after Your Honor certified the class, that all
18 changed. And when we came in on December 6, 2018, is when my
19 firm noticed an appearance in the case; that was right in the
20 middle of prior counsel petitioning the Tenth Circuit for an
21 interlocutory appeal of Your Honor's class certification
22 ruling. And while prior counsel fought hard there, they lost.

23 And the Tenth Circuit came down -- I believe it was
24 December 13th -- denying Northstar's petition for interlocutory
25 review of Your Honor's certification order.

1 Thereafter, my firm prepared the petition for expedited
2 declaratory ruling to file with the FCC. We worked over the
3 holidays to finalize it. We filed it on January 2nd. We moved
4 for a stay in this Court on January 3rd.

5 And, you know, not long after that, the federal government
6 shut down and I think it was shut down for about 34 days, and
7 the FCC, almost immediately upon reopening, put out its notice
8 for public comment on February 13th of this year. And we filed
9 that notice of supplemental authority that Your Honor
10 referenced earlier alerting the Court that that happened.

11 And as it stands right now, Your Honor, 11 days from now
12 is when comments may be filed with the FCC on Northstar's
13 petition. And that's not just comments from Northstar, but
14 Plaintiff Braver can submit comments as well.

15 And then, really, I'm getting into sort of the standard
16 for primary jurisdiction in the Tenth Circuit. One of the
17 considerations under the Tenth Circuit's decision in TON
18 Services, is is there a need for uniformity in an industry or
19 in an area that a federal agency has been delegated authority
20 to regulate. This is one of those areas.

21 I don't think there's any question that the issue before
22 Your Honor about whether the calls -- the technology used to
23 place the calls at issue in this case, whether that's covered
24 by the TCPA or not is a question of first impression.

25 And not one of the cases -- and I believe this is

1 correct -- not one of the cases that we cite or that plaintiff
2 cites has ever dealt with that question on the merits. It's
3 the first time that it's come up.

4 THE COURT: What particular -- and if you would, do
5 your best to speak a little more slowly.

6 MR. FREELAND: Sure.

7 THE COURT: But what particular facet of the calls or
8 the sound that the recipient of the call hears that makes it a
9 question of first impression under the -- or within the ambit
10 of the phrase "artificial or prerecorded voice to deliver a
11 message"?

12 What particular -- this is probably -- I'm probably rising
13 to the bait just a little bit and this may not be necessary for
14 me to get into this afternoon, but that does pique my
15 curiosity.

16 MR. FREELAND: Absolutely, Your Honor.

17 So the plaintiffs present a very simplistic view of it,
18 which is soundboard calls play snippets of prerecorded
19 messages, therefore, under the plain meaning of the statute,
20 it's an artificial or prerecorded voice to deliver a message.

21 We are of a contrary view, as we lay out in the brief and
22 in our petition that we filed with the FCC, which is that it's
23 a message. Well, soundboard doesn't deliver a message, it
24 delivers multiple messages.

25 And in light of the FCC's recent holdings and other

1 rulings about the level of human involvement that is involved
2 in telecommunications technology, not in this space, but in
3 connection with what's called the auto-dialer provisions of the
4 TCPA, and that's where, you know, you have a system that just
5 generates random and sequential numbers and dials them without
6 any human involvement, the FCC has been recently coming closer
7 to saying where there's more human involvement involved, then
8 it's less likely to be an auto dialer.

9 The same is true here, Your Honor. Because there is a
10 human being, a live agent, that is behind the calls that are
11 being made with the soundboard technology and that agent gets
12 to select and determine which snippets will be played to the
13 person on the other end of the phone so that in many instances,
14 if not most or all instances, the person on the other end of
15 the phone doesn't even know they're speaking to -- you know,
16 speaking to a prerecorded message, because that's the way the
17 system is designed, to make it seem as if they are speaking
18 with a live human, but that's the type of thing that we
19 believe, in addition to the other arguments we make, takes this
20 outside of what that undefined term is in the TCPA of an
21 "artificial or prerecorded voice to deliver a message."

22 And in addition to that, Your Honor -- and we talk about
23 this in our papers -- the Supreme Court in the Mims decision
24 talked about Senator Holling's very vigorous statement on the
25 floor of Congress leading up to the passage of the 1991 act

1 about the types of calls that the TCPA was designed to target.
2 And these are calls that, you know, wake us up in the middle of
3 the night, interrupt our dinner, et cetera.

4 And one of the things that comes out of the legislative
5 history that we point out in the briefing, when it comes to the
6 prerecorded nature of a call, is, you know, they deprive the
7 person on the other end of the phone the opportunity to slam
8 the phone down in frustration so that the person that called
9 them understands how upset they are that their privacy was
10 invaded. That isn't true at all for soundboard calls.

11 THE COURT: You've gone probably far enough down that
12 road and I do appreciate your answer to my question.

13 Next question: If I do stay the case, how long should I
14 stay it?

15 MR. FREELAND: Your Honor -- and I anticipated that
16 question, as well. What I would recommend -- and this is with
17 respect to the plaintiff's indefiniteness argument, which, you
18 know, it is a concern, but it's not something that cannot be
19 dealt with by Your Honor.

20 Just as Judge Leonard did in the Cox case, you could have
21 us come back three months, six months, from now and provide
22 Your Honor with a status report for where things stand with the
23 FCC. And if the circumstances change, then maybe we would even
24 agree to lift the stay, or if plaintiff wanted to seek lifting
25 the stay, then they could file papers with Your Honor and we

1 could argue that.

2 But given -- and I know that there's some discussion in
3 the papers about likely indefiniteness and there's some cases
4 that are cited, where we are in this case, Judge, the conduct
5 that's challenged in the complaint long ago ceased, so there's
6 no ongoing harm.

7 And, in fact, because my client didn't even make the
8 calls, we're certainly not using Yodel to make any calls right
9 now, or Yodel to make any calls right now, so there isn't
10 really any exigency to sort of rush this thing along without
11 the benefit of the FCC's declaratory ruling on what we believe
12 is a dispositive issue, because if we're right, the case is
13 over as to all defendants. If we're wrong, we can pick the
14 case back up and then we can argue about vicarious liability
15 for Northstar.

16 So that's a long-winded way of not answering Your Honor's
17 question, but I think that it would be, for lack of a better
18 term, an indefinite stay but with periodic status reports
19 coming back to Your Honor to let you know how things are
20 proceeding.

21 THE COURT: What's the next stop after the FCC? The
22 DC Circuit?

23 MR. FREELAND: It would be the DC Circuit if one of
24 the commentators chose to appeal whatever the ruling may be from
25 the FCC, that's correct, Your Honor.

1 THE COURT: Well, this -- and correct me if I'm
2 wrong -- this strikes me as an issue that's not only important
3 to the defendants in this case, it's important to a fair number
4 of other companies and consumers and probably consumer
5 organizations, somebody is going to be pretty steamed when and
6 if the FCC makes their determination; am I right about that?

7 MR. FREELAND: You're correct, Your Honor.

8 THE COURT: And they're going to be steamed enough to
9 take it to the circuit.

10 MR. FREELAND: Very likely, Your Honor. Very likely.

11 THE COURT: So that's in the mix.

12 And I hate to hang my hat too firmly on this hook, because
13 it's -- it could always be a pretext for denying a stay, but
14 I'd have to say I probably have in common with a few hundred
15 other district judges a general desire, at least, to avoid
16 hitching my docket to somebody else's docket, especially what
17 we in this part of the country think of as the docket of an
18 administrative agency with proceedings that could go on for a
19 very long time. That's a serious concern. It really is.

20 This case -- and in this case, dispositive motions are due
21 in about 60 -- almost exactly 60 days.

22 MR. FREELAND: May 8th, Your Honor, correct.

23 THE COURT: Which means you're likely to have some
24 rulings on the merits somewhere in the neighborhood of mid
25 summer. The case is on the November docket and the -- there

1 sits the Tenth Circuit. You can probably get this case to the
2 Tenth Circuit faster than you can get it from the FCC to the DC
3 Circuit.

4 MR. FREELAND: There is a chance of that, Your Honor,
5 and that's one of the things that Mr. Braver points out, quite
6 frankly, in his briefing is that we don't have a crystal ball
7 and we don't know how long the FCC proceeding is going to take.

8 THE COURT: And, of course, that presumes that you
9 would be the party appealing from this Court. For all we know,
10 Mr. Braver is going to be the appealing party.

11 MR. FREELAND: That's correct, Your Honor.

12 THE COURT: Okay. You may continue.

13 MR. FREELAND: And so, Your Honor, on that point --
14 and this is one of the things, again, coming back to the Tenth
15 Circuit's decision in TON Services, which as Your Honor quite
16 frankly pointed out, there's going to be a lot of other people
17 other than the parties before Your Honor here today that are
18 going to submit comments to the FCC.

19 And that's one of the factors that the Tenth Circuit
20 points out is the need for uniformity on an issue across the
21 board, so not just in the Western District or even in the Tenth
22 Circuit, but something that applies across the board.

23 And, again, from our perspective, we know what's at stake
24 here potentially, in the event that Your Honor, you know, were
25 to agree with Mr. Braver, given the liability that we're

1 looking at here potentially, that's why we believe that the FCC
2 in the first instance, which is the agency -- and Mr. Braver
3 doesn't challenge this -- the agency that has the authority to
4 interpret the TCPA at least be given a chance to tell us what
5 it thinks on a dispositive issue in this case.

6 THE COURT: Well, I -- as I understand it, what you
7 seek at the FCC is not a formal regulatory exemption, but an
8 interpretation.

9 MR. FREELAND: Correct, Your Honor.

10 THE COURT: And interpretation, at least since the
11 1930s, if not before, interpreting federal regulatory
12 legislation has been, in effect, day to day, a joint
13 responsibility of the third branch, operating under Article III
14 and the administrative agencies.

15 And the question before the Court today is whether there
16 is a good reason for this third-branch entity, if you will, a
17 federal district court, to enter what for all practical
18 purposes would probably be, at a minimum, an indefinite stay
19 and perhaps a long stay, while another entity, namely the FCC,
20 ponders an issue that could be teed up in front of this Court
21 in 60 days. That's a concern.

22 MR. FREELAND: Agree, Your Honor.

23 And the one thing I can say, to give the Court I hope some
24 comfort, is that we've had a change in the administration and
25 there's now the commission, which is now chaired by Ajit Pai,

1 along with Commissioner O'Reilly, have made it a point -- and I
2 can't recall whether this is pointed out in our briefing, I
3 apologize if it's not -- but they have made it a point to act
4 quickly even more recently on issues under the TCPA.

5 For example --

6 THE COURT: Let me have a little fun with you.

7 Suppose they want to go your way, why wouldn't they
8 consider it to be really necessary to wait until after the 2020
9 election to do that?

10 MR. FREELAND: Well, I'm not sure, Your Honor -- not
11 to get too political, but I'm not sure they would want to do
12 that because it's an all-Republican commission and they have
13 been moving things along since the administration has switched.

14 THE COURT: Okay. Well, I -- okay, go ahead.

15 MR. FREELAND: And, again, just coming back more
16 recently, there was an issue under the -- we talk a little bit
17 about the DC Circuit's ruling in what's known as the ACA case,
18 and that was where the DC Circuit basically told the FCC more
19 pointedly -- the prior administration of the FCC -- that you
20 got a lot of things really wrong in this big order that you
21 entered back in 2015.

22 The current FCC acted promptly on that. In particular,
23 there was a question about whether or not liability for calling
24 a reassigned number -- so this is where, for example, an
25 advertiser has what it believes to be the right phone number of

1 a customer and it calls that customer with a telemarketing
2 message or it uses an automatic telephone dialing system to
3 text or call that customer, believing that it had consent to
4 call.

5 Now, under the old rule that the DC Circuit set aside, you
6 got what was called "one freebie," which is, you know, you make
7 that and then everything after that call, that initial first
8 call, is a liability call.

9 The DC Circuit said that rule doesn't work because it
10 doesn't make any sense, it's not reasoned agency
11 decision-making.

12 The FCC acted promptly on that, sent out a notice saying
13 we need some comments on a new assigned number rule, and then
14 it was some months after that, I think it was about 11 months
15 after that, it could have been less, I can't recall off memory,
16 they issued that ruling on -- and provided us a new reassigned
17 number rule.

18 In connection with the announcement of that rule, which
19 happened, I think, back in December of last year, Commissioner
20 O'Reilly said, in a public statement, I'm voting for this new
21 assigned number rule because it makes sense but also because
22 I've been promised by the chairman that there will be an
23 overhaul of major provisions in the TCPA coming soon.

24 And so that statement by Commissioner O'Reilly, coupled
25 with how quickly the FCC acted, even after the government

1 shutdown, to put our petition out for notice, we think does
2 show some evidence that the commission is going to promptly
3 move this along.

4 And, again, Your Honor is absolutely right. If we win,
5 then Plaintiff Braver, or the other folks that submit comments
6 on the consumer side, they may take it up to the DC Circuit.
7 If we lose, we may take it up to the DC Circuit.

8 But, you know, at a minimum, we think, in light of the
9 cases that we cite to Your Honor, that we should give the FCC a
10 chance to tell us what it thinks before, you know, moving this
11 case into the merits.

12 And, again, we can come back to Your Honor with status
13 reports periodically in, you know, whatever time frame Your
14 Honor would like, to report on where we are with the FCC.

15 THE COURT: Thank you.

16 MR. FREELAND: And then just a couple final notes,
17 Your Honor.

18 There was -- and this is consistent with Your Honor's line
19 of questioning here. On page 17 of Mr. Braver's opposition
20 brief, and that's ECF Number 96 -- I'll wait for Your Honor to
21 get that.

22 THE COURT: All right. I'm there.

23 MR. FREELAND: There's a citation, Your Honor, to a
24 petition filed by soundboard -- a soundboard company called
25 Call Assistant and Mr. Braver makes the argument from that that

1 the FCC, eight years later, hasn't ruled on that petition.

2 And, Your Honor, I do apologize for not addressing this in
3 our reply brief, but we did some digging in advance of today's
4 hearing, there is a reason that the FCC never ruled on that
5 request and that's because it was withdrawn by Call Assistant.

6 And I have the withdrawal paper here, Your Honor. If you
7 would like me to hand it up, I'm happy to do so. I'll leave
8 that up to Your Honor.

9 THE COURT: Well, have you provided a copy to
10 counsel?

11 MR. FREELAND: Yes, I have an extra copy right here.

12 THE COURT: Well, give a copy to counsel and they can
13 be looking it over before I hear from counsel and then we'll
14 take it one step at a time.

15 MR. FREELAND: Would Your Honor like me to hand a
16 copy up?

17 THE COURT: Please give a copy to the clerk.

18 MR. FREELAND: And then, Your Honor, just one final
19 comment.

20 I don't know -- this didn't come up in Your Honor's
21 questions, but I just wanted to make sure that we closed the
22 loop on this. There's been a lot of discussion by Mr. Braver
23 in the brief about a letter from Lois Greisman of the Federal
24 Trade Commission that was issued in November of 2016. And I
25 just want to give a little bit more flavor as to what's going

1 on there.

2 The Federal Trade Commission has what's -- has promulgated
3 what's known as the Telemarketing Sales Rule. That's not the
4 TCPA. It was not promulgated under the TCPA.

5 Now, it does have some language in it that says thou shalt
6 not make prerecorded calls to consumers with advertising
7 messages, etc., without having prior express consent, so there
8 are some similarities between the Telemarketing Sales Rule, or
9 what's colloquially known as the TSR, and the TCPA.

10 However, the FTC Telemarketing Sales Rule is really geared
11 towards the substance -- the substance of what an advertiser
12 needs to communicate to a consumer.

13 So it contains things like thou shalt not commit fraud
14 over the telephone to a consumer. If you're going to sign a
15 consumer up for a subscription plan for anything, you've got to
16 disclose how much it costs, when they're going to be billed,
17 how they can cancel.

18 So it's really -- and this is at 16 CFR 310, Your Honor,
19 is where the Telemarketing Sales Rule is located. It's really
20 geared towards everything that needs to happen after the call
21 is picked up, by and large.

22 The TCPA, on the other hand, deals with the
23 telecommunications equipment that's used to make the call and
24 it deals with sort of other -- the other mechanical things that
25 equipment needs to have or not have in order to be covered

1 within its ambit.

2 That statute, pursuant to 47 USC 227, which is the
3 Telephone Consumer Protection Act, that statute is exclusively
4 within the province of the FCC. And so Ms. Greisman's letter
5 from November of 2016, it doesn't have any bearing on its face
6 to what the TCPA says.

7 Now, Plaintiff Braver is absolutely correct that Congress
8 has admonished the FTC and the FCC, saying you guys need to be
9 consistent, where the TSR and the TCPA overlap, you guys need
10 to be consistent. There's no question that Congress has
11 directed them to do that.

12 But here is the problem with Mr. Braver's argument, as we
13 pointed out in our reply brief: The FTC itself doesn't
14 consider the letter that Mr. Braver cites to be binding on the
15 agency or even final agency action.

16 In fact, after that letter was issued, the Soundboard
17 Association, which is a trade association representing members
18 of the soundboard community that either develop and license
19 soundboard technology or use soundboard technology in
20 connection with either telemarketing or customer service, filed
21 a challenge in the DC District Court against the FTC under the
22 Administrative Procedure Act saying that it was final agency
23 action and that it was an about-face and a change in the
24 regulation in the Telemarketing Sales Rule without the
25 requisite notice and comment being done under the APA.

1 As we pointed out in our reply brief, Your Honor, the FTC
2 came in and said: What are you talking about, that was from a
3 low-level staff attorney, that's not final agency action,
4 that's not dispositive and it's not binding on us.

5 And so that went up -- the DC District Court Judge Mehta
6 agreed with the FTC, said it wasn't final agency action. It
7 went up to the DC Circuit; DC Circuit said it's not final
8 agency action, Soundboard Association, you lose.

9 Soundboard Association then petitioned the Supreme Court
10 for certiori. And after briefing was closed in this case, Your
11 Honor, the FTC filed its response brief with the Supreme Court.

12 And, again, I have an extra copy for counsel and I can
13 hand it to up Your Honor. I just wanted to point out a couple
14 of specific provisions in it.

15 Permission to approach, Your Honor?

16 THE COURT: Surely.

17 MR. FREELAND: And so, Your Honor, on page 11 of the
18 FTC's brief -- and we've gone ahead and highlighted that for
19 Your Honor -- the FTC doesn't mince any words talking about the
20 letter that Plaintiff Braver relies upon.

21 "The 2016 letter at issue here by contrast is an advisory
22 opinion not from the commission but from FTC staff."

23 And then if that wasn't clear enough, Your Honor, if we
24 turn over to page 12, the FTC really drives the point home,
25 where they say, indeed, the agency has not even spoken its

1 first word on the matter, since the commission has never opined
2 on the applicability of the TSR anti-robo call position to
3 soundboard technology.

4 And so in our view, Your Honor, we think this closes the
5 loop on this discussion about the FTC letter that Mr. Braver
6 cites.

7 And then just one final point, Your Honor. Even assuming
8 that they are correct, that this 2016 letter from the FTC has
9 some import on how Your Honor or the FCC would interpret the
10 language in the TCPA governing prerecorded messages and whether
11 it applies to soundboard technology, the calls at issue in this
12 case were made before that 2016 letter was issued.

13 The calls in this case were placed after an earlier letter
14 by the same FTC staff attorney from 2009 that concluded that
15 soundboard calls are not preordered message calls under the
16 Telemarketing Sales Rule.

17 So it's one of those things that if they're right, we
18 still win, but we don't believe that they are right.

19 And with that, Your Honor, we thank the Court for its
20 time, of course. Happy to answer any questions and we will
21 respectfully ask the motion be granted.

22 THE COURT: Thank you. I may well have some more
23 questions, but I'll hear from the plaintiff.

24 MR. FREELAND: Thank you, Your Honor.

25 MR. CATALANO: Paul Catalano for the plaintiff, Your

1 Honor.

2 We would respectfully ask that the Court not stay this
3 action. And there's a variety of reasons for it that we've
4 briefed. I'm happy to answer any questions.

5 But on a couple of specific points to lead off with, this
6 issue that they've raised here is not something that just came
7 to them in the last few months.

8 In their original answers at Docket 21 and Docket 30, page
9 7 and page 4 respectively, both defendants first claimed that
10 the technology used here was not subject to the TCPA.

11 They reiterated this idea in their -- in the joint status
12 report on Docket 31 at pages 4 and 5.

13 And then they really argued it fairly vehemently in their
14 opposition to the class certification in Docket 57, pages 11
15 and 12.

16 This has been an issue that has been out there from day
17 one for these defendants. This idea that somehow the
18 soundboard -- the use of soundboard technology is taking it out
19 of the TCPA's ambit to regulate pre -- calls initiated with a
20 prerecorded message, and yet they waited.

21 Now, counsel has made the argument your certification
22 changed the value of this case and that no further individuals
23 are being harmed because Northstar is no longer involved in any
24 kinds of telemarketing and certainly not using Yodel any
25 longer.

1 But Yodel --

2 THE COURT: Excuse me. And forgive the interruption.

3 Speaking of Yodel, Ms. Zachritz, I didn't mean to cut you
4 off, in case you wanted to be heard in support of the motion.

5 MS. ZACHRITZ: No, Your Honor, we concur with
6 Northstar's position.

7 THE COURT: Okay. Thank you.

8 Counsel, you may continue.

9 MR. CATALANO: I'm sorry, I need to find my train of
10 thought.

11 THE COURT: Wait until you're 71 years old, that's
12 when it really --

13 MR. CATALANO: So they waited -- their argument was
14 that, in part, that the certification changed the value of the
15 case and, in part, that no one is being harmed at this time by
16 continued conduct because Northstar is no longer using Yodel,
17 no longer involved in telemarketing.

18 But Yodel is. Yodel's entire business model, from
19 everything they advertise on their Web site, is the use of this
20 soundboard technology.

21 People are continuing to get calls from Yodel, not
22 necessarily related to Northstar at this time, but from any
23 other client that wanted to hire them on using this soundboard
24 technology all over the country. It's not -- it's not a thing
25 that has stopped.

1 And we have from the beginning asked for an injunction on
2 the very behavior that they are addressing, so -- which is part
3 of the relief that's available under the TCPA Act.

4 So as Your Honor commented, there's more here than just
5 the dollar value as far as what is happening. The relief
6 requested here is going to be very significant for Yodel if it
7 loses. Its entire business model may be gone.

8 But they waited. They waited until 21 months in and
9 adverse decisions against them and then said now we're going to
10 raise primary jurisdiction and take an issue to the FCC.

11 And it is our premise in the brief that they have waived
12 this argument, Your Honor.

13 THE COURT: Well, the time factor probably is a
14 consideration. In all candor, I'm going to have to tell you
15 that I'm not prepared to conclude that there is a waiver in the
16 strict sense, but I do hear you on the time factor. The fact
17 that I'm having difficulty concluding that there was a waiver
18 does not mean that the time factor isn't in the mix, and --
19 because it certainly is, under Rule 1 of the Federal Rules of
20 Civil Procedure, it's in the mix every day.

21 And so I understand your basic point. Whether I come out
22 with a hard waiver ruling is doubtful. But all that means is
23 we go to the -- if you will, the merits of the primary
24 jurisdiction argument.

25 And let me frame that for you just a little bit.

1 MR. CATALANO: Certainly.

2 THE COURT: Here I sit in flyover country, in
3 Washington, DC, we've got some commissioners and some staff
4 that are steeped in these regulatory issues, they've got a
5 nationwide view, if you will, of how all this shapes up, they
6 work every day with this legislation and the regulations, the
7 administrative history, to say nothing of the commercial
8 history and the legislative history -- all of that could make a
9 federal district judge feel kind of small in the grand scheme
10 of things, when we have people in Washington who are paid to
11 really be up to snuff on this. That is kind of a horseback
12 summary of much of the defendant's argument and that's what I
13 really need you to address.

14 MR. CATALANO: Well, Your Honor, I think that your
15 own opinion in the Sierra Club case, I believe that was yours,
16 kind of really sums up when primary jurisdiction really
17 matters.

18 All right. In that case, there was a determination of how
19 scientific evidence needed to be weighed. There was a broad
20 scope.

21 And I will admit that I was an English major and then on
22 to law school, with some teaching in between. To try and -- if
23 I were to be a judge, the things that were in front of the
24 Court in Sierra Club were well beyond my cognizance, and I
25 don't know very many judges in my experience that spent tons of

1 time doing geology and chemistry and things probably at issue
2 that you would need for that case.

3 Here, that's not what we're dealing with. We're dealing
4 with the meaning of a very, very simple word, "prerecorded."
5 Unlike many words in the English language, there's not a whole
6 lot of ways to interpret that word. I don't need a specialist
7 somewhere to define what "prerecorded" is.

8 They talk about the idea that, well, we have this
9 technology that isn't just prerecorded because you have all --
10 it's not automated because there's a person sitting behind it,
11 but the express language of the statute doesn't address an
12 automated prerecorded call. In fact, it does the exact
13 opposite.

14 In the statute in question for our case, which involves
15 residential telephone numbers, there is absolutely no mention
16 of automation. It is the initiation of a call -- of any call
17 using a -- an artificial or prerecorded voice to deliver a
18 message. There's nowhere in there that says the initiation had
19 to have any kind of automation to it.

20 And if you go up a section, to the portion that deals with
21 prerecorded calls to cell phone numbers, it also says that it's
22 a violation to use an ATDS or --

23 THE COURT: A what?

24 MR. CATALANO: An ATDS, an automated telephone
25 dialing system, or a prerecorded message.

1 It does that disjunctive. You don't have to be automated
2 even in a cell phone call for it to be a prerecorded message.
3 The issue is was the call initiated with a prerecorded voice to
4 deliver a message. And that is clearly what the evidence shows
5 happened in this case.

6 They freely admit that they hired voice actors to record
7 messages that were then played in snippets. There's no
8 argument that the first thing that a consumer heard upon
9 answering their phone was an initial recording prepared for
10 that purpose.

11 What happens after that initiation, all of this
12 non-automation, we can respond to what you're doing, is not
13 addressed in the TCPA.

14 The TCPA violation happened right at the beginning, at
15 initiation. An initiation of a call using a prerecorded voice
16 is extremely -- is simple -- it's all simple English language
17 definitions.

18 And they may -- they may have talked on the floor and they
19 did talk on the floor of the Senate about automation, but when
20 they passed the language of this section, they didn't address
21 automation, they addressed prerecorded and initiation of the
22 call. And that is very significant because the FCC, even if
23 they take this on, cannot interpret away the plain language of
24 the statute.

25 THE COURT: Okay, let me interrupt there.

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1 Mr. Freeland, when you're back up, I'll need you to
2 specifically address this, if you will, this simplicity
3 argument, because simplicity versus complexity is I think in
4 play in terms of how apt I should be to recognize primary
5 jurisdiction and the FCC.

6 So I'll need you to address this simplicity argument, and
7 in that connection, I'll invite you to tell me about, as an
8 example, what materials you might lay before the FCC to support
9 your case that they would inherently be better equipped to
10 evaluate than a federal district judge would be, given what
11 Mr. Catalano says is the simplicity of the issue.

12 Forgive the second interruption, Mr. Catalano. You may
13 continue.

14 MR. CATALANO: That's all right.

15 And the -- I mean, for us, that is the bulk of what is
16 going on here. The bulk of the -- the question before this
17 Court is, the primary jurisdiction required that the
18 specialization of the FCC was necessary to determine a factual
19 situation. The case law is very clear that the factual issues
20 are what the Court might be needing help from the FCC on.

21 Now, all of the cases where they've granted stays, all --
22 even within the FCC, they all hinge on some ideas that were not
23 so clear to the courts. What is an automated telephone dialing
24 system? Does this technology have the capacity to do these
25 things? How does this technology work?

1 It doesn't -- it -- whether or not it has those things is
2 a -- is a technical question that the FCC is best equipped to
3 answer.

4 What it meant to make a call, whether that would include
5 the text messaging technology or not, was a question that, you
6 know, the courts relied on the FCC to make a determination on,
7 whether text messaging was a call versus the standard version
8 of calls pre-smartphones. They were much more technical
9 issues.

10 Here, it doesn't matter if the technology is using a
11 modern-day WAV file or some other digital means on a computer
12 or if they were using an old school phonograph with a needle
13 and were playing a recording, either way, it's a prerecorded
14 voice, nothing has changed between Technology A and Technology
15 B as to whether anything was prerecorded.

16 All of the changes that they're talking about, all of the
17 things that they talk about that they believe makes this a
18 complicated issue that the FCC should rule on, all occurs after
19 they've initiated that call, all occurs when a question is
20 asked somewhere down the line. And those things are all
21 post-initiation. The initiation of the call with the
22 prerecorded voice already happened.

23 They also make the argument --

24 THE COURT: Let me interrupt before you go on to your
25 next point.

1 MR. CATALANO: Sure.

2 THE COURT: And this question -- I would ask you to
3 understand this question to be put regardless of which way the
4 FCC might rule on the pending matter when it rules.

5 Is this Court bound by that ruling? It might rule your
6 way, it might not.

7 MR. CATALANO: Your Honor, the Court would have the
8 opportunity to look at it through the eye of Chevron and
9 determine if the FCC made a ruling that interprets the plain
10 language of the statute in a way different than what Congress
11 intended. There's still room for that.

12 THE COURT: I think the defendants cite some cases --
13 there's I think maybe two district court cases and one circuit
14 court case that would suggest there's -- that I'm just flat
15 bound, it's not a Chevron deference thing, I'm bound. I could
16 be mistaken about that, but --

17 MR. CATALANO: I believe that Chevron deference to
18 the final court ruling is still applicable. They are not --
19 and we cited the case law along those lines, I believe, in our
20 brief. They are not a -- they are not allowed to make a rule
21 or a decision that is in express contradiction to the language
22 -- to the clear language of the statute.

23 If the language is not ambiguous, they have no room to
24 interpret it in a manner as they choose. That is exactly what
25 arbitrary and capriciousness is about when they're overturning

1 -- when the DC Circuit is overturning the decision on -- in
2 ACA.

3 There's plenty of precedent for the idea that a court can
4 look at this ruling and say you went somewhere that you didn't
5 get authority from Congress to go by going against their -- the
6 express language of the statute. Is that going to be an
7 appealable issue, whether or not you abused your discretion or
8 you -- your interpretation was correct? Certainly.

9 There's lots of different ways that this case is likely to
10 end up in front of the Tenth Circuit or the DC Circuit when
11 it's all said and done. I'll admit that. There's -- but it's
12 not without -- the fact that it's going -- it's likely to be
13 appealed doesn't change the fact that the express language of
14 the statute does not address any of the things that they're
15 asking the FCC to rule on.

16 They make a lot of noise about the use of singular, that
17 if -- because the statute says "a" prerecorded voice and "a"
18 message, that the fact that we used multiple prerecorded
19 messages makes what we're doing okay, the case law they cite to
20 to support that all addressed the idea that there were -- the
21 case -- the statute said that there had to be several or
22 multiple occurrences for -- and a pattern -- I want to say it
23 was the Fair Labor Standards Act -- for treating someone as a
24 non-exempt employee, that a single event treating them as a
25 non-exempt employee did not change the nature of the

1 employment, and so multiple was required to breach the statute.

2 Here, the use of "a," and if you've used ten messages,
3 you've used one message, "a" prerecorded message violates the
4 statute if it was used to initiate the call.

5 The second issue that we take with their use of a singular
6 is, it's singular as to prerecorded voice --

7 THE COURT: Okay. Now you're really getting into the
8 weeds on the underlying merits on the matter, and the question
9 that was pending, which I -- well, one of my questions you have
10 not answered, namely, are you going to be bound either way?

11 But the main question that was pending went to the question of
12 simplicity versus complexity of the issue before the FCC, and
13 so there's no need, really, for either one of you to dwell at
14 great length on the merits of what either I or the FCC might --

15 MR. CATALANO: Can I make just one comment on this
16 issue, Your Honor?

17 THE COURT: Sure.

18 MR. CATALANO: A -- if their reading of the singular
19 being that important in the statute is correct, another way
20 around obligations under the TCPA, where it says "a prerecorded
21 voice," would be to have two people or more in the initial
22 prerecorded message, because now you've used two or more
23 prerecorded voices and all of a sudden you are not "a"
24 prerecorded voice, and that would take it outside of the TCPA.

25 And that kind of emphasis on the singular here, that one

1 voice, one message, versus two voices or multiple messages, is
2 not what the TCPA intended in its use of "singular."

3 One violation, one initiation of a call with a prerecorded
4 voice and -- to deliver a message is sufficient. Everything
5 that happens after that doesn't matter. The violation's
6 already occurred.

7 THE COURT: Bottle that up for me for this courtroom
8 maybe in June or July, if I deny the stay, and that, of course,
9 is the question before the Court today.

10 One -- another matter that I'm going to invite
11 Mr. Freeland to address, as well as you -- and I think I know
12 what your answer on this is going to be -- I'm a little
13 concerned -- tell me -- and the reason I want to hear about
14 this is I'm a little concerned about effectiveness of class
15 action notice if this matter sits for two years, with people on
16 the move.

17 Tell me just a little bit about your class member
18 identification protocol. If that's not -- if that's not likely
19 to be a huge problem, then that's one thing. But if it is, it
20 may be in the mix.

21 Tell me about your class member identification protocol.

22 MR. CATALANO: Yodel had records that were produced
23 in this matter; it's a pretty voluminous file. We haven't yet
24 figured out how we're going to present it to the Court because
25 it's such a large file. That contained the name, address and

1 phone number of all of the different people that were in this
2 call list. And these were residential -- these were
3 residential phones in -- of homeowners who would be -- might be
4 interested in an alarm system. That was who they were looking
5 to reach.

6 And so the -- we are going to use that list initially to
7 identify and send notice based on the addresses that Yodel had
8 for the people that they called.

9 But as our expert testified in the class certification
10 hearing, there is -- and I'm going from memory here, sir, and I
11 apologize if I don't exactly have the testimony correct, but I
12 want to say he said there was a 5 percent per year average
13 where people in that kind of situation would have changed
14 addresses, will have moved.

15 And so the longer this sits out there, the calls were made
16 in 2016, so we've already got, you know, somewhere in the
17 average of a 15 percent drift on whether people are going to
18 still be at those addresses, and that's going to continue to
19 get worse, not better, the longer this case -- the longer we
20 wait to provide notice.

21 So we think that is part of the prejudice to the class, is
22 that getting them notice of their representation in this matter
23 is an issue, that the longer this takes to get to a decision
24 and to give notice and to get the claims processed, assuming
25 there's a verdict in our favor, started and completed once

1 there is a judgment or a settlement and there's money out there
2 to pay the class.

3 THE COURT: One other question while I've got you
4 diverted from your intended argument.

5 Mr. Freeland has commented in some detail as to the
6 reasons that, at least arguably, point in the direction that
7 the FCC wants -- has perhaps a more-than-ordinary inclination
8 to move on this and he has sought to allay my concerns that --
9 consistent with conventional wisdom, it could sit there for ,
10 years.

11 I'll need you to address that as best you can.

12 MR. CATALANO: So a great example, Your Honor, is the
13 Bank case that they cite. The Second Circuit had an issue in
14 front of it that the FCC itself went to the Second Circuit and
15 said, hey, stay this so that we can make a decision on what
16 this term means. And that was done -- let me check my notes.

17 THE COURT: Now, this is which case?

18 MR. CATALANO: Bank is the gentleman's first name,
19 the plaintiff's first name, Your Honor. Todd Bank.

20 THE COURT: Okay. Go ahead. Go ahead.

21 MR. CATALANO: Bank v. Independent Energy is the
22 case, Your Honor.

23 In 2016, the FCC asked the Second Circuit to stay any
24 action in that case while it made a ruling on a petition that
25 was before it. It hasn't ruled yet.

1 They may still be very interested in moving quickly
2 according -- as Mr. Freeland says, but three years later, they
3 haven't ruled on a case that the FCC instigated, hey, stay it
4 so we can do something. And directly under the TCPA.

5 The new administration has not come forward and said, hey,
6 we're going to do something about this now -- the old
7 administration sat on their heels, but we're going to be
8 different, we're going to get this decided, that isn't the case
9 here.

10 They -- even though they instigated, they requested that
11 it be stayed so they can make a decision, three years later
12 there is no decision. And there's no -- there's no clarity,
13 there's no certainty, certainly, that they're going to make a
14 quick decision on anything related to this soundboard
15 technology.

16 The -- you know, they address the idea that in Call
17 Assistant, the request was withdrawn. But one of the factors
18 here, though, is within consideration of whether to give
19 primary jurisdiction is whether an issue was in the knowledge
20 of the FCC.

21 And, you know, going all the way back to -- to 2002, I
22 believe, when the petition was initially filed in that case
23 about soundboard technology, and 11 years later, with no
24 decision made, they withdrew it.

25 But the idea that someone -- that there may be some

1 question about whether soundboard technology was already placed
2 in front of the FCC once and they have not made a decision one
3 way or the other on that issue, the -- Mr. Freeland made much
4 too about the letter by the FCC. And we agree that that letter
5 is not a binding letter. The 2016 letter and the 2006 letter,
6 neither one of them was a binding decision and neither one of
7 them is directly related to the FCC.

8 That didn't change defendant's decision to rely on that
9 letter when they responded to Mr. Braver's initial complaint to
10 say we're fine because the FTC says we are.

11 But what's most significant about that letter is that in
12 the ten years between the 2006 decision and the 2016 decision,
13 countless complaints and a pile of evidence was apparently
14 amassed that said soundboard technology is not this great thing
15 that was presented to us in 2006 to get us to decide that the
16 soundboard technology is not fit under the Telemarketing Sales
17 Rule.

18 That same evidence is going to be there for the FCC here,
19 that the soundboard technology that they -- the way they
20 describe it in their brief, in their petition to the FCC, is
21 very, very similar to the way it was described in 2006.

22 And what's being discovered is, like here, it's not being
23 used in that manner. Here we have Yodel contracting people in
24 India, who its CEO testified did not even have to speak English
25 to press buttons and interact with the consumers.

1 It is not -- it may be possible that there will be a
2 seamless interaction, but there have been countless complaints
3 about soundboard technology, the FTC and the FCC, that makes it
4 clear that it's not this seamless interaction that they want to
5 make it out to be.

6 And the fact that the FTC has moved away based on this
7 evidence, from the idea that soundboard technology is exempt,
8 we think that that similar evidence is going to be out there.
9 It's going to be in front of the FCC and they're going to have
10 that same issue and they're not going to be able to say, well,
11 this technology is always exempt.

12 If they want the technology to be -- if they want to use
13 soundboard technology for these kinds of calls, the Ninth
14 Circuit already addressed many, many years ago -- and I'm
15 sorry, Your Honor, I forget what the case was -- but we did
16 cite it in our brief -- the idea that if you don't want the
17 TCPA to apply to a prerecorded call, have a live person
18 introduce your recording.

19 All they would have to do to be able to use this
20 technology without the TCPA involved is initiate the call,
21 "Hello, Judge Friot, we have some information for you that we
22 would like to play," and then they can start playing their
23 information and they can interact with you all they want
24 through their soundboard at that point and they've taken it out
25 of the ambit of the TCPA by initiating the call with a live

1 person.

2 That's not what they do. That's not how soundboard
3 technology is being used.

4 THE COURT: Now, you mention -- forgive the
5 interruption again, but you mentioned that the FTC has -- I
6 think your word was moved away from the defendant's view of the
7 matter.

8 What's the FTC's most recent expression on that score?

9 MR. CATALANO: Its most recent expression on that
10 score is the 2016 letter. It's not a binding letter. But it
11 was the opinion of the FTC staff that soundboard technology is
12 absolutely a prerecorded -- absolutely uses a prerecorded
13 voice, that it is prerecorded communication and that's what's
14 been used.

15 THE COURT: Okay. Well, I just wanted to get some
16 idea as to when that occurred.

17 You may continue.

18 MR. CATALANO: Looking at my notes, Your Honor, I
19 believe that I have covered the main points that I wanted to
20 cover.

21 Did you have any other questions for us?

22 THE COURT: Let me look at my notes here just a
23 moment.

24 That's all the questions I have at the moment, but I just
25 lost real time, which I do glance at every now and again.

1 Hold on. Here it is back. Okay.

2 So, Mr. Catalano, I thank you.

3 I'm going to surmise that Mr. Freeland has more to say.

4 And, Mr. Freeland, let me start you out where my mind is
5 and then you can take me where your mind wants me to go.

6 I'm -- as you might be able to tell, I have focused
7 somewhat on the issue of simplicity, because one thing that I
8 think should make a federal district judge or, for that matter,
9 a Court of Appeals, fear to tread is if I'm getting into just a
10 real briar patch in terms of complexity, industry practice and
11 technology versus statutory language, commercial practice and
12 commercial reality versus statutory language -- if I'm getting
13 into a real briar patch, I need you to educate me on that,
14 because I might prefer to stay out of that briar patch.

15 And the reason I pose that right up front is that
16 Mr. Catalano is telling me, not without some reticence, if you
17 will, that, okay, Judge, you're looking at the words
18 "prerecorded voice" and you are asked to determine whether --
19 what this equipment does -- does or does not fit within that
20 two-word description.

21 So Mr. Catalano has made a showing or at least an argument
22 that this is not the sort of a -- my word is "briar patch" --
23 that the judicial branch should shrink from if there is an
24 opportunity to lateral the issue to an agency with agency
25 expertise.

1 So please address the simplicity issue first.

2 MR. FREELAND: Thank you, Your Honor. I hope I
3 copied down your questions correctly. I was going to start
4 with that.

5 THE COURT: Sure.

6 MR. FREELAND: The -- some of the statements that
7 Mr. Catalano made actually only confirm the need for the FCC
8 agency guidance here.

9 Back to Your Honor's question, what materials would be
10 labeled for the FCC that we wouldn't label for Your Honor, I
11 don't know if there would be much difference in terms of the
12 technological description of the technology.

13 I don't think there's any real dispute between the
14 parties, and we candidly admit this, that there's any dispute
15 between how soundboard operates.

16 The question for the FCC is a combination of a both
17 technical and a policy question. There are other provisions in
18 the TCPA -- and granted, Your Honor, I admit forthrightly that
19 the simplicity argument and the loss that Mr. Braver puts on it
20 has some appeal, without question.

21 But there have been other provisions within the TCPA that
22 look similar on their face to have the plain meaning that
23 Mr. Catalano is urging "prerecorded message" does.

24 For example, the statute says you can't make an
25 auto-dialed call to a cell phone without prior express consent.

1 Seems simple enough, right?

2 Well, the FCC, interpreting that definition in the
3 statute, says, well, there's two different kinds of prior
4 express consent. If you're going to auto dial someone for an
5 account or a non-telemarketing message, this would be, for
6 example, if Your Honor got a fraud alert from your bank on your
7 cell phone that was sent with an auto dialer to say, Judge,
8 emergency, someone is trying to hack into your account, in that
9 instance, the simple provisioning of Your Honor's cell phone to
10 your bank constitutes prior express consent to use the auto
11 dialer to reach Your Honor with that fraud alert.

12 In the telemarketing context, though, prior express
13 consent in the statute, according to the FCC, means prior
14 express written consent, meaning that your bank can't send you
15 a message that says, Your Honor, we've got a great deal on a
16 new loan for you to go and buy that big boat you've been
17 wanting. Right? They couldn't send Your Honor that message
18 with an auto dialer unless they had Your Honor's prior express
19 written consent.

20 So there are terms in the TCPA that facially seem to have
21 these definitions that make -- that jump right off the page at
22 you, but which the FCC has said, no, not so fast.

23 Because of policy reasons -- and I'll touch on that in a
24 little bit because Mr. Catalano got into that -- because of
25 policy reasons, we're going to have different definitions than

1 what may appear to be the things that jump off the page at you.

2 Mr. Catalano talked about all the complaints that the FTC
3 talks about in its November 2016 letter. That's exactly the
4 type of consumer benefit versus consumer harm type of evidence
5 that the agency should be weighing in the first instance in
6 giving a determination on what prerecorded message --
7 clarification on what prerecorded message means in the TCPA.
8 Because there are also, as we lay out in our petition for
9 declaratory --

10 THE COURT: Well, that presupposes that the statutory
11 language leaves room for policy evaluations at the agency
12 level.

13 MR. FREELAND: And, again, Your Honor, coming back to
14 the example -- I'd love to give Your Honor an example of where
15 the FCC has done this with prerecorded voice, but we haven't
16 found any. And if we had, we would have showed it to Your
17 Honor. So I've got to rely on other instances, like the auto
18 dialer and the different definitions of prior "express
19 consent."

20 When the FCC made that determination, to say there's two
21 different types of prior express consent, they weighed things
22 like what are consumer expectations, what are the company's
23 expectations, what should the company be expected to do to not
24 annoy its customers or potential customers. It was the agency
25 that weighed those things in coming up with the two different

1 definitions.

2 The same is true here. Mr. Catalano properly talks about
3 the complaints that the FTC letter cites. We talk about all
4 the pro-consumer benefits that come from soundboard technology,
5 which are keeping telemarketers on script. The stories are
6 legendary, Your Honor. And, in fact, one of the reasons that
7 telemarketing became to be regulated was you had fraudsters
8 cold calling everyone and just trying to milk them out of their
9 retirement or whatever.

10 With soundboard, because the snippets are already
11 recorded, it keeps the agent on script, so that if that script
12 is legally approved to be non-deceptive, non-misleading, and to
13 clearly and conspicuously convey the offer to the consumer,
14 then the agent, a live agent behind those snippets, is less
15 likely to go what's called "off script" and commit
16 telemarketing fraud. That's a consumer benefit from this
17 technology.

18 And there are others. For example, people with
19 disabilities can be employed as soundboard agents where they
20 can't be -- they can't be employed similarly as a live
21 telemarketing agent because they may have a problem with
22 speaking or something to that --

23 THE COURT: As appealing as that undoubtedly is, does
24 the statutory language permit an agency or a court to go off
25 into -- in that direction, to interpret this statutory language

1 as applied to what you call snippets that are already recorded?

2 MR. FREELAND: It does in this context, Your Honor,
3 because when the statute was passed, this technology didn't
4 exist.

5 THE COURT: Okay.

6 MR. FREELAND: And the -- but -- and, again, this is
7 why the FCC is the agency in the first instance should look at
8 the legislative history, which we've cited for Your Honor in
9 both our briefing and our petition, which we attached to our
10 motion, where the whole point here is people needed to be able
11 to slam the phone and scream into the phone and say I'm tired
12 of being called, I'm tired of you annoying me. All of those
13 things can be achieved through soundboard. That's exactly the
14 type of policy --

15 THE COURT: One thing that can't be achieved is an
16 oldster falling and breaking their hip trying to answer an
17 unsolicited call.

18 MR. FREELAND: That's correct, Your Honor,
19 absolutely.

20 But, for example, in that instance, if the consumer had
21 given consent to receive the call, for example, then obviously
22 the telemarketing call may cause them to fall and slip and
23 break their hip, but the FCC is determined that's not a
24 violation, right?

25 And so those are the types of policy determinations meshed

1 with the technological advancements that the agency should be
2 entrusted to handle in the first instance.

3 So that's the technical-versus-simplicity answer, Your
4 Honor.

5 I think the second question, Your Honor, was whether or
6 not a determination from the FCC would be binding on Your
7 Honor. And we believe that under what's called the Hobbs Act,
8 it would.

9 The Hobbs Act says -- I might be butchering it a little
10 bit -- but the Hobbs Act says that if you've got a problem with
11 an FCC order, you can't complain about it at the district court
12 level. You've got to take that up to the DC Circuit.

13 And so that comes back to the discussion we had earlier,
14 Your Honor, about the potential appeals to the DC Circuit,
15 which, again, we candidly admit that there could be appeals,
16 and likely would be, depending on how it comes down.

17 THE COURT: How long do those typically pend in the
18 DC Circuit?

19 MR. FREELAND: Well, it varies. In the Soundboard
20 Association case, I believe that the determination -- and,
21 again, that comes back to the -- the challenge to the FTC
22 letter we were talking about earlier -- I think that was pretty
23 prompt. I think the decision issued -- and I'm happy to
24 supplement the briefing with just this point, Your Honor, if
25 you would like -- but I think it came down within a year of

1 briefing being completed and oral argument.

2 THE COURT: You may continue.

3 MR. FREELAND: And, Your Honor, the third point about
4 class notice -- and, again, this is something that is an issue
5 in any class action where you've got movement -- you know,
6 potential movement of class members, you know, after the
7 complaint is filed, before certification, after
8 certification -- Your Honor obviously has wide discretion in
9 determining a class notice.

10 One way to alleviate that could be to notify them that
11 there is this proceeding at the FCC and that the case has been
12 stayed pending that determination and that class members are
13 welcome to submit comments with the FCC. That's just one idea
14 to deal with that, Your Honor.

15 THE COURT: Thank you.

16 MR. FREELAND: And with that, Your Honor, unless you
17 have any other questions, I will sit down.

18 THE COURT: Okay. Thank you.

19 MR. FREELAND: Thank you, Your Honor.

20 THE COURT: Ms. Zachritz, again, I certainly don't
21 mean to cut you off.

22 MS. ZACHRITZ: I have nothing to add, Your Honor.

23 THE COURT: Okay. Thank you.

24 Counsel, just -- if you would, stand by for just a moment.

25 I do have the benefit of not only good briefing -- and I

1 certainly have -- but good arguments, which I also certainly
2 have. And I do appreciate the time and the effort and the
3 professionalism that went into the briefing, as well as the
4 arguments. And I'm not just saying that. I really do mean
5 that.

6 Obviously, the framework for my determination as to
7 whether to stay this action falls into two spheres: One is the
8 doctrine of primary jurisdiction, the other one is my inherent
9 power to control my own docket. And if the defendants persuade
10 me on either one, then the action gets stayed.

11 Turning to the first framework first, and that is the
12 doctrine of primary jurisdiction, of course, as we all know in
13 one sense, or at least in the sense that Article III courts
14 usually use the word "jurisdiction," it's not strictly speaking
15 a subject matter jurisdiction issue. Subject matter
16 jurisdiction is not a matter addressed to a Court's discretion.
17 And I think I can fairly say that application of the doctrine
18 of primary jurisdiction is addressed to the Court's carefully
19 guided discretion and certainly not unbridled discretion.

20 The Court of Appeals has made it clear that -- first, that
21 there is no fixed formula for applying the doctrine of primary
22 jurisdiction. That's actually from the U.S. Supreme Court.
23 And taking its cue from that, the Court of Appeals has given us
24 what I consider to be very valuable guidance, and that guidance
25 is to be found in cases like the Crystal Clear Communications

1 case and other cases from the Court of Appeals.

2 Interestingly enough, a good many of the primary
3 jurisdiction cases evaluate the issue to be addressed either by
4 a court or by a regulatory agency as an issue of fact, and I
5 think here I have perhaps either an issue of fact or a mixed
6 question of fact and law, but that's not really briefed by the
7 parties and so I'm not going to dwell on that, nor do I think
8 that makes much difference.

9 But we are taught by the Court of Appeals that one thing I
10 look at is whether the resolution of this issue, be it an issue
11 of fact or law -- and, again, a good many of the cases look --
12 deal with issues of fact -- I examine whether or not the issue
13 that one party proposes that I lateral to an administrative
14 agency or defer to an administrative agency for resolution is
15 or is not within the conventional experience of judges.

16 The second factor that I look at is whether -- it's not a
17 factor, this is an alternative basis for primary jurisdiction,
18 whether the matter requires the exercise of administrative
19 discretion.

20 The third consideration is whether the matter requires
21 uniformity and consistency in the regulation of the business
22 entrusted to the particular agency.

23 And relevant to that is the fact that it's -- it is not
24 inappropriate to take notice of the fact that a given issue, as
25 to which primary jurisdiction arguments are addressed, is, in

1 fact, pending before the agency in question, as it is here.

2 What -- that is the framework under which I am to address
3 the matter as a question of primary jurisdiction.

4 What it boils down to is that the overriding issue -- and
5 it doesn't very often work out quite this way -- but the
6 overriding issue is as to how the import of a statutory phrase,
7 "artificial or prerecorded voice," and probably it's not even
8 that long, it's probably just "prerecorded voice," how that
9 statutory phrase stacks up against the way this soundboard
10 technology works.

11 I do note that the FCC has not been asked to promulgate a
12 formal regulatory exemption. Instead, the FCC has been asked
13 to do what I'm asked to do in this case, and that is interpret
14 how that statutory phrase -- or what that statutory phrase
15 means and how it applies to the facts of the technology
16 involved in this case.

17 And, frankly, there's probably not much, if any, and
18 probably not any real dispute in this case, in this court, at
19 least, as to how the soundboard technology, in fact, works.

20 So the FCC is being asked to do something that both
21 regulatory agencies and courts regularly do, and a court is
22 correspondingly being asked to do something that both courts
23 and regulatory agencies do, namely, look at statutory language
24 and decide what it means.

25 And that brings me back to the question of whether under

1 these Tenth Circuit considerations that I've already alluded to
2 I should defer for an undetermined length of time to the
3 Federal Communications Commission.

4 On that score, the issue -- the aspect of the matter that
5 for me carries the day is the very simplicity of the issue. I
6 do not see this as an issue that is going to result in either
7 me or the FCC having to work through an administrative record
8 that includes boxes and boxes of materials, other than perhaps
9 comments at the FCC, I don't see that there's an issue that
10 requires extensive study of exactly how the soundboard
11 technology works.

12 The papers that are already before the Court demonstrate
13 to me that the essential features of the functioning of the
14 soundboard technology are not difficult to understand,
15 especially as relevant to how they square up with the very
16 short concise statutory phrase at issue.

17 I have to determine whether, as Mr. Freeland calls it,
18 "the snippets" which are already recorded do or do not square
19 up with the language "an artificial or prerecorded voice."

20 I'm entirely unpersuaded that the complexity of this issue
21 is such that I should stay this action for an undetermined
22 duration by hitching my docket to the docket of the Federal
23 Communications Commission, let alone the docket of the DC
24 Circuit.

25 And make no mistake about it, this is a matter which would

1 end up in the DC Circuit from the FCC, because any meaningful
2 action taken by the FCC is going to leave one side or the other
3 deeply aggrieved with the outcome.

4 And I'm sure the FCC will take final agency action within
5 the meaning of the applicable administrative legislation so
6 that that final agency action will be fair game for review in
7 the DC Circuit.

8 Now, in the same breath, I want to say that the one part
9 of it that gives me pause is really the third consideration
10 given to us by the Court of Appeals, and that is whether there
11 is -- is a need for uniformity and consistency in the
12 regulation of the business entrusted to the particular agency.
13 In this case, there is.

14 But as I see it, it's going to be a while, whether it be
15 through the FCC, to the DC Circuit, or from this Court to the
16 Tenth Circuit, it's going to be a while before we get anything
17 that is definitive in any national sense.

18 And, admittedly, if we had final agency action with holy
19 water poured on it by the DC Circuit, that would command a
20 broader national compliance, if you will, than my ruling and
21 then the Tenth Circuit's ruling.

22 But I really don't see any glaring discrepancy, glaring
23 difference, between the uniformity and consistency that is
24 available within a reasonable period of time from the judicial
25 branch, from here to Denver, than would be available from the

1 FCC to the DC Circuit.

2 Going to the first factor considered by the Court of
3 Appeals and that is -- not factor, these are alternative
4 disjunctive bases for primary jurisdiction -- whether the
5 matter is within the conventional expertise of judges, I can
6 tell you without hesitation that the application of this
7 statute to these facts is far less complex than matters that
8 are routinely entrusted to the judicial branch by way of
9 interpretation of statutory language in light of a hideously
10 complex factual record that happens day in and day out.

11 Yes, this is a matter within the conventional experience
12 of judges, and I say that acknowledging in the same breath that
13 it's also a matter within the conventional experience of the
14 FCC.

15 The suggestion that this issue might require the exercise
16 of administrative discretion seems to me to be a bit hollow for
17 this reason: I have a hard time imagining that, in light of
18 language of this kind, a legislative expression this concise,
19 administrative discretion in the sense that has been suggested
20 here that they might decide, well, handicapped people ought to
21 have a break, we ought to interpret this language in a certain
22 way to give handicapped people a break -- I don't see that sort
23 of leeway in the statutory language.

24 The plaintiff may be right as a matter of interpretation
25 or may be wrong, but I don't see that sort of leeway or, for

1 that matter, any other substantial playing field, if you will,
2 for importing generalized policy considerations into the
3 interpretation of the statute.

4 So the most telling factor from the defendant's
5 perspective in my view is the need for uniformity and
6 consistency but, for the reasons I've said, I am not terribly
7 impressed by that in terms of just exactly how we would get
8 that uniformity and consistency.

9 The FCC certainly has something to offer on that score
10 that a strictly Article III approach does not have to offer
11 but, after all, it's going to end up in an Article III court
12 one way or another in any event.

13 Now, the argument on the other side of that is, well, if
14 it goes to the Tenth Circuit, then that's just one circuit
15 court, whereas if it goes to the Court of Appeals in
16 Washington, that is one circuit court addressing a
17 determination of nationwide import. I do understand that.

18 But either way, it can get Court of Appeals treatment
19 without undo delay from this Court to the Tenth Circuit Court
20 of Appeals, which is probably where it would end up in any
21 event if the matter is resolved by this Court.

22 Many of the same considerations do inform my evaluation of
23 the matter in terms of my inherent authority to control my
24 docket and lead me to the same conclusion, and that is that a
25 stay should be denied on that basis, as well.

1 And in terms of my inherent authority to control my
2 docket, I can be a bit more unvarnished in my expression of my
3 concern about the time factor. And I don't get from the Tenth
4 Circuit cases on primary jurisdiction that the time factor is
5 the be all and end all and, for that reason, I do not evaluate
6 primary jurisdiction by letting the time factor be the be all
7 and end all.

8 But the time factor becomes, I think, significantly more
9 prominent when it is taken into account as a factor informing
10 my evaluation of the application of my inherent authority to
11 control my docket. That's where I am every day required to
12 take into account Rule 1 of the Federal Rules of Civil
13 Procedure. I decline to hitch my docket to the FCC's docket
14 for what is very clearly an undetermined length of time. And
15 for that reason, the motion to stay is denied.

16 That does bring us to the motion to approve class action
17 notice. I'm prepared to address that motion very promptly, and
18 I assure counsel on both sides that I will address that matter
19 very promptly.

20 Anything further in this matter from the plaintiff?

21 MR. CATALANO: No, Your Honor.

22 THE COURT: From the defendant?

23 MR. FREELAND: No, Your Honor.

24 THE COURT: From the other defendant?

25 MS. ZACHRITZ: No, Your Honor.

1 THE COURT: Court will be in recess.

2 (COURT ADJOURNED.)

3
4 CERTIFICATE OF OFFICIAL REPORTER

5 I, Tracy Thompson, Federal Official Realtime Court
6 Reporter, in and for the United States District Court for the
7 Western District of Oklahoma, do hereby certify that pursuant
8 to Section 753, Title 28, United States Code that the foregoing
9 is a true and correct transcript of the stenographically
10 reported proceedings held in the above-entitled matter and that
11 the transcript page format is in conformance with the
12 regulations of the Judicial Conference of the United States.

13 Dated this 13th day of March 2019.

14
15 /S/ Tracy Thompson

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