



April 30, 2012

Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: **GC Docket No. 02-278**

Dear Commissioners,

Thank you for the opportunity to comment in support of the SoundBite Communications, Inc. (SoundBite) petition seeking a declaratory ruling that (i) otherwise permissible text messages remain permissible after an “opt-out” has been received if sent within the 30-day grace period established by the Federal Communication Commission (“Commission” or ‘FCC”) for subject entities to effectuate opt-out requests for telephone communications and facsimiles¹ and (ii) any telephonic or computer equipment or software system when used to send opt-out confirmations is not an “automatic telephone dialing system” with the meaning of the Telephone Consumer Protection Act (TCPA) and the Commissions implementing rules.²

This comment letter is submitted on behalf of Varolii Corporation (Varolii). Varolii is headquartered in Seattle, Washington and has over 200 employees. Varolii’s clients include the leading airlines, financial services, healthcare, telecommunications and utilities companies in the country. These firms rely on Varolii’s advanced communications technologies to convey timely and important information to their customers by phone, email, text messaging and smartphone. Varolii applications provide notification of data breaches and possible fraud; warn of flight delays or cancellations, prompt patients to take their medications, and protect consumers against the adverse consequences of failing to make timely payments on their accounts.

Varolii supports the positions set forth by SoundBite in its petition and in its request for a declaratory ruling. A ruling as requested in the petition will confirm a common-sense interpretation of the existing rules and orders of the Commission and apply them explicitly to text messages, while continuing to promote good consumer policy and protect U.S. businesses observing best practices from worrying class-action lawsuits. The lawsuits described in the petition impose unwarranted costs and inconveniences on consumers, businesses, and the economy as a whole. Varolii is concerned that unless this declaratory ruling is issued, businesses will find it increasingly difficult to communicate efficiently with their customers for many important non-marketing purposes.

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 03-153, 18 FCC Red 14014 (“2003 TCPA Order”).

² 47 U.S.C. § 227(a)(1); 64.1200(f)(1).

In response to consumer preferences and requests, many businesses use text messaging as a means of communicating quickly and non-intrusively with their customers for marketing and non-telemarketing purposes. As the FCC is aware, many people use only a cellular phone and many prefer communications via text messaging.

Wireless operators and aggregators require Varolii and its clients to follow the Mobile Marketing Association (MMA), U.S. Consumer Best Practices (“MMA Consumer Best Practices”), for text messaging campaigns and these requirements apply to our clients non-marketing campaigns. These entities, in our opinion, effectively monitor and police text messaging campaigns. We believe following MMA Consumer Best Practices and continued self-policing by the industry is the best public policy and protects consumer/public interests. As the petition mentions, the MMA Consumer Best Practices require express consent to “opt-in” to a text messaging campaign and require companies to send a text message confirming an “opt-out” from the campaign. These requirements apply equally to marketing and non-marketing text messaging campaigns.

The petition properly notes that telemarketing calls and facsimiles are granted a 30-day grace period where calls and facsimiles may continue to be made or sent while the entity affects an opt-out request. The Commission has made clear that text messages should be considered the same as calls to cell phones for regulatory purposes. Wireless carriers and aggregators know these rules and by requiring a single confirmation text must have concluded the grace period is applicable to text messaging. As the petition highlights class-action attorneys have elected to exploit a void in regulations and interpretive guidance by the Commission to threaten companies with millions of dollars of potential liability and extract settlements from conscientious companies following MMA Consumer Best Practices. We agree with the petition that these lawsuits (and the threat of additional lawsuits) are wasting resources and stifling companies’ growth. It is precisely these types of baffling suits (i.e., being sued for following best practices) that give rise to the increasing public sentiment that U.S. businesses are over-regulated and that our court system is being abused.

The petition requests a declaration by the Commission that “opt-out” confirmation text messages be expressly granted a grace period. To us, this is a well-grounded request and a common sense solution. The petition leaves to the Commission the decision of how long text messages may be permitted after receipt of the opt-out message. While a shorter period is certainly technically feasible, Varolii would like the Commission to be consistent with its prior actions and confirm that the post opt-out 30-day grace period for telephone calls and facsimiles applies similarly to text messaging. While the MMA Consumer Best Practices would still require an immediate opt-out message and then cessation of further text messages, the 30-day period should properly be the standard for liability purposes under the TCPA.

SoundBite’s petition also requests the Commission provide a ruling that an “automatic telephone dialing system” must use a random or sequential number generator to produce telephone numbers to be called. Dialing equipment technologies have evolved significantly

since the adoption of the TCPA. The Commission should take this opportunity to remove uncertainty and confirm that if the telephone equipment or system is calling or texting numbers from any customer list or other nonrandom or nonsequential list, then the system is not “using a random or sequential number generator” and is not an automatic telephone dialing system within the meaning of 47 U.S.C §227(a)(1).

Given the extensive use of text messaging since the TCPA rules were originally promulgated, the increased usage of text messaging between consumers and business and the benefits to consumers from such usage, the Commission should find in favor of SoundBite’s petition. For these reasons, the Commission should enter an order clarifying that:

- The 30-day grace period for communications following opt-out requests applies to text messaging; and
- The restrictions under the TCPA do not apply to equipment or systems that merely store, call or text pre-determined telephone numbers or that has latent (but unused) capacity to generate random or sequential numbers.

In the alternative, Varolii would like the Commission to rule that complying with consumer best practices of confirming a customer’s opt out request with an one-time text message does not violate the TCPA or any of the Commission’s rules.

We appreciate the Commission considering these issues and Varolii’s comments in support of the petition. Should you have any questions about these comments, please do not hesitate to call me at (206) 902-3906.

Sincerely,

/s/ Brian Moore

Brian Moore
Executive Director
Varolii Corporation