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November 26, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Meeting in CG Docket No. 02-278

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's rules and regulations, SoundBite Communications Inc. hereby submits this letter summarizing its *ex parte* presentation in the above-referenced docket. On November 25, 2003, Tom Gregory, Vice President of SoundBite Communications Inc., John Hyvnar, Legal Counsel to SoundBite Communications, Inc., and its outside counsel Susan F. Duarte and the undersigned of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. met with Daniel Gonzalez, Senior Legal Advisor to Commissioner Kevin Martin to discuss the attached presentation.

If you have any questions regarding this presentation, please contact the undersigned.

Respectfully submitted,

/s/

Chérie R. Kiser

cc: Christopher Libertelli
Matthew Brill
K. Dane Snowden
Erica McMahon

SoundBite Communications Inc.

An Overview Presented to:

Federal Communications Commission

November 25, 2003

Overview

- Introduction to SoundBite Communications Inc.
- Resolution of the inconsistencies between the FCC's and FTC's rules regarding prerecorded calls is critical to SoundBite's business.
- The industry requires an unequivocal national policy regulating interstate telemarketing calls over which states have no jurisdiction.
- The Commission should reaffirm its policy regarding debt collection calls.

Corporate Background

- Founded in 2000, privately held.
- Over 160 clients:
  - Leading wireline and wireless telephone companies, cable companies and programmers, financial, publishing, non-profit, and service companies.
- Our mission: Provide organizations an **effective** & **respectful** way to communicate with their customers.
- An Application Service Provider (ASP) of **Interactive Communications** solutions, with a focus on voice messaging.
- Thousands of successful calling programs; many millions of messages sent.
- Used for customer service, marketing and debt collection purposes.

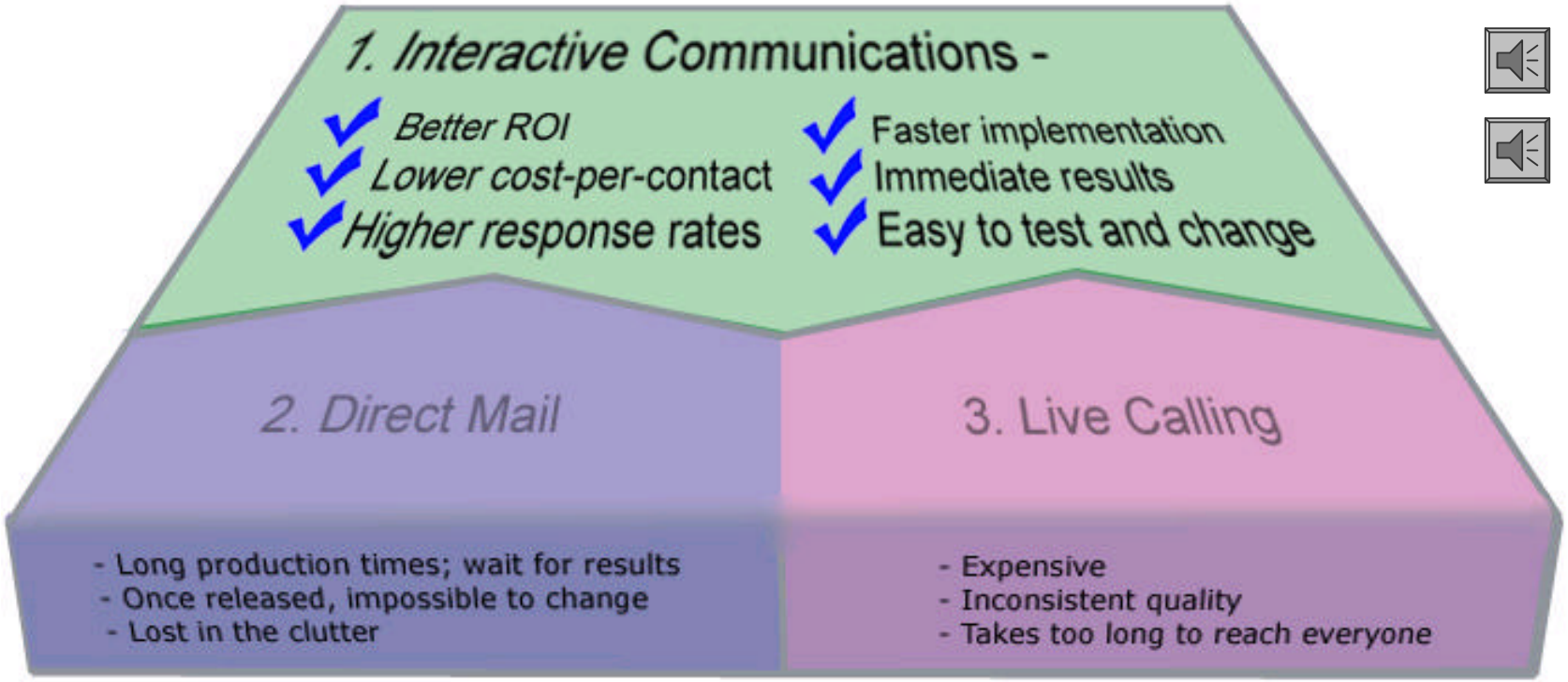
Based in Burlington, MA

Tom Gregory, Vice President – SoundBite
Cherie Kiser & Susan Duarte – Mintz, Levin
John Hyvnar, Legal Counsel – SoundBite

Companies Rely on this Channel

Interactive Communications is an essential part of an effective customer contact strategy.

The latest telephony, voice recognition and Internet technologies provide significant benefits over traditional methods.



Why People Listen and Respond

- Recipient has an existing relationship with the sender
- Message is high-quality, consistent, even personalized
- No hang-up on a live person
- No pause or delay before message is played
- Valid Caller-ID number; call-back number in message
- When person hangs-up, call is disconnected immediately
- Recipient is in control; convenient and interactive
  … can take immediate action

✓ Voice messaging is an effective and respectful way to communicate with existing customers … *if used properly.*

"I think every business should use SoundBite. The message was concise and to-the-point, and I could do my renewal right away."

- Magazine subscriber

Strong Consumer Acceptance

A. Leading insurance company makes an automated "courtesy call"
A follow-up customer survey asks …

	Strongly Agree	Agree	Neutral	Total
"Was automated call appreciated?"	**53%**	**17%**	14%	84%

B. Large insurance company makes automated quote follow-up calls

Receives just 3 complaints out of 90,000 calls.

C. When given the choice to "opt-out" of future automated calls … only 1% to 2.5% do.

D. Most people listen to the messages

61% listened to an entire fundraising call from a not-for-profit organization.
67% of a cable company's subscribers listened to a marketing call.
70% of a telco company's customers listened to a collections call.

The Inconsistency Between the FCC's and the FTC's Rules

- The TCPA and the FCC's rules prohibit telephone calls to residences using artificial or prerecorded voice to deliver a message.
- The FCC recognizes the following exemptions:
  - Calls to customers with whom the caller has an established business relationship ("EBR").
  - Prior express consent of the called party.
  - Calls made for emergency purposes.
  - Non-commercial calls.
  - Calls made by tax-exempt nonprofit organizations.

The Inconsistency Between the FCC's and the FTC's Rules

- The FTC's rule prohibits abandoned calls (calls that are not connected to a live sales representative within two second's of the person's completed greeting).
- The FTC's rules prohibit the delivery of *all* prerecorded calls as abandoned calls.
- The FTC does not recognize any exemptions, including the EBR.
- Calls that would otherwise be lawful under the FCC's rules are prohibited under the FTC's rules.

Real World Effects of the Inconsistency

- SoundBite is losing business because its clients have a legitimate concern about violating the FTC's regulation even though SoundBite's service is permissible under the FCC's regulations.
- SoundBite's business depends on private equity funding; however, regulatory uncertainty effects SoundBite's ability to obtain such funding.

The FCC's Rules Should Prevail

- The FCC – not the FTC – has jurisdiction over telephone solicitations.
- The Communications Act gives the FCC the authority to regulate interstate and foreign commerce in communications by wire and radio.
- When enacting the Do-Not-Call Act, members of Congress made clear that the FCC – not the FTC – has jurisdiction over telephone solicitations.

The FTC's Jurisdiction is Limited

- The FTC is only authorized to prevent deceptive and abusive telemarketing practices.
- The law was not designed to regulate legitimate businesses practices.
- In enacting the Telephone Consumer Fraud and Abuse Prevention Act, Congress clarified that the legislation:

  > "strikes an equitable balance between the interests of stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses."

The FCC is Charged to Regulate Prerecorded Calls

- Congress gave the FCC the authority to create rules governing the transmission of prerecorded calls.
- The FCC – not the FTC – has the statutory authority to establish exceptions to its rules prohibiting prerecorded calls.
- An agency is only permitted to do what it is charged to do, even in an instance of overlapping agency jurisdiction.

Both the FTC and the FCC Must Recognize the EBR Exception

- The EBR exception serves an important purpose.
- Companies need both agencies to recognize the EBR so they can contact their customers.
- Customers expect well-crafted messages from organizations with whom they have an EBR.
- SoundBite's prerecorded calls do not create the consumer frustrations that Congress sought to avoid.

The Memorandum of Understanding ("MOU")

- Swift action is necessary to resolve the inconsistencies regarding prerecorded calls through a MOU finding that the FCC's rules prevail with respect to prerecorded calls.
- Further delay will harm industry participants and impair their ability to obtain funding from outside investors, retain existing business, and growing new business.

State Regulation of Interstate Calls

- The Communications Act is clear that the FCC has jurisdiction over interstate calls.
- Numerous court cases have confirmed that the FCC has jurisdiction over interstate calls. The courts also have found that:

  "states have no independent regulatory power over the interstate telemarketing activities;"

  "states do not have jurisdiction over intestate [telemarketing] calls."

Congress Clarified that the FCC has Jurisdiction Over Interstate Calls

- In the legislative history of the TCPA, Congress made clear that the FCC has jurisdiction over interstate calls:

  "Over 40 states have enacted legislation limiting the use of [prerecorded calls] . . .[t]hese measures have had limited effect, however, because the States do not have jurisdiction over interstate calls."

  "State regulation of interstate communications, including interstate communications intended for telemarketing purposes, is preempted."

The FCC Has Confirmed that the TCPA Preempts State Regulation of Interstate Calls

- In addressing two consumer inquiries, the Bureau concluded that the FCC has jurisdiction over interstate calls:
  - "States can regulate and restrict intrastate commercial tele-marketing calls. The TCPA and Commission regulations . . . govern interstate commercial telemarketing calls in the United States;"
  - "Maryland can regulate intrastate commercial calls . . . [but is] preclude[d] . . . from regulating or restricting interstate commercial telemarketing laws. Maryland cannot apply its statutes to calls received in Maryland and originated in another state or calls that originate in Maryland and are received in another state."
- The FCC needs to reaffirm its jurisdiction over interstate telephone calls to ensure that the industry is not subject to a patchwork of regulations that attempt to regulate interstate calls (*e.g.*, Indiana, North Carolina, Tennessee, California, and Maine).

Debt Collection Calls

- The FTC recognizes that debt collection calls fall outside the scope of its rules.

- The FCC has already recognized that debt collection calls do not fall within the scope of its rules.
  The Commission should reaffirm its findings.

Summary

- Recorded voice messages are an essential part of the customer contact strategy for hundreds of leading companies and non-profits.
- Consumer acceptance is high … if the messages are from organizations with whom they have an EBR and "best practices" are followed.
  - ✓ Therefore, prohibit the abuses, but don't ban the medium.
- The FCC's positions on recorded calls, the preemption of state laws for interstate calls, and debt collection calls are well-founded.
  - ✓ We ask that the FCC continue to work towards the positive resolution of the inconsistencies between it and the FTC's rules.
- If these matters are not resolved quickly and in favor of the FCC, there will be significant, negative results for SoundBite, this industry and the many organizations that rely on this communications channel.