

**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)	

REPLY COMMENTS OF YODEL TECHNOLOGIES LLC

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EXECUTIVE SUMMARY

The six opponents to the Yodel Petition (“Opposing Commenters”) collectively and to varying degrees raise four broad categories of concern. First, they advocate that Yodel’s technology has been—and may be—misused without an expansion of the Telephone Consumer Protection Act (“TCPA”). Second, they take issue with Yodel’s textual reading of the TCPA as applying only to messages that are static and wholly prerecorded. Third, they advocate that policy concerns should prevail over the language and focus of the statute. Fourth, and finally, they argue that the FCC lacks the authority to—and otherwise should not—grant Yodel retroactive relief.

First, Yodel’s Petition seeks only very narrow relief clarifying, essentially, that not every use of a prerecorded voice in a live call *per se* triggers TCPA liability. Opposing Commenters vigorously attack a strawman version of Yodel’s narrow and reasonable Petition, repeatedly warning that millions of unattended “robotic” calls will follow if relief is granted. Opposing Commenters misapprehend the relief sought by the Petition and, as a result, their primary and lengthy arguments related to potential “abuse” of soundboard technology are misplaced.

Second, continuing the theme of misapprehending Yodel’s request, several Opposing Commenters take issue with Yodel’s textual approach to interpreting the TCPA’s restrictions at 47 U.S.C. § 227(b)(1)(B). That provision reads, in relevant part: “It shall be unlawful for any person ... to initiate any *telephone call* to any residential telephone line using an artificial or prerecorded voice to deliver a message....” Opposing Commenters assert that this provision is “clear” that *any use* of a prerecorded voice necessarily triggers TCPA liability. But their reading is *not* clear, which explains why no agency or court had adopted it during the 28 years since the statute’s enactment. In any event, this argument overlooks an ambiguity in the statutory language. Initiating a call means taking the steps necessary to launch a call, which implies that only a call that is wholly prerecorded or artificial (that is computerized) is covered by this section of the statute. This interpretation is

confirmed by repeated suggestions by the Commission that the TCPA applies to prerecorded *calls* and not merely the playing of a prerecorded message on an otherwise live call.

Third, the TCPA was not designed to apply to all telemarketing calls or to bar any unsolicited use of a message in a phone call. Congress adopted a balance in enacting the TCPA and elected to have it apply to only a specific set of technologies. That Congress might have gone even farther in pursuit of its policy goals is proof that Yodel's Petition ought to be granted, not that the FCC needs to stretch the statute further to address technology not facially at issue in the statute.

Fourth, the FCC has the ability to grant retroactive waivers of statutory liability by virtue of its power to implement the TCPA. "By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency."¹ Indeed, the Commission has already squarely held that it may grant retroactive waivers in the context of litigation between private parties, noting "[l]ikewise, the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances, does not undercut [the Commission's authority], as the expert agency, to define the scope of when and how our rules apply."²

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Application For Review Filed By Anda Inc.*, Order, 29 FCC Rcd. 13998, 14008, ¶21 (2014).

² *Id.*

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In accordance with the Commission's Public Notice, dated September 19, 2019, Yodel Technologies LLC ("Yodel" or "Petitioner") hereby timely submits its Reply Comments in this matter.³

Introduction

Yodel has reviewed the six posted oppositions to its Petition ("Opposing Comments").⁴ Three of the Opposing Comments are from individual telephone consumers.⁵ One is from repeat Telephone Consumer Protection Act ("TCPA") plaintiff and FCC commenter Joe Shields.⁶ One is from Mr. Braver, a plaintiff in a pending class action TCPA suit against Yodel, in which his counsel hopes to recover millions of dollars.⁷ The final Opposing Comment is by the NCLC, a consistent

³ FCC Public Notice, "Consumer And Governmental Affairs Bureau Seeks Comment On Petition For Declaratory Ruling Or Retroactive Waiver Filed By Yodel Technologies LLC," DA 19-931, (rel. Sept. 19, 2019). Hereinafter the Petition For Expedited Declaratory Ruling or in the Alternative Retroactive Waiver shall be referred to as the "Petition."

⁴ Comments of Carl Paulson, CG Docket No. 02-278 (filed Sept. 23, 2019) ("Paulson Comments"); Comments of Christopher Sawyer, CG Docket No. 02-278 (filed Oct. 15, 2019) ("Sawyer Comments"); Comments of John A. Shaw, CG Docket No. 02-278 (filed Oct. 21, 2019) ("Shaw Comments"); Comments of Joe Shields, CG Docket No. 02-278 (filed Oct. 21, 2019) ("Shields Comments"); Comments of Robert Braver, CG Docket No. 02-278 (filed Oct. 21, 2019) ("Braver Comments"); Comments of National Consumer Law Center, CG Docket No. 02-278 (filed Oct. 21, 2019) ("NCLC Comments") (collectively "Opposing Commenters").

⁵ Shaw Comments; Paulson Comments; Sawyer Comments.

⁶ Shields Comments.

⁷ Braver Comments.

proponent of private enforcement of the TCPA via litigation.⁸

The Opposing Commenters raise four broad categories of concern. First, they advocate that Yodel's technology has been—and may be—misused without an expansion of the TCPA. Second, they take issue with Yodel's textual reading of the TCPA as applying only to messages that are static and wholly prerecorded. Third, they advocate that policy concerns should prevail over the language and focus of the statute. Fourth, and finally, Opposing Commenters argue that the FCC lacks the authority to—and otherwise should not—grant Yodel retroactive relief. Yodel responds to each of these arguments in turn.

I. Commenters' Concerns Regarding "Abuse" Of Soundboard Technology Overlook That Yodel's Petition Does Not Seek Modification To The TCPA's Existing Limitations On Automated Calls

Yodel's Petition seeks only narrow relief clarifying, essentially, that not every use of a prerecorded voice in a live call *per se* triggers TCPA liability. Opposing Commenters vigorously attack a strawman version of Yodel's reasonable Petition, repeatedly warning that millions of unattended "robotic" calls will follow if relief is granted. Opposing Commenters misapprehend the relief sought by the Petition and, as a result, their primary and lengthy arguments related to potential "abuse" of soundboard technology are misplaced.

Several of the Opposing Comments seek to cast Yodel as a bad actor and warn of the potential abuse of soundboard technology if it is not subject to the TCPA. The Braver Comments, in particular, make numerous assertions unsupported by the factual record and are laden with rhetoric, characterizing Yodel as a law violator that places telemarketing calls without regard for consent. Commenter Shields likewise asserts—relying on unproven allegations asserted in

⁸ NCLC Comments. Three other commenters support the Yodel Petition. See Comments of Drew Gilkey, CG Docket No. 02-278, (filed Sept. 20, 2019); Comments of Consolidated World Travel, Inc. and Consolidated Travel Holdings Group, Inc., CG Docket No. 02-278 (filed Oct. 4, 2019); Comments of Tantillo Law PLLC, CG Docket No. 02-278 (filed Oct. 21, 2019).

litigation—that Yodel’s technology is still being used indiscriminately and without regard for consumer contact preferences. Commenter Sawyer is primarily concerned with the use of Yodel’s technology for unsolicited telemarketing, as well.⁹ The Commission should note that the assertions in the Opposing Comments are, for the most part, unsupported by any factual citation.

The TCPA is not designed to cover all unsolicited telemarketing. The statute’s delivery restrictions apply only to the use of certain specified technology. For the reasons identified in the Petition, however, Yodel’s technology is not within the class of systems regulated by the TCPA. The Opposing Comments correctly underscore the potential for abuse of any calling technology—including technology such as Yodel’s — that is not regulated by the TCPA. Nonetheless, the TCPA is a “statutory rifle shot.”¹⁰ It affords an additional remedy to individuals receiving unwanted and uninvited calls from only specific classes of technology. The TCPA is simply not a catchall prohibition banning all unwanted automated technology. Remedies exist under state and common law addressing unwanted calls made using technology that is not subject to the TCPA.¹¹

Critically, Opposing Commenters appear to assume that Yodel is looking for a declaratory ruling offering blanket protection for users of soundboard technology. It is doing no such thing. As Commenter Braver correctly points out, soundboard calls might be launched using an automatic telephone dialing system (“ATDS”). *Yodel’s petition seeks no redress on this issue.* If a Court concludes that Yodel’s technology uses an ATDS to “make” the call such that the calls are regulated by the TCPA, then Yodel’s client must obtain the requisite level of consent to make that call or face potential TCPA exposure. It bears repeating that Yodel’s Petition contains only a narrow request—

⁹ Sawyer Comments at 1.

¹⁰ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8075 (2015) (Dissenting Statement Of Commissioner Ajit Pai).

¹¹ See e.g., 47 U.S.C. § 223; M. Sean Royall, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. Chi. L. Rev. 1403 (1989).

clarification that the use of a prerecorded voice in an otherwise live call does not *per se* trigger TCPA coverage as the initiation of a prerecorded voice call. Thus, the relief sought in the Petition will only assist users of soundboard technology where the call was made manually or in circumstances where the use of an ATDS is not regulated. Opposing Commenters' fears of widespread misuse of soundboard technology are, therefore, vastly overblown.

Moreover, that soundboard technology might be misused or abused does not mean that it is pernicious or nefarious technology. Indeed, Opposing Commenters themselves identify numerous perfectly valid reasons why a customer might want to use Yodel's technology. For instance, the Braver Comments note that "these soundboard agents play numerous prerecorded voice messages throughout the call because they either cannot speak English or have a heavy accent that would make conversation difficult."¹² The Shaw Comments raise a similar point: noting the use of technology by individuals with "difficult-to-understand" accents.¹³ But utilizing technology to enable agents who can understand English, but may not be comfortable speaking it, to engage in conversations they could not otherwise have is a commendable use of the soundboard tool. Suggestions by Opposing Commenters that such individuals should be denied the opportunity to engage in live conversation with English-speaking individuals is unfortunate and unwarranted. As a policy matter the FCC should not punish the use of technology that enables disabled individuals, or individuals who are not comfortable speaking clear English, to engage in communication.¹⁴

Commenter Sawyer also notes that Yodel's Petition does not address what will be done when

¹² Braver Comments at 1.

¹³ Shaw Comments at 4.

¹⁴ Relatedly, the Sawyer Comments remark that Yodel's technology is intended to "further computerized automation of outgoing telephone calls..." Sawyer Comments at 3. It is unclear what that fear is based on or what that assertion means in this context. At bottom, Yodel's technology involves human beings communicating with each other in real time. True, the consumer is not hearing the agent's actual voice. But that does not make the interaction any less "human." There is simply no "computerized automation" involved in these exchanges.

a request for calls to stop is received.¹⁵ That is true, but unsurprising since the Petition seeks a clarification that Yodel's technology is not covered by the TCPA's prerecorded voice restriction. As such the Petition does not seek to modify—and therefore did not address—the Commission's existing revocation paradigm. As conceded above, however, Yodel's calls may be made using automated technology that separately triggers a requirement to obtain prior express consent. Where applicable, therefore, a client using Yodel's technology would need to maintain prior express written consent,¹⁶ maintain a comprehensive opt-out list,¹⁷ and honor do-not-call requests.¹⁸

The narrow clarification sought by Yodel's Petition does not impact these requirements, except where the call is determined to have been placed manually or where the separate use of an ATDS does not trigger liability. Even in those narrow instances, however, impacted telephone consumers have a remedy in existing legal theories and causes of action available under state common law such as for invasion of privacy, intrusion upon seclusion, and perhaps harassment.¹⁹ That Congress enacted limits on the reach of the TCPA's ATDS prohibitions, however, is evidence of Congressional intent *not* to afford a further remedy for such calls under the TCPA. Expanding the TCPA to cover Yodel's technology in this context, therefore, is inconsistent with the letter and spirit of the statute.²⁰

¹⁵ Sawyer Comments at 2.

¹⁶ See 47 C.F.R. § 64.1200(a)(2),(3), (f)(8).

¹⁷ See 47 C.F.R. § 64.1200(b)(3), (d).

¹⁸ See 47 C.F.R. § 64.1200(c).

¹⁹ See generally *Emerging Technologies and the Law* § 9.04; Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 Yale J. on Reg. 99 (1986). consumer statutes discussed at <https://www.justia.com/consumer/consumer-protection-law/>; <https://tcpaworld.com/2019/10/03/california-governor-signs-robocall-legislation/>

²⁰ Commenter Braver also contends that Yodel uses its messages to “deceive and mislead” the public. Braver Comments at 1. That is not true, but that assertion is likewise beside the point. Remedies for fraud and dishonest businesses practices involving telemarketing are found outside of the TCPA. The TCPA is content neutral. The statute does not concern itself with the content of the message being delivered—rather the focus is on the manner of delivery. That certain lawfully delivered messages might otherwise be fraudulent or contain inaccurate or misleading information does not mean that the TCPA must/should/could be expanded to address such calls.

II. The Text Of The TCPA Is Ambiguous, But Common Sense And Constitutional Restrictions Assure That Not Any Use Of A Prerecorded Voice During A Live Call Necessarily Triggers TCPA Coverage

Continuing the theme of misapprehending Yodel's Petition, several commenters take issue with Yodel's textual approach to interpreting the TCPA's restrictions at 47 U.S.C. § 227(b)(1)(B).²¹ The provision reads, in relevant part: "It shall be unlawful for any person... to initiate any *telephone call* to any residential telephone line using an artificial or prerecorded voice to deliver a message...."²² Opposing Commenters assert that this provision is "clear" that *any use* of a prerecorded voice necessarily triggers TCPA liability. Yet this argument overlooks an ambiguity in the statutory language. Initiating a call means taking the steps necessary to launch a call; which seemingly implies that only a call that is wholly prerecorded or artificial (that is computerized) is impacted by this section of the statute. This interpretation is confirmed by repeated suggestions by the Commission that the TCPA applies to prerecorded *calls* and not merely the playing of a prerecorded message on an otherwise live call.²³

Indeed, Commenter NCLC makes Yodel's statutory interpretation point for it and rather directly. As NCLC points out "the *message* from the caller is not contained in the individual snippets... the *message* is the whole call made by the caller with the goal of selling a product."²⁴ Yodel could not have said it better itself. In the case of a soundboard call, the *message* is the whole call; yet the whole call is not a single static prerecorded interaction. It is a dynamic discourse, the content of which is not determined until the call concludes. The *message* is neither prerecorded nor automatically generated—it is a live conversation and the content is never determined before the call initiates. So soundboard calls necessarily do not use a prerecorded or artificial means to deliver

²¹ NCLC Comments at 3; Braver Comments at 5; Shaw Comments at 2-3.

²² 47 U.S.C. § 227(b)(1)(B).

²³ Petition at 4-5.

²⁴ NCLC Comments at 5.

a message—they use a *human agent* to deliver messages throughout the “whole call.”²⁵

Opposing Commenters likewise point to legislative history that actually aids Yodel’s position. For instance, both Commenter NCLC and Commentator Braver cite a portion of the Senate Committee Report demonstrating that the statute plainly assumed that a prerecorded message could be played on a call that included participation by a live agent who sought consent after the call was connected.²⁶ But in the context addressed in the Senate Committee Report, the *entire* prerecorded message to the consumer consisted of a single non-interactive message.²⁷ That is—the Senate Committee Report demonstrates that Congress intended the TCPA to apply where the *entirety of the message is prerecorded*, not, whereas here, the contents of the message are determined only during interaction with a live call recipient.²⁸

Still, Commenter NCLC argues that this distinction is “meaningless” as “there is no functional difference between a call with one uninterrupted prerecorded voice communication and a call with multiple snippets of prerecorded voice phrases.”²⁹ But of course there is. The difference is the ability for the human call recipient to interact with the human caller in real time. This live

²⁵ Commenter Shaw asserts that Congress “did not include any provision in the TCPA that would allow for an exception for such technology.” Shaw Comments at 3. But as the TCPA is not properly interpreted to apply to such technology to begin with, an exemption is not needed.

²⁶ See NCLC Comments at 2, 6; Braver Comments at 6, both citing S. Rep. No. 102-178, 102d Cong. 1st Sess., Oct. 8, 1991, at 8 (“*Senate Report*”). The Commenters ignore the importance to Congress of having a live agent on the phone—something provided by soundboards. See 137 Cong. Rec. S16206 (Nov. 7, 1991) (comments of Sen. Hollings) (“Let me also make clear with respect to the Constitution that this legislation does not cover calls made by live persons. The intention of this bill is to deal directly with computerized calls. All this legislation requires is that when a person is called at home, there must be a live person at the other end of the line.”)

²⁷ Congress’ concern was focused on “automated calls [that] cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape or a voice recording service, and do not disconnect the line even after the customer hangs up the telephone.” *Senate Report* at 4-5. See discussion of FCC briefs in *Moser v. FCC*, 46 F. 3d 970 (9th Cir. 1995) (“*Moser*”) in Petition at 6, particularly at n.17 (“In contrast, ..., an automated message, ‘cannot interact with the customer except in programmed ways’ and does ‘not allow the caller to’ ... ask questions, register complaints, or ask not to be called again.”).

²⁸ On the issue of human participation on the call, Opposing Commenters seem to have a bit of confusion. For instance, Commenter Sawyer discusses the use of technology enabling “software” to determine when to transfer the call to a live person. Sawyer Comments at 2. But Yodel’s technology requires a live human being to be involved with the interaction with the consumer at all times; the agent, not software, determines the messages the consumer hears. Petition at 2-3.

²⁹ NCLC Comments at 4.

interaction thwarts the typical concerns raised by purely prerecorded message delivery—such as the inability of a consumer to register their discontent with the caller or request calls to cease.³⁰

This approach is perfectly consistent with the requirements of the FCC’s regulation at 47 C.F.R. § 64.1200(b)(2). Without question, a prerecorded call for purposes of Section 227(b)(1)(B) of the TCPA is a prerecorded call for purposes of Section 64.1200(b)(2). Yet applying the restrictions of Section 64.1200(b)(2) to the use of any prerecorded snippet played during an otherwise live call would destroy the ability of callers to use short-duration prerecorded messages of any sort (i.e., notifications that a call may be recorded for quality assurance.) So the restrictions of Sections 64.1200(b)(2) and 227(b)(1)(B) are best understood as applying to messages that are *wholly* prerecorded. Tellingly only one Opposing Commenter—Commenter Braver—even addresses this critical issue, and he falls back on an untenable position noting finicky distinctions in the language used in the two Sections.³¹ Yet there is no coherent distinction between the phrases used in those Sections that would enable divergent treatment for purposes of the TCPA’s regulations. The silence of Opposing Commenters on this issue is simply deafening.

Finally, the NCLC and Braver Comments vigorously assert that a single district court in Oklahoma has determined that soundboard technology passes muster under the text of the TCPA.³² But the Court there was asked only to consider whether Yodel’s use of multiple messages—plural—exempted it from the TCPA as a matter of pure statutory construction.³³ The Court’s conclusion that *that* argument did not hold water was not relied upon in Yodel’s Petition here. Yet the *Braver* court did not weigh the impact of *Moser* and the FCC’s previous repeated suggestions on the meaning of

³⁰ See Petition at 5, 6 citing *Moser* and the FCC’s briefs in that case.

³¹ Braver Comments at 6.

³² NCLC Comments at 7-8; Braver Comments at 5.

³³ *Braver v. NorthStar Alarm Servs., LLC*, No. CIV-17-0383-F, 2019 U.S. Dist. LEXIS 118080, at *11-12 (W.D. Okla. July 16, 2019).

prerecorded calls. In short, the *Braver* ruling answered only one piece of the overall statutory-construction puzzle—and not a particularly germane one. The Commission does not have to disagree with the findings made in *Braver* to depart from its ultimate conclusion as Yodel’s Petition provides numerous sound bases to grant the declaratory relief sought without reliance on the argument rejected in *Braver*.

III. Policy Concerns Do Not Justify Or Enable Expansion Of The TCPA To Soundboard Technology

Opposing Commenters also address the policy behind the TCPA, which they say is simply to “protect telephone consumers.”³⁴ But the TCPA’s language cannot be ignored in favor of a maximalist application of the law. The TCPA does not apply to all telemarketing calls or bar any unsolicited use of a message in a phone call. Congress adopted a balance in enacting the TCPA and elected to have it apply narrowly to only a specific set of technologies.³⁵ That Congress might have gone even farther in pursuit of its policy goals, but did not, is proof that Yodel’s Petition ought to be granted, not that the FCC needs to stretch the statute further to address technology not covered by the text of the statute.³⁶ This is particularly true given the speech-restrictive nature of the TCPA and the presumption against reading statutes to raise constitutional concerns.

IV. The Commission Is Empowered To Grant The Retroactive Relief Yodel Seeks And The Record Fully Justifies Such Relief

Two Opposing Commenters assert the Commission cannot waive statutory liability.³⁷ But the Petition seeks a declaration or retroactive waiver of liability under the TCPA as implemented by

³⁴ See Shaw Comments at 4.

³⁵ The Congressional findings in the TCPA’s preamble stress that “[i]ndividuals privacy rights, public safety interests, and commercial freedom of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.” Telephone Consumer Protection Act, Pub. L. 102-243, §3(a), 105 Stat. 2395, Sec.2(9) (Dec. 20, 1991).

³⁶ See, e.g., *Bais Yaakov of Spring Valley v. FCC*, 852 F. 3d 1078, 1083 (D.C. Cir. 2017) (“But the fact that the agency believes its Solicited Fax Rule is good policy does not change the statute’s text.”)

³⁷ See Braver Comments at 11; NCLC Comments at 12.

the FCC's regulations. Congress empowered the FCC to promulgate rules and regulations interpreting and implementing the provisions of the TCPA.³⁸ The FCC did so by, among other things, promulgating the delivery-restriction regulations at 47 C.F.R. § 64.1200 that govern the use of "prerecorded voice ... message[s]" now at issue. The FCC's regulation utilizes the term "prerecorded voice ... message" to implement the scope of TCPA liability, including through restrictions relevant to the Petition.³⁹ Any FCC ruling in Yodel's Petition plainly would not purport to amend a federal statute; rather, it would address and construe the TCPA *as implemented by the FCC's own regulations*.

The FCC has the ability to issue declaratory relief or grant retroactive waivers of statutory liability by virtue of its power to implement the TCPA. "As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting and implementing a statute, the TCPA, over which Congress provided the Commission authority as the expert agency."⁴⁰ Indeed, the Commission has already held that it has authority to retroactively waive liability even in litigation between private parties, noting that "the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut the Commission's authority, as the expert agency, to define the scope of when and how its rules apply."⁴¹

Without question, then, the Commission is empowered to implement and interpret vague provisions of the TCPA.⁴² As Braver acknowledged elsewhere, "the FCC may grant retroactive

³⁸ See, 47 U.S.C. § 227(b)(2).

³⁹ See § 64.1200(a)(1), (a)(2), (a)(3), (b), *et seq.*

⁴⁰ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 31 FCC Rcd 11943, 11949 ¶12 (Consumer and Gov'tl Affairs Bur. 2016) ("2016 Waiver Order"); see *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Application For Review Filed By Anda Inc.*, Order, 29 FCC Rcd. 13998, 14008, ¶21 (2014) ("[W] reject any implications that by addressing the petitions filed in this matter while related litigation is pending, we have 'violate[d] the separation of powers vis-a-vis the judiciary'" ("Anda Order").

⁴¹ *2016 Waiver Order* at 11950; see also *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act*, Order, 30 FCC Rcd 8598 (Consumer and Gov'tl Affairs Bur. 2015).

⁴² 47 CFR §1.2; *NCTA v. Brand X*, 545 U.S. 967, 980 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act, . . . and to 'prescribe such rules and regulations as may be necessary

waivers of its own rules in certain circumstances.”⁴³ This principle can hold true even if the waiver involves statutory interpretation and may affect statutory liability.⁴⁴ Indeed, the ability to authoritatively and expertly implement and interpret the statute (FCC Rule 1.2) leads naturally to the lesser power to waive the applicability of regulations issued under the statute in limited circumstances where “good cause [is] shown” (FCC Rule 1.3).⁴⁵ That is to say, if the Commission has the power to interpret the TCPA as not applying to soundboard technology at all—as it no doubt does—it necessarily has the power to interpret the statute as inapplicable to Yodel, specifically, on the facts before it.⁴⁶

Alternatively, of course, the Commission can interpret the TCPA as written to *not* cover soundboard technology, but then proceed with a notice and comment rulemaking to consider utilizing the FCC regulatory authority to bring soundboard technology within the TCPA’s coverage on a prospective basis. The retroactive impact of such a ruling would afford Yodel the waiver it is entitled to under the law as of 2016, while yet preserving the FCC’s authority to interpret the statute more broadly on a prospective basis.⁴⁷ Either approach yields the same result—the Commission is

in the public interest to carry out the provisions’ of the Act.”) (citations omitted); *id.* at 983-84 (“[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. . . . Instead, the agency may . . . choose a different construction [than the court], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”).

⁴³ *Braver v. Yodel Technologies, LLC*, Plaintiff’s Response to Yodel Technologies, LLC Motion to Stay, at 3; *see, e.g., Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999) (FCC interpretive rulings, issued in the absence of prior controlling precedent, “merely clarified what those existing rights and obligations had always been”) (quoting *Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989)).

⁴⁴ *See Simon v. Healthways, Inc.*, 2015 U.S. Dist. LEXIS 176179, at *17–21 (C.D. Cal. Dec. 17, 2015) (rejecting party’s contention that waiver of regulation was improper because “the FCC cannot use an administrative waiver to eliminate statutory liability”) (distinguishing *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2015) (“*Simon v. Healthways, Inc.*”).

⁴⁵ *See McClellan v. Chipman*, 164 U.S. 347 (1896) “[T]he power to do the greater necessarily carries with it the right to do the lesser.”; *Coastal States Energy Co. v. Hodel*, 816 F.2d 502, n. 6 (10th Cir. 1987) (“The power to do the greater includes the power to do the lesser.”).

⁴⁶ Commenter Shields argues that the FCC lacks the ability to interpret a statute in a manner that has retroactive effect. Shields Comment at p. 2. He is incorrect. *See In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, 21 FCC Rcd 7290, 7304-05 (2006) (noting that declaratory rulings are a form of adjudication and generally adjudications are applied retroactively, but retroactivity will be denied if it will create a manifest injustice) *vacated in part, Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007).

⁴⁷ Notably this is essentially the approach adopted by the FTC on the issue. First the FTC issued guidance confirming

empowered to grant Yodel appropriate retroactive relief, even if it elects to expand the TCPA to cover soundboard technology moving forward.

Commenter Braver cites *National Ass'n of Broadcasters v. FCC* as disapproving of any procedure to afford retroactive relief for violations of a statute, but the case is not on point.⁴⁸ There the D.C. Circuit Court of Appeals approved a modification to the Commission's minimum distance waiver policy as *permitted* under its authority to issue waivers of its own regulations under 47 C.F.R. § 1.3. The Court did not consider, much less decide, whether the Commission was prevented from waiving liability under the statute as implemented by FCC regulations. Commenter Braver's reliance on *Physicians Healthsource v. Stryker Sales Corp* is even weaker. There the Court flat misapprehended the FCC's power to issue retroactive waivers impacting private litigation and concluded that "at most, the FCC can choose not to exercise its own enforcement power."⁴⁹ But that is simply not true, as the Central District of California recognized only one year later in *Simon v. Healthways, Inc.*⁵⁰

Next, while it is true—as Commenters NCLC and Braver point out—that the Commission refused to grant relief on a petition related to faxes that facially and plainly violated the TCPA,⁵¹ the application of the TCPA to Yodel depends on policy and regulatory decisions turning on an

that soundboard is not within the scope of its rules. Letter, dated September 11, 2009, from Lois Greisman, Associate Director, Division of Marketing Services, Federal Trade Commission, to Michael Bills, CEO Call Assistant, LLC, *available at*, http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf.

Then it changed its position, but gave time for callers to conform with the new definition. Letter, dated November 10, 2016, from Lois Greisman, Associate Director, Division of Marketing Services, Federal Trade Commission, to Michael Bills, CEO, Call Assistant, LLC, *available at*,

https://www.ftc.gov/system/files/documents/advisory_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopsoundboarding.pdf.

⁴⁸ *National Ass'n of Broadcasters v. FCC*, 569 F. 3d 416 (D.C. Cir. 2009).

⁴⁹ *Id.* at 498.

⁵⁰ *Simon v. Healthways, Inc.* at *17–21 (distinguishing *Stryer* and approving waiver of liability); see also *Anda Order* at 14008, ¶21.

⁵¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition of Kohll's Pharmacy & Homecare Inc. for Declaratory Ruling and Waiver*, Order, 31 FCC Rcd 13289, 13295, ¶13 n. 55 (Consumer and Gov't Affairs Bur. 2016).

interpretation of a vague phrase as implemented by the FCC's regulations. In the *Kohll's* proceeding, the Commission did not credit the position taken by the petitioner and declined to grant even a waiver of its own rules for want of "good cause" to do so.⁵² Here, by contrast, good cause is surely shown—and the primary driver for a good cause determination is the ambiguity in the statute as implemented by the Commission. That is, the Commission is not being asked to waive requirements that were readily and clearly known to callers as in *Kohll's*, but merely to prevent injustice by protecting a party from pre-clarification liability consistent with its authority to interpret the statute and apply its own regulations.

Finally, Commenters NCLC and Braver suggest that Yodel did not "plead with particularity the facts and circumstances" justifying a waiver. This bar is not so high as the Opposing Commenters suggest. A mere good faith showing of "confusion or misplaced confidence" is sufficient to authorize waiver.⁵³ And here Yodel has demonstrated a purely good faith belief that its conduct was consistent with the TCPA, Federal Trade Commission ("FTC") guidance, FCC regulatory discussion, and Ninth Circuit case law.⁵⁴

Notably, while the NCLC Comments likewise criticize Yodel's showing of good cause, they characterize language the FTC concluded did *not* include soundboard calls during the timeframes Yodel took action as "almost identical to the analogous provisions in the TCPA."⁵⁵ It is an extraordinary circumstance that inventive plaintiffs lawyers would seek to hold Yodel liable under the TCPA for relying on the FTC's guidance on such "identical and analogous" provisions especially given the "harmonization" between those rules NCLC now encourages.⁵⁶ That Yodel may prove to

⁵² *Id.* at 13295.

⁵³ See *Anda Order* at 14009-10, ¶¶24-26; *2016 Waiver Order* at 11949-50, ¶12.

⁵⁴ See Petition at 7, 8.

⁵⁵ NCLC Comments at 8.

⁵⁶ *Id.* at 11 (urging harmonization between FCC and FTC rules regarding soundboard.).

have been ultimately mistaken in its belief regarding the scope of the TCPA and its reliance on the FTC—as one Court has,⁵⁷ indeed, found—does not mean that it should *per se* be denied retroactive relief and put out of business; rather the unique facts and circumstances presented by Yodel’s Petition weigh powerfully in favor of retroactive relief.⁵⁸

V. Conclusion

For the reasons expressed above and in its Petition, the Commission should issue a declaratory ruling holding that Yodel’s 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 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.

⁵⁷ The Shields Comments assert that “several courts have held that soundboard or avatar calls violate the TCPA’s restrictions on prerecorded message calls.” Shields Comments at 5. He provides no citation to any case law and Yodel is unaware of any authority for the proposition other than *Braver*.

⁵⁸ Petitioner Braver also complains that the Petition did not identify the precise rule to be waived. Braver Comments at 12-13. However the Petition very clearly specified that it sought declaratory relief respecting the application of *any* of the prerecorded call requirements of the TCPA as implemented by the FCC’s regulations to soundboard technology and a concomitant waiver of any retroactive liability attendant to any such application in the event the Petition was denied. Petition at 9. As to the Commission’s exercise of retroactive waiver authority, again see *Anda Order, supra*; *2016 Waiver Order, supra*; see also, *In the Matter of Rules and Regulations of Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Order, 15 FCC Rcd 7197 (1999).

Respectfully submitted,

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