

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

In the Matter of Yodel Technologies LLC's)	
Petition for Expedited Declaratory Ruling or)	
In the Alternative Retroactive Waiver)	
)	CG Docket No. 02-278
)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

**PETITION FOR EXPEDITED DECLARATORY RULING
REGARDING THE APPLICATION OF 47 U.S.C. § 227(b)(1)(B) OF
THE TELEPHONE CONSUMER PROTECTION ACT OR IN THE ALTERNATIVE
RETROACTIVE WAIVER**

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EXECUTIVE SUMMARY

Yodel Technologies LLC (“Yodel”) seeks a declaratory ruling or, in the alternative, a retroactive waiver with respect to its use of soundboard technology. Such a ruling or waiver from the Commission is critically necessary because soundboard technology, which involves a live agent on each call, affords the capability for a high degree of interactivity between a caller and a called party. These calls are not wholly prerecorded calls that deprive consumers of the ability to register their discontent or otherwise interact with the party placing the calls. The FCC’s guidance under the Telephone Consumer Protection Act (“TCPA”) has long suggested that only calls which are entirely prerecorded and lack any human interaction trigger statutory coverage. The U.S. Court of Appeals for the Ninth Circuit also has held that the use of “tape recorded” messages by live agents does not violate the TCPA. Yet Yodel now faces potentially business-ending damages in a class action TCPA lawsuit following its use of this technology in a manner that appeared perfectly legal at the time the calls were made.

Alternatively, should the Commission conclude that the messages played by live agents using soundboard technology amount to “prerecorded voice ... messages” under the statute, Yodel requests an urgent and expedited retroactive waiver of liability from the Commission for its use of soundboard technology prior to May 12, 2017. As shown below, it utilized soundboard technology on the good faith belief that this technology did not constitute the use of a prerecorded call, as explained by positions taken by the Federal Trade Commission, the Ninth Circuit’s decision in *Moser v FCC*, 46 F.3d 970 (9th Cir. 1995) and the FCC’s repeated guidance suggesting the nature of the prerecorded calls covered by the TCPA.

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Pursuant to Section 1.2 of the Rules of the Federal Communications Commission (“FCC” or “Commission”),¹ Yodel Technologies LLC (“Yodel” or “Petitioner”) respectfully petitions the Commission for an expedited declaratory ruling that the use of soundboard or so-called avatar technology—affording the capability for a high degree of human interaction between a live caller using a suite of, in many cases brief, prerecorded voice messages—is not a prerecorded call of the type prohibited by Section 227(b)(1) of the Telephone Consumer Protection Act (“TCPA” or the “Act”) and the FCC’s implementing rules, 47 C.F.R. §64.1200(a)(1).

In the alternative, pursuant to Section 1.3 of the Commission’s rules,² Yodel requests that the Commission grant a retroactive waiver, for the period prior to May 12, 2017, of application of those prerecorded call prohibitions under the TCPA to Yodel’s use of soundboard technology.

¹ 47 C.F.R. § 1.2.

² 47 C.F.R. § 1.3.

A declaratory ruling or, in the alternative, a waiver from the Commission is critically necessary because soundboard technology, which involves a live agent on each call, affords the capability for a high degree of interactivity between a caller and a called party. These calls are not wholly prerecorded calls that deprive consumers of the ability to register their discontent or otherwise interact with the party placing the calls. To the contrary, the technology is specifically designed to help live agents *respond* in a dynamic and helpful way to questions and comments from the call recipient. The FCC's guidance has long suggested that only calls which are entirely prerecorded and lack any human interaction trigger statutory coverage. The U.S. Court of Appeals for the Ninth Circuit also has held that the use of "tape recorded" messages by live agents do not violate the TCPA. Yet Yodel now faces potentially business-ending damages in a class action TCPA lawsuit following its use of this technology in a manner that appeared perfectly legal at the time the calls were made.

Alternatively, Yodel requests an urgent and expedited retroactive waiver of liability from the Commission. As shown below, it utilized soundboard technology on the good faith belief that this technology did not constitute the use of a prerecorded call, as explained by positions taken by the Federal Trade Commission ("FTC"), the Ninth Circuit's decision in *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995) and the FCC's repeated guidance suggesting the nature of the prerecorded calls covered by the TCPA.

I. BACKGROUND ON YODEL AND SOUNDBOARD TECHNOLOGY

Yodel is a Florida-based company that is a pioneer in the development and use of soundboard technology. Soundboard technology employs live agents who, once a call is initiated, respond to call-recipient statements and questions by selecting one or more often short recorded responses during live calls. The live agent is on the line from call inception and, where necessary based on the responses from the called party, can intervene in the call in real time by speaking directly to the

recipient. Soundboard technology does not involve the uninterrupted playing of a prerecorded voice message, which was and remains the true target of the TCPA's restrictions. Moreover, the soundboard does not "automatically" play anything; a live agent decides and manually controls which prompts are played and in what order.

This technology is desirable from a consumer perspective because it allows a called party to interact with an individual whose live voice, instructions and information are easy to understand. The technology is desirable from a business perspective because it assures human agents will not go "off script" with improper, inaccurate, or incomplete assertions. It also aids compliance with the FCC's telemarketing rules because businesses can assure that agents make the proper and required disclosures. Further, it aids in enforcement activity because if the necessary disclosures are not made as part of the scripts used by the agents, that will be apparent and easily remedied.

The Commission is familiar with soundboard technology from a currently pending Petition For Emergency Declaratory Ruling filed by NorthStar Alarm Services, LLC, that sets forth a litany of persuasive reasons why the Commission should rule that use of soundboard technology does not violate the TCPA.³ Yodel, which provided such services to NorthStar and is now subject to the same litigation exposure that prompted that Petition, fully supports those arguments and submits its own justifications for the Commission to make the requested declaration. In the alternative, the Commission should retroactively waive application of the requirements to Yodel's use of soundboard technology as outlined below.

³ Consumer and Governmental Affairs Bureau Seeks Comment On Petition for Expedited Declaratory Ruling by NorthStar Alarm Services, LLC, DA 19-74, Public Notice, (rel. Feb. 12, 2019) ("*NorthStar Petition*"). The comment period closed on March 29, 2019 and the Petition remains pending.

II. SOUNDBOARD TECHNOLOGY IS NOT SUBJECT TO THE PRERECORDED VOICE MESSAGE PROSCRIPTIONS OF SECTION 227(b)(1)(B) OF THE TCPA

The TCPA generally prohibits initiation of “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.”⁴ A call is “initiated” when a person or entity “takes the steps necessary to physically place a telephone call....”⁵

Since the Commission’s implementation of that provision in 1992 it has repeatedly suggested that the phrase “prerecorded voice ... message” refers to “autodialed and prerecorded voice message calls”—that is, calls and messages that were *entirely prerecorded*—and not merely the use of a prerecorded voice segment as part of an otherwise live call.⁶ Indeed, Yodel respectfully submits that the FCC’s statements have consistently suggested the phrase “using an artificial or prerecorded voice to deliver a message” in Section 227(b)(1)(B) refers to calls that are entirely prerecorded and fully automated for more than 25 years.

Further examples abound. The Commission’s 2012 TCPA Report and Order refers to calls forbidden by the TCPA as either “prerecorded calls” or “robocalls.”⁷ Every example of such calls given by the FCC, whether proscribed or not, assumes a fully automated call like a notification of

⁴ 47 U.S.C § 227(b)(1)(B). Note the arguments herein are equally applicable to the use of the term “artificial and prerecorded voice” in Section 227(b)(1)(A).

⁵ In the Matter of Joint Petition Filed by DISH Network, LLC et al., CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6583 ¶26 (2013) (“*Dish Declaratory Ruling*”).

⁶ See, e.g., In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order 7 FCC Rcd 8752, 8753 ¶2 (1992) (TCPA prohibits use of autodialers and prerecorded messages to place calls); *id.*, at 8756-57 ¶8 (FCC had requested comment on whether there is inherent difference in nuisance factor “between artificial or prerecorded voice calls as opposed to live solicitations”); *id.*, at 8757-58 ¶9 (“Calls placed by recorded message players can be more difficult for the consumers to reject or avoid”); *id.*, at 8768 ¶28 (TCPA allows autodialed and prerecorded message calls if called party expressly consents) (emphases added) (1992).

⁷ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, ¶¶2, 4, 9, 18-19, 20-21, 30, 41, 45-47 (2012); *see id.*, at ¶2 n.5 (“Throughout this Report and Order, we use the term “prerecorded” message or call to refer to “artificial or prerecorded voice” messages or calls.”).

“a workplace or school closing” or mass “emergency messages.”⁸ Similarly, its 2003 TCPA Report and Order⁹, exclusively uses examples of TCPA messages *as fully automated calls*.¹⁰ Similar references are contained in the Commission’s 2015 TCPA Declaratory Ruling and Order.¹¹

In addition, the FCC’s regulations, 47 C.F.R. § 64.1200(b)(2), place disclosure obligations on “artificial or prerecorded telephone messages” requiring disclosure of a number “other than that of the artificial or prerecorded message player that placed the call”—language that assumes that the TCPA applies only to fully automated robocalls. The FCC also interprets the TCPA’s language regarding automation narrowly to avoid including technologies outside of robocalls.¹²

The Commission’s perspective that the statute was intended to address calls that were *entirely prerecorded* — and not merely the use of a prerecorded voice in an otherwise live call — is fully consistent with what the U.S. Court of Appeals for the Ninth Circuit held in 1995.¹³ The Court cited the Congressional finding about the ““nuisance and greater invasion of privacy”” of calls that ““cannot interact with the customer except in preprogrammed ways.””¹⁴ The Court went on to note that the statute did not ban prerecorded messages introduced by a live operator.¹⁵

⁸ *Id.*, at ¶17.

⁹ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

¹⁰ See e.g., *id.*, at ¶127 n.410, ¶137 n. 462, ¶138 n.469; see also *id.*, at ¶8 (explaining that “[a]utodialers can deliver prerecorded messages to thousands of potential customers every day”).

¹¹ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278; WC Docket No. 07-135, 30 FCC Rcd 7961, ¶ 1 n.1 (2015) (“*Omnibus Order*”) (“In this Declaratory Ruling and Order, we refer to calls that require consumer consent under the TCPA as ‘robocalls’ ... Unless otherwise indicated, the term ‘robocalls’ includes calls made either with an automatic telephone dialing system (‘autodialer’) or with a prerecorded or artificial voice. We may also refer to prerecorded-voice and artificial-voice calls collectively as ‘prerecorded calls.’”).

¹² See *DISH Declaratory Ruling*, 28 FCC Rcd at 6583, ¶26 (“We conclude that a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.”).

¹³ *Moser v. F.C.C.*, 46 F.3d 970 (9th Cir. 1995) (“*Moser*”)

¹⁴ *Id.*, at 972; see also *id.*, at 974.

¹⁵ *Id.* at 974.

The Commission in its own Brief in the *Moser* case conceded that Congress had granted greater latitude where there was interaction between humans than where there were only machine-generated messages.¹⁶ The FCC noted that “the demarcation drawn by the statute, which gives greater protection to human exchange than prerecorded announcements,” was further supported by state experiences, favorably citing a finding that “the distinction between live and prerecorded calls “addresses the inescapable fact that machines cannot ascertain the propriety of proceeding with a message.””¹⁷ Soundboard technology of course can.

Finally, for seven years, the Staff of the Federal Trade Commission, which cooperates with the FCC in combatting illegal robocalls, held that its Telemarketing Sales Rule on use of prerecorded telemarketing calls did not apply to the use of soundboard technology where “a single agent stays with a call from beginning to end.”¹⁸ When the FTC Staff changed its position in 2016 regarding soundboard’s use for telemarketing calling, it expressly recognized the serious reliance interests at stake and (even when huge TCPA damages were not implicated) afforded parties months to come into compliance with the FTC’s new guidance.¹⁹ Meanwhile, the FCC’s repeated statements thus still stand.

Soundboard technology involves a live operator on every call, available to interact with the called party from inception as necessary. There is no uninterrupted prerecorded message which the called party is forced to listen to or hang up, without any ability to convey that the call is unwanted.

¹⁶ *Moser*, Brief for the Appellants Federal Communications Commission 1993 WL 13101270, p. 10.

¹⁷ *Id.*, pp. 10-11, citing *State of Minnesota v. Casino Marketing Group, Inc.* 491 N.W. 2d 882, 890 (1992), *cert. den.*, 113 S. Ct. 1648 (1993); *see also* Reply Brief for Appellants Federal Communications Commission, 1994 WL 16014724, p. 4 (“In contrast, . . . , an automated message, ‘cannot interact with the customer except in preprogrammed ways’ and does ‘not allow the caller to’ . . . ask questions, register complaints, or ask not to be called again.”).

¹⁸ A copy of the September 11, 2009 FTC staff opinion letter can be found at http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf.

¹⁹ A copy of the revised FTC Staff advice can be found at https://www.ftc.gov/system/files/documents/advisory_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopsoundboarding.pdf. Consistent with the FTC’s guidance, Yodel immediately changed its practices after the FTC Staff changed its position. The FTC letter, moreover, expressly stated that it was not opining on the applicability of the FCC-administered TCPA.

(Indeed, the potential class of plaintiffs in the Yodel case is partially defined by recipients who interjected and asked not to be called—precisely the functionality and interactivity that Congress and the FTC sought to preserve by barring one-way recordings.) For the foregoing reasons and those set forth in the NorthStar Petition, Yodel respectfully requests that the Commission, consistent with its lengthy string of statements referring to such uninterruptable prerecorded calls, formally declare that the use of soundboard technology is not subject to the prerecorded voice message proscriptions of Section 227(b)(1)(B) of the TCPA.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD RETROACTIVELY WAIVE APPLICATION OF THE TCPA RULES REGARDING PRERECORDED CALLS TO SOUNDBOARD TECHNOLOGY

In the event the Commission does not declare that the use of soundboard technology does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA, it should waive the application of the rules for the period prior to May 12, 2017 for the reasons set out below.²⁰

The Commission's rules expressly provide that the Commission may waive any provision of its rules "if good cause therefor is shown."²¹ The Commission "may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest."²² It is well established that the Commission will waive its rules in specific cases if it determines, after careful consideration of all pertinent factors, that such a grant would serve the public interest without undermining the policy that the rule in question is intended to serve.²³

Yodel respectfully submits that there is ample good cause present under the circumstances to justify a retroactive waiver. Yodel's use of soundboard technology had been fully consistent with

²⁰ This is the date on which the revised FTC Staff advice took effect.

²¹ 47 C.F.R. § 1.3.

²² *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*)).

²³ See *WAIT Radio*, 418 F.2d at 1157.

what was reasonably understood to be the applicable law by the industry and regulators. Relatively early on, the Ninth Circuit's *Moser* decision had seemingly blessed a rudimentary form of the technology Yodel uses. That precedent has never been called into question or reversed. Further, and more importantly, the Commission has repeatedly suggested that the TCPA was intended to combat calls that were prerecorded *in their entirety*, not calls involving a live agent employing selected prerecorded messages. Furthermore, the FTC explicitly had blessed the use of soundboard technology as outside the scope of the Telemarketing Sales Rule—a regulation containing virtually the same language as the TCPA on the subject of prerecorded calls. Finally, Yodel timely responded to the FTC's change in position as it related to the Telemarketing Sales Rule.

As noted above, the Commission has never interpreted this provision to cover all soundboard technology, nor revised its repeated descriptions of Section 227(b) to cover entirely prerecorded calls. Thus, Yodel respectfully submits that it was reasonable for Yodel to assume that the underlying purpose of the statute and related FCC rule was to address calls that were prerecorded *in their entirety*, not calls involving a live agent employing selected prerecorded messages.

It would be fundamentally unfair for Yodel to face crippling liability based on its reliance on FCC, FTC, and Ninth Circuit statements. Yodel relied on the Commission's statements in good faith and should not be exposed to business-threatening TCPA liability for prior conduct before it conformed its practices to the FTC's later revised position (particularly where the FTC itself afforded parties time to come into prospective compliance with its new view). Failure at least to grant such a waiver effectively would provide an open license to file more TCPA lawsuits in connection with calls where there had been live parties on either end of the line.

The Commission has previously granted waivers where there was confusion or reasonable questions about the requirements of the agency's TCPA rules regarding, for example, consent and

opt-out requirements.²⁴ But such confusion or questions should not be a prerequisite for the waiver relief sought in this case.²⁵

Indeed, here, as previously noted, the Commission has repeatedly suggested that the phrase “autodialed and prerecorded voice message calls” made reference to calls and messages that were *entirely prerecorded* — and not merely the use of a prerecorded voice in an otherwise live call. Yodel relied in good faith on those statements and the other authorities cited. Under these circumstances, strict compliance with an FCC rule now being interpreted as applicable to live-call use would not be in the public interest. The Commission at least should grant a retroactive waiver as requested for any claims of TCPA violations prior to May 12, 2017.

IV. CONCLUSION

For the reasons expressed above, the Commission should issue a declaratory ruling holding that the use of soundboard or so-called avatar technology—affording the capability for a high degree of human interaction between a live caller using a suite of prerecorded voice messages—is not a prerecorded call of the type prohibited by Section 227(b)(1) of the Telephone Consumer Protection Act (“TCPA” or the “Act”) and the FCC’s implementing rules, 47 C.F.R. § 64.1200(a)(1).


In the alternative the Commission should retroactively waive the application of the rules relating to artificial and prerecorded voice messages to Yodel’s use of soundboard technology for the period prior to May 12, 2017 for the reasons set forth above.

²⁴ *Omnibus Order*, at 8014 ¶102; In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278; 05-338, Order, 29 FCC Rcd 13998 (2014); *see also* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Order, DA 19-562 (CGB rel. June 13, 2019); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Order, 31 FCC Rcd 11643 (CGB 2016).

²⁵ If the Commission were to find that its statements were ambiguous or unclear, then a waiver would be equally justified.

Respectfully submitted,

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