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**Before the  
 Federal Communications Commission  
 Washington DC 20544**

<p><b>In the matter of</b></p> <p><b>SoundBite Communication Inc.'s          Petition for an Expedited Declaratory          Ruling</b></p>	<p><b>CG Docket No. 02-278</b></p> <p><b>Rules and Regulations Implementing the          Telephone Consumer Protection Act of          1991</b></p> <p><b>DA 12-511          March 30, 2012</b></p>
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**I. Introduction**

In DA 12-511, the FCC seeks comment about SoundBite Communication’s February 16, 2012 petition. Generally, SoundBite’s petition seeks permission to send a text message to a cellular telephone when SoundBite absolutely knows that the subscriber has revoked the statutorily required permission for SoundBite to send such text messages.

For its justification, SoundBite leans on an absurd interpretation of “grace period”.<sup>1</sup> Additionally, SoundBite reopens an old attack on the TCPA definition of “automatic telephone dialing system” (ATDS) that would eviscerate the privacy interests of the cellular subscribers.<sup>2</sup> SoundBite goes on to claim that it is good public policy for subscribers to pay SoundBite’s advertising costs.

I first address the comments submitted on the petition. Generally, comments in favor of the petition speak to the notion that a confirmation message is good business practice, but they do not address whether the FCC has the power to permit such text messages when the subscriber revoked express consent. Many in support also claim that SoundBite’s system is not an ATDS because it is not calling randomly generated or sequentially generated telephone numbers; that is neither the common meaning nor the statutory definition of ATDS. If the pro-petition viewpoint were true, then even predictive dialers would not be an ATDS. That would create an open season on cellular telephones. Machines could call cellular numbers and force the recipients to pay for those calls. Both privacy and cost shifting would be affected.

## II. Docket comments

There were several comments on the docket about this matter.

**Joe Shields.**<sup>3</sup> Shields states that text messages are calls. SoundBite’s machine is an ATDS. MMA best practices are not the law, and they should not override the law. Opt-out confirmation messages are illegal and amount to theft. The SoundBite petition seeks immunity from lawsuits. Shields gives an example of receiving an unsolicited text (which he paid for), texting a STOP (which he paid for), and then getting a confirmation (which he also paid for). He is understandably angry. Shields presents a situation that is not unlike many of the lawsuits that SoundBite protests: a consumer receives an initial, illegal, unsolicited text, then texts STOP to prevent further texts for which he will be billed, and then receives and must pay for a STOP confirmation when there was never any prior express consent for the first text message. In that situation, it would make sense to file a TCPA lawsuit for both text messages. SoundBite does not present that fact pattern in its petition, but that is the fact pattern alleged in *Sager v. Bank of America and SoundBite Communications*. One could argue that SoundBite is attempting to halve the damages even when the first call is illegal.<sup>4</sup>

**National Association of Consumer Advocates (NACA).**<sup>5</sup> NACA states that SoundBite’s petition was unnecessary because the law clearly forbids sending a

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<sup>1</sup> Petition, page 4, section A.

<sup>2</sup> Petition, page 5, section B.

<sup>3</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021911893>

<sup>4</sup> There has not been an answer filed in *Sager*. In the complaint, Sager alleges the first text message was without permission, but the alleged first text suggests a business relationship and possibly consent for the first call. However, for the given fact pattern, the confirmation call should not automatically be excluded from liability.

<sup>5</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914659>

confirmation text because prior express consent is absent. Text messages are calls. The confirmation message violates the plain language of the TCPA. NACA was concerned with the cost of the message, and it points out that SoundBite may profit from sending the confirmation message because it could charge its clients for the additional text.

**CTIA – The Wireless Association.**<sup>6</sup> CTIA claims that the TCPA does not prohibit the confirmation message and the messages are not autodialed. CTIA argues that consent still exists for the confirmation text, but it does not cite authority. CTIA claims that SoundBite’s system lacks “the capacity to generate and dial random or sequential numbers”. CTIA argues that “using a random or sequential number generator” modifies “to store or produce telephone numbers to be called”. CTIA explains that “to dial such numbers” “refers to dialing numbers that have been randomly or sequentially generated.” In CTIA’s view, even the telephone numbers that are stored must be numbers that were randomly or sequentially generated in order for the equipment to be an ATDS. CTIA’s view necessarily means that a predictive dialer would not be ATDS because predictive dialers store targeted telephone numbers rather than ones generated by random or sequential number generators.<sup>7</sup> Any company using random or sequential number generators today would run afoul of the NDNCL; it would also not be competitive against those companies using targeted lists. CTIA ignores the implication for predictive dialers. CTIA also argues that consent remains until “at least” the confirmation is sent, but it does not appeal to any statutory authority for that view. CTIA claims that by texting STOP, the subscriber has invited or permitted the confirmation message, but CTIA does not show that is the subscriber’s intent. The only clear intent is the subscriber wants the texts to stop. CTIA then gives a twisted and horribly flawed contract law argument. CTIA claims the subscriber’s STOP message is a contract “offer” that the provider must “accept”. Under CTIA’s dubious theory, the provider could instead reject the STOP offer and continue to send further texts under the original contract. See footnote 17 where CTIA points out that the “modification of a contract requires the mutual assent of both, or all, parties to the contract.” The illogical conclusion of CTIA’s argument is nothing less than irrevocable consent. A contract does not trump a statute. Even if we fall for the contract argument, the provider can signal acceptance by ceasing to send any more text messages. CTIA does not seriously address the legality of a confirmation text. Its argument is simply that sending a confirmation text might be a nice thing to do. Except the confirmation message isn’t than nice: it’s like sending a letter with postage due. And the recipient cannot refuse delivery.

**The Future of Privacy Forum (FPF).**<sup>8</sup> FPF claims the opt-out confirmation text helps protect individual privacy, is an industry practice, and provides a formal record of the opt-out. FPF has a strange notion of privacy: FPF wants to protect companies from counterfeit STOP requests. FPF also creates a scenario where an industrious identity thief spoofs the origin of a text message in order to turn off text alerts to a depositor and then presumably drains a bank account without fear of the bank sending a confirmation

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<sup>6</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914768>

<sup>7</sup> That view runs counter to the FCC continually finding that predictive dialers are ATDS. For example, <http://apps.fcc.gov/ecfs/document/view?id=6520027448>, FCC 07-232.

<sup>8</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914836>

text to the depositor's cellular phone. The scenario presumes that the identity thief can create access to an existing account. Someone who is paying for an identity protection service would probably not text STOP to that service without also canceling the service. The identity protection service should already have imposter protection. It's a clever scenario, but how common or realistic is it? FPF raises the privacy interests of the TCPA, but FPF ignores the cost shifting aspect of the TCPA. It confuses the privacy aspect of a do-not-call request (§ 227(c)) with the revocation of consent for sending texts for which the subscriber must pay. FPF further claims the TCPA does not prohibit the confirmation message because the autodialer does not have the capacity to generate and dial random or sequential numbers. FPF does not recognize the logical consequent of that position for predictive dialers. FPF states, without argument, that prior express consent remains intact until it has been confirmed. FPF does require that the confirmation be a single text message, so it would not tolerate the split text in SoundBite's examples.

**GroupMe.**<sup>9</sup> GroupMe seeks to extend the debate into “third-party consent for non-telemarketing, administrative, informational calls or text messages to wireless numbers.” Apparently, GroupMe wants the FCC exceed its authority and overrule Congress. GroupMe also seeks to advance its own petition to the Commission. It seeks protection from litigation. It states that confirmations are a sensible practice. GroupMe wants the ATDS definition addressed, and it acknowledges that predictive dialers are an ATDS. On page 6, GroupMe makes clear that ATDS “encompasses only equipment that, at the time of use, could, in fact have autodialed random or sequential numbers without human intervention”. GroupMe concludes that an ATDS would only be a machine that dialed random or sequential telephone numbers, but GroupMe does not explain how that position would not negate predictive dialers being ATDS.

**Mobile Marketing Association (MMA).**<sup>10</sup> MMA characterizes the confirmation text as a receipt and good policy. It does not offer any arguments about authority under the TCPA for that policy or whether the FCC can authorize such a policy.

**Retail Industry Leaders Association (RILA).**<sup>11</sup> RILA believes that sending a confirmation is a good business practice, but acknowledges the threat of class action lawsuits if those confirmations are sent. RILA wants compliance to be enforced by CTIA, but it does not show that CTIA has any power for effective enforcement – especially if the offender is not a member of CTIA. RILA does not argue why the confirmation text would be legal or why CTIA enforcement would be better than class actions. Clearly, SoundBite and other commentators are concerned about class actions. That suggests that class actions are an effective enforcement tool. RILA does not acknowledge that simply dropping the confirmation message would eliminate class actions over such confirmations. If doing something is dangerous, then don't do it.

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<sup>9</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914772>

<sup>10</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914796>

<sup>11</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914913>

**SoundBite Communications.**<sup>12</sup> SoundBite wants the FCC to declare that a confirmation text does not violate the TCPA. SoundBite acknowledges that it is being sued “at least in part” for these confirmation messages. SoundBite does not acknowledge that it could simply stop sending the confirmation messages and eliminate the risk of subsequent violations and attending lawsuits. SoundBite does not explain where the FCC has the authority to permit such texts when SoundBite knows that any prior express consent has been revoked by the subscriber with the STOP message. Confirmations may seem to be a good practice, but the fundamental issue is the practice legal. SoundBite presents many examples of organizations that sent STOP confirmation text messages, including an embarrassing STOP confirmation from the FCC,<sup>13</sup> but those confirmation messages are not on point. Many people have robbed banks, but that does not mean it is legal for me to rob banks. SoundBite argues there should be a grace period for texts. Fundamentally, such a grace period is reasonable – there may be parts of SoundBite’s system that are in the process of transmitting an ordinary text when another part of its system receives the STOP message. As long as SoundBite stops the now unwanted texts with a reasonable period of time, then it should not incur liability for those texts it sent in ignorance of the stop request. That is what the § 227(c) grace period is all about. The graced messages would be both rare and unintended violations (the graced messages would not have been made if the company knew about the do-not-call request). SoundBite’s argument, however, is not for sending a text while it is ignorant of a STOP, but rather sending a text when it absolutely knows consent has been revoked. SoundBite is silent on that crucial point. SoundBite also seeks a redefinition of ATDS. SoundBite quotes the FCC 2003 Report and Order at ¶ 131: “The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.” SoundBite goes on to explain that its “system is programmed to put the individual number on a separate list (a type of ‘do not text’ list)”. That is, the system stores the number in a do-not-text database. SoundBite then strangely claims that the system has “no capacity to store, look-up, or dial in any random or sequential order.” That would mean the system could not store the number in the do-not-text database, and it could not look up any of the telephone numbers in the do-not-text database. Consequently, the database would be useless. SoundBite’s system must dial the numbers in that do-not-text database – that’s how the confirmation texts are sent. The texts are not sent instantly, but rather after a few minutes. They are stored for a few minutes and then sent. Several other STOP requests may have been received in the interim. SoundBite is dialing the number from a database: it is storing and dialing numbers from a database, and that fits the FCC description SoundBite quoted in footnote 23. SoundBite claims the telephone numbers are not generated in a random or sequential fashion, but that is not a requirement of footnote 23; calling from a database is sufficient. SoundBite’s interpretation would also exclude predictive dialers from being an ATDS.

**Twilio Inc.**<sup>14</sup> Twilio claims that the class action plaintiff’s interpretation of the TCPA is absurd. Twilio does not explain why the interpretation is absurd, and it does not

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<sup>12</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914808>

<sup>13</sup> SoundBite comments, Exhibit A, page 9

<sup>14</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914839>

offer characterizations of any class action suits. Twilio also wants the Commission to address other outstanding petitions. Twilio offers a software platform that uses text messaging. GroupMe, at least originally, was based on Twilio's platform. Twilio points out that the TCPA intended to protect consumers from unwanted calls, but it is silent about cost shifting. Twilio argues that a text message is only part of a conversation that includes other texts. Twilio says that the confirmation text should be considered a part of a conversation that occurs under the original prior express consent. Twilio essentially argues that each separate text is not a call. The FCC, however, views a text message as a call, and the 9<sup>th</sup> Circuit has accepted that view. Twilio points out that Congress has amended the TCPA but has not found it necessary to change the definition of ATDS. That point does not augur well for Twilio because it means that Congress has found the FCC's interpretation of ATDS to be reasonable. Twilio points out that an iPhone has the capacity to be an ATDS, and apparently implies that all iPhone owners are therefore violating the TCPA. Twilio misses the crucial point that the iPhone needs to automatically dial the numbers. The usual iPhone user isn't going to confront a class action lawsuit because his iPhone could be an autodialer; the typical iPhone user doesn't unleash his iPhone to automatically call a bunch of numbers in a contact list. The iPhone user may use a speed dial function to dial one number at a time; speed dialing technology existed in 1991, and Congress did not intend to prohibit its use. Twilio also believes that the numbers called must be either random or sequential telephone numbers. Twilio's argument ("companies like Twilio, GroupMe, and SoundBite do not design their software and hardware to have the capacity to autodial random or sequential numbers because it would serve no purpose") also applies to predictive dialers, and therefore contradicts the Commission's view that predictive dialers are ATDS. Twilio does not address how to distinguish the two. Twilio claims there is a 30-day grace period in which to process the opt-out. That is not the case. If it were, then companies could deliberately slow down the opt-out processing in order to continue to send unwanted texts to the subscriber. A grace period is not a right. Twilio defeats its own conversation/call argument by acknowledging that the Commission and several courts consider a text message a "call".

**Varolii.**<sup>15</sup> Varolii claims the petition is a common sense interpretation of existing rules and good consumer policy. That is not a legal argument. Varolii does not address alternative common sense interpretations of existing rules or alternative good policy: SoundBite's system is an ATDS; the statutory policy is SoundBite cannot force consumers to spend money without their consent. Varolii claims that lawsuits are wasting resources and stifling companies' growth, but it does not explain those views in context. Are the lawsuits completely unfounded? Is company growth always good? Many companies flourished during the subprime mortgage heyday. Varolii claims there is a 30-day grace period for calls and facsimiles, and it wants a 30-day grace period for text opt-outs. Varolii wants if "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)." Varolii puts a very clear point on its ATDS argument: "The restrictions under the TCPA do not apply to equipment or systems that merely store, call or text pre-determined telephone numbers or

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<sup>15</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914716>

that has latent (but unused) capacity to generate random or sequential numbers.” The definition is a consumer disaster. Varolii’s definition would put predictive dialers and commercial text messages outside the definition of an ATDS.

**Verizon.**<sup>16</sup> Verizon notes that it has filed many TCPA lawsuits. Verizon believes the opt-out text serves a beneficial purpose and “is strictly informational, solely to confirm the opt-out election, and is delivered within a reasonably short time frame.” Verizon compares the confirmation text to a confirmation email, but consumers do not pay a separate charge for the email confirmation. Verizon basically argues that “prior express consent” for the termination message is *implied*. One cannot imply something that, by statute, must be expressed. Verizon argues that a “text message directed to a single telephone number ... uses neither a ‘random’ nor ‘sequential’ number generation process, and, therefore, falls outside the TCPA.” The ATDS definition does not require that a number be called more than once. Verizon states that the Commission’s interpretation of ATDS covers “almost any ‘dialing’ process except manual dialing. That is an apt summary of automatic dialing that makes sense: if it is not manual, then it is automatic. Verizon changes the definition of ATDS to be “to store or produce randomly or sequentially generated numbers for initiating calls to large numbers of consumers.” Verizon wants an ATDS to store random or sequentially generated numbers, and that would also exclude predictive dialers. Verizon claims that Congress was not concerned with one-time opt-out messages, but that is not true. Congress was specifically concerned with calls that imposed a cost on the subscriber.

**WMC Global.**<sup>17</sup> WMC Global claims there is an established business relationship (EBR) exception for cellular telephone calls. The issue is not an EBR (which is a “telephone solicitation issue”), but rather prior express consent. The STOP message revokes consent.<sup>18</sup> WMC Global claims that the one time confirmation does not violate consumers’ rights, but it does not argue the point. WMC Global is silent about the cost shifting prohibition.

**William E. Raney.**<sup>19</sup> Raney points out that the confirmation messages are sent following industry practices, and there is no ill intent. Raney also claims the messages do not harm consumers, but that ignores Congress wishing to avoid cost shifting to the subscriber. Raney claims “[t]he FCC has the power to right this wrong”, but as a knowledgeable attorney, Raney cites no authority for that position.

**Gerald Roylance.**<sup>20</sup> I argued that the Commission should have rejected the petition because the confirmation text is sent when SoundBite knows that consent has been revoked, and the Commission has no authority to overrule the statute when the subscriber is charged for the call. I suggested the real purpose of the petition is forum

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<sup>16</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914752>

<sup>17</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914807>

<sup>18</sup> It may also function as a § 227(c) do-not-call request, but that issue is not so relevant here because a simple confirmation message is not a telephone solicitation.

<sup>19</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021914809>

<sup>20</sup> <http://apps.fcc.gov/ecfs/document/view?id=7021915107>

shopping. I claimed that SoundBite misinterprets the purpose of a grace period. I argued for a specific interpretation of ATDS. I argued that even if the FCC were to see a good public policy behind sending confirmations, the FCC cannot override a statute.

### III. Observations

#### **A. Policy and confirmations**

Those comments supporting the petition take a singular viewpoint without putting it into a larger context. According to them, the industry practice/policy is to send a confirmation text, so that is the way it should be done. They dismiss without discussion any viewpoint that Congress may hold. The issue of whether such a text is legal in the first place is not addressed; they simply want the FCC to declare the practice is legal. They don't even go through the formality of showing that the FCC has the power to make such a declaratory ruling.<sup>21</sup>

The pro-petition commenters also do not discuss the consequent: how bad would it be if a confirmation text were not sent? Would the world end? They don't do that because there is a fixed mindset: they want to send the confirmations.

Why require confirmations? First, the past: many of the pro-petition commenters point to litigation and class actions, and they want immunity from any past violations. That could have tremendous value. The petitioner, SoundBite, is currently fighting a purported class action. That is the impetus for this petition. More information about that lawsuit is provided below. Second, the future: charging clients for those STOP confirmation texts is a revenue stream. When looked at from the subscriber's perspective, it's only one additional text, but from SoundBite's position, it is tens of thousands of additional billable messages per campaign. Verizon may wear a white hat for going after illegal telemarketers, but Verizon also wants to see the number of billable text messages increase.

In the common sense world, those cellular telephone subscribers who are on an unlimited texting plan may be indifferent or even welcome the confirmation text. Those who are paying for each text may have a different view. The pro-petition commenters blindly do not address the cost reactions of the subscribers. The industry apparently sweeps that issue under the rug with a "text message rates may apply" warning. The industry has a playbook that says such messages should be sent, but without information whether those messages are actually appreciated or desired.<sup>22</sup> Many cost conscious

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<sup>21</sup> The petitioner and commenters are not stupid. If they can get the FCC to make such a declaration, there's a good chance nobody will bother to appeal. Then, by virtue of the Hobbs Act, the FCC's declaration handcuffs the district courts.

<sup>22</sup> Aaron Smith, Pew Research presentation, *Trends in mobile phone usage*, <http://www.slideshare.net/PewInternet/cell-phone-ownership-and-trends>. National survey of adults over 18. Page 8, only 10 percent of all adults use their phone for a status

subscribers are now avoiding long term contracts and opting for pay-as-you-go services.<sup>23</sup> Shields, who is billed per text, clearly does not want the confirmation texts. Congress, when it passed the TCPA, clearly did not want cellular telephone subscribers footing the bill for unwanted automated calls.<sup>24</sup>

## ***B. Automatic Telephone Dialing System***

Especially troubling is the pro-petition commenters focus on an interpretation of ATDS that requires the telephone numbers to be random or sequential and excludes telephone numbers that were deliberately compiled. Under that interpretation, one could load a machine with a telephone directory listing and have the machine call each and every one of those numbers. The directory list is not a collection of random numbers, and the telephone numbers are listed in subscriber order rather than sequentially within the exchange.

The pro-petition commenters seek to interpret the statutory language of the TCPA by merely choosing an interpretation that suits their needs. They do not parse the possible interpretations of the statutory language and argue the merits of each interpretation. See more on interpretation below. Uniformly, the pro-petition commenters adopt a view that would also exclude the predictive dialer from the definition of an ATDS.

Even worse are the advertising floodgates that would open up. Let's assume that "automated telephone equipment"<sup>25</sup> that calls telephone numbers that are neither random nor sequential is not an "automatic telephone dialing system". The TCPA would then permit such a machine to text anybody. A text is not "an artificial or prerecorded voice", so it avoids the other prong of 47 U.S.C. § 227(b)(1)(A).<sup>26</sup> It doesn't make sense today, but such a machine could also text emergency numbers for hospitals, doctor's offices, and poison control centers; texting hospital rooms would also be fair game.<sup>27</sup> An unscrupulous wireless provider could decide to send its customers 10 or 20 texts a day

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or update service. Page 10, 57 percent receive unwanted or spam text messages. Page 11, 42 percent were irritated by calls or texts interrupting them.

<sup>23</sup> Jenna Wortham, *More Customers Give Up the Cellphone Contract*, New York Times, February 20, 2009,

[http://www.nytimes.com/2009/02/21/technology/21prepaid.html?\\_r=1&partner=rss&emc=rss](http://www.nytimes.com/2009/02/21/technology/21prepaid.html?_r=1&partner=rss&emc=rss).

<sup>24</sup> 2003 Report and Order, FCC 03-153, ¶ 133 cost shifting argument.

<sup>25</sup> Undefined term at 47 U.S.C § 227(b)

<sup>26</sup> Texts would also avoid the voice restrictions of § 227(b)(1)(B) and fax provisions of § 227(b)(1)(C).

<sup>27</sup> 2003 Report and Order, FCC 03-153, ¶ 133, stating that excluding predictive dialing equipment from the definition of ATDS "would lead to an unintended result" permitting "calls to emergency numbers, health care facilities, and wireless numbers".

just to increase its bill.<sup>28</sup> During election season, a subscriber could be inundated with vote-for-me texts that deplete the subscriber's pocketbook. As long as the called telephone number was not on the NDNCL or a company specific do-not-call list, then the TCPA would also permit those text messages to contain unsolicited advertisements. Furthermore, tens of thousands of different companies could launch their own text marketing campaigns, and they could inundate a cellular telephone subscriber with unwanted texts.

The petition's spin on the definition of an ATDS is a consumer disaster.

#### **IV. SoundBite is being sued**

SoundBite's list of lawsuits did not include *Sager v Bank of America and SoundBite Communications, Inc.*, 2012-CV-00197 (N.D. Cal). That case is probably the reason for SoundBite's petition.

##### **A. The lawsuit**

*Sager* was filed January 11, 2012. Bank of America ("BofA") and SoundBite have not answered the complaint yet. Instead there have been many stipulations to extend the time to respond to the suit. The response is now due June 21, 2012. The stipulated extensions were for "judicial economy" because the parties were engaging in mediation. SoundBite petitioning the Commission does not sound in judicial economy. *Sager* did not comment on this docket, so one can wonder if *Sager* is even aware of this petition.

The complaint is only eight pages. BofA and SoundBite are not being sued for only the STOP confirmation, but the STOP confirmation is a significant part.

The complaint ¶ 19 alleges that *Sager* received on March 16, 2009, the following message from a short code number:

BANK OF AMERICA FREE TEXT ALERT: TO AVOID A  
SERVICE INTERRUPTION ON YOUR ACCOUNT, PLEASE CALL  
866-963-1064 BEFORE 9PM TODAY. TO END ALERTS REPLY  
STOP.

The complaint ¶ 20 alleges that *Sager* replied with a STOP.

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<sup>28</sup> This practice actually exists today. When a cellular phone subscriber is behind on his bill, he can get dunning calls to that number which have the side-effect of increasing the amount owed.

The complaint ¶ 21 alleges receiving the following text reply:

THANK YOU. YOU WILL NO LONGER RECEIVE TEXT ALERTS FROM BANK OF AMERICA TO THIS NUMBER. IF YOU HAVE QUESTIONS, PLEASE CALL 866-963-1064.

The telephone number in both texts is the same. The second message could accomplish the same as the first.

Sager alleges that both texts were without permission.

Interestingly, the first text claims to be a “FREE TEXT ALERT”, but the second makes no such claim. The claim implies that the first text was a Free To End User (“FTEU”) text, but the second does not carry the free statement and may have been billed.

### ***B. Free To End User text messages***

The following is some background on SoundBite’s FTEU texting.

A Google search for “SoundBite TCPA” finds a link to <http://www.collectiontechnology.net/profiles/blogs/got-debtors-cell-number>. The main article describes a data mining operation that takes a debtor’s name and matches it to the debtor’s cell phone. Of course, calling a cellular telephone number that was discovered that way would be a violation of the TCPA – the debtor had not voluntarily released his cellular number. I’m heartened that Chris Baggett spoke out against the practice. The last time I spoke with Mr. Baggett was at the Los Gatos, CA, courthouse where he appeared for Optima Funding – a notorious fax and prerecorded call advertiser that the FCC has cited.

Another of the webpage’s comments is also critical of the data mining:

**Comment by [Alan Berrey](#) on March 12, 2009 at 11:48pm**

Free-to-end-user (FTEU) text messaging was brought to market by [Mobile Collect](#) in 2005. Mobile Collect was acquired by [SoundBite](#) in 2008. SoundBite provides FTEU messaging on all major US carriers including Verizon. FTEU is patent pending by SoundBite. FTEU improves compliance with TCPA and FDCPA but it is not a panacea. The solution outlined in this article assumes that text messaging is permissible, even when the telephone number is obtained through a third party. Most organizations disagree with this assumption and avoid this type approach. There are highly effective ways to use FTEU text messaging. Some top 10 banks have used FTEU since 2005 with resounding success. That being said, however, the approach outlined in this article is a dangerous way to start.

Alan Berrey was VP of Market Development for SoundBite.<sup>29</sup> He was also a VP of Emerging Solutions for SoundBite.<sup>30</sup> He presumably speaks with authority for SoundBite’s position. Berrey’s comment does explain more about the Free-to-End-User

<sup>29</sup> <http://www.alanberrey.com/text-article-017.shtml> dated 2008.

<sup>30</sup> <http://www.soundbite.com/about-us/news-and-events/press-releases/javelin-strategy-research-and-soundbite-communications-to-host-webinar> dated July 15, 2010.

service. The obvious tie-in is 47 U.S.C. § 227(b)(1)(A)(iii) that prohibits making an automated call “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call”. Berrey and SoundBite are clearly aware that there are TCPA issues in the FTEU service.

Notice *Sager* alleges the first text was March 16, 2009, four days after the above post. SoundBite was fully aware of the risks it was taking.

In 2009, Club Texting petitioned the Commission for a Declaratory Ruling.<sup>31</sup> Club Texting started providing services in 2006 as one of a number of text broadcasters who “provide text message marketing tools and services”.<sup>32</sup> The issue of TCPA liability for sending unsolicited text message advertisements quickly became an issue, and that issue prompted Club Texting’s petition. Club Texting sought a common carrier / fax broadcaster declaration for itself alone; Club Texting was apparently willing to let its clients twist in the wind.

SoundBite commented on Club Texting’s petition.<sup>33</sup> SoundBite started in 2000, and it appeared to clearly recognize that subscribers must opt-in to received text messages.<sup>34</sup>

I submitted reply comments on Club Texting’s petition, and SoundBite responded to my comments.<sup>35</sup> It said, “SoundBite does not advise its customers that FTEU messages are per se exempt from FCC rules requiring consent for autodialed calls to wireless telephones. To the contrary, SoundBite recognizes that even FTEU messages require such consent unless they are sent by the recipient’s wireless carrier.” Furthermore, “SoundBite enters into written contracts with its customers – many of which are governmental agencies and Fortune 500 companies – which ensures that both parties are aware of, and committed to, their legal responsibilities.”

We therefore have the situation where Bank of America and SoundBite did all their texting fully aware of the risks they undertook.

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<sup>31</sup> Club Texting, Inc. Petition for Declaratory Ruling, August 25, 2009, FCC Docket 02-278, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020347885>.

<sup>32</sup> Club Texting Petition, page 3.

<sup>33</sup> SoundBite’s comments on Club Texting Petition, November 9, 2009, DA 09-2387 <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020350297>, posted Dec. 1, 2009.

<sup>34</sup> <http://www.slideshare.net/NECCF/sound-bite-presentationforneccf08june2010>. See page 10, where a consumer preference is “I opt-in to receive marketing calls on my mobile phone.” Page 13 claiming low opt-out rate of 2.7%. Page 17 has a customer explicitly requesting texts by sending the first one in response to a printed marketing request. Same thing for a delinquent debtor. Page 18: “Obtain stated and observed preferences.”

<sup>35</sup> SoundBite ex parte to Docket 02-278 on Club Texting petition, December 18, 2009, <http://apps.fcc.gov/ecfs/document/view?id=7020353591>.

SoundBite examples suggest that explicit permission is required.<sup>36</sup>

A significant issue, however, is what SoundBite means with the qualifier “unless [the FTEU messages] are sent by the recipient’s wireless carrier.” Does SoundBite mean consent is not required even when recipient’s wireless carrier is sending messages on behalf of a third party? In other words, can BofA have AT&T send FTEU texts on behalf of BofA without the AT&T subscriber’s prior express consent?

That is a complex question. Some will say yes, others will impose restrictions on the message content, and still others will say no. Many arguments depend on facts that we do not have.

### ***C. Apparent basis of the FTEU text messaging***

Free-To-End-User texting was being discussed in 2008.<sup>37</sup> The idea purports to be a way around some restrictions in the TCPA. The method requires the cooperation of wireless carriers, but most carriers are resistant to the idea.<sup>38</sup>

The TCPA prohibits making a call using an ATDS without prior express consent “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call”.<sup>39</sup> The plain reading of that prohibition is a blanket prohibition for any call to a cellular telephone service unless there is prior express consent. Using the last antecedent rule, the “for which the called party is charged for the call” modifies only “any service” and does not reach back to modify “cellular telephone service”.

In 1992, despite the above plain reading, the Commission stated, “Based on the plain language of § 227(b)(1)(iii), we conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged.”<sup>40</sup> The Commission went on to say, “Accordingly, cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialer and artificial and prerecorded message calls for which the cellular subscriber is not charged.”

In its conclusion, the Commission ignores the Congressional finding that “Evidence compiled by the Congress indicates that residential telephone subscribers

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<sup>36</sup> SoundBite, March 3 2011,

[http://www.soundbite.com/sites/default/files/SoundBite\\_Multi-channel-Blending-Webinar\\_03Mar2011.pdf](http://www.soundbite.com/sites/default/files/SoundBite_Multi-channel-Blending-Webinar_03Mar2011.pdf) Page 37: solicits explicit permission to use text messages

<sup>37</sup> <http://www.pattonboggs.com/abc.aspx?url=news%2FNewsDetail.aspx%3Fnews=578> September 15, 2008.

<sup>38</sup> <https://prodnet.www.neca.org/publicationsdocs/wwpdf/61110mobile.pdf> June 11, 2010 presentation to the FCC. Slide labeled “Carriers have inhibited competition” suggests that only AT&T and T-Mobile (out of 13 carriers) permit FTEU.

<sup>39</sup> 47 U.S.C. § 227(b)(1)(B)(iii)

<sup>40</sup> 1992 Report and Order, FCC 92-443, ¶ 66.

consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.”<sup>41</sup> It is not hard to extrapolate that finding about residential subscribers to cellular telephone subscribers; the industry continually points out that many homes are wireless-only now, so residential rules should apply now if not back in 1992.

The literal reading of those Commission conclusions is anyone who can guarantee a cellular subscriber will not be charged may call that cellular phone to his heart’s content. The FTEU text message exploits that unfortunate interpretation: the FTEU provider cuts a deal with the cellular carrier not to charge the subscriber, and then the FTEU sends a text without first getting the subscribers prior express consent.

In the 2003 Report and Order, the Commission stated, “We affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number.”<sup>42</sup> Unfortunately, the Commission added footnote 610 stating, “Consistent with our determination in 1992, calls made by cellular carriers to their subscribers, for which subscribers are not charged in any way for the call ... are not prohibited by the TCPA.”

In 2004 under CAN-SPAM, the Commission stated, “Based upon the record before us, we decline to grant CMRS providers a special exemption from the requirement to obtain express prior authorization from their current subscribers before sending them any MSCM. In reaching this decision, we are persuaded by commenters, including many consumer groups and individuals, who urge us to provide greater consumer protection for wireless consumers – protection that is not diluted by such an exemption. The Act itself requires us to protect consumers from “unwanted” commercial messages, not only those that have additional costs. As commenters note, consumers are concerned with the nuisance of receiving such messages.”<sup>43</sup>

In 2007, the Commission confirmed its CAN-SPAM position.<sup>44</sup> The CAN-SPAM discussion appears fatal to any general purpose usage of FTEU texts. Commercial Mobile Radio Service (CMRS) providers may not send Mobile Service Commercial Messages (MSCMs) to their subscribers. The only exceptions are transactional or relationship messages which are not MSCMs.

In late 2007, the Commission strangely reiterated its 1992 position that wireless carriers may use an ATDS to call their subscribers if the subscribers are not charged.<sup>45</sup>

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<sup>41</sup> Public Law 102-243 (TCPA), Findings, § 2(10). See also finding (14) where businesses also complain about prerecorded calls.

<sup>42</sup> 2003 Report and Order, FCC 03-153, ¶ 165.

<sup>43</sup> 2004 Order, FCC 04-194, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-194A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-194A1.pdf)

<sup>44</sup> Order (Cingular Wireless), March 20, 2007, FCC 07-26, <http://apps.fcc.gov/ecfs/document/view?id=6518916854>

<sup>45</sup> 2007 Declaratory Ruling (ACA Petition), FCC 07-232, footnote 15.

The Commission's position is inconsistent. The Commission is saying it is OK to transmit a prerecorded voice message containing a commercial offer to a subscriber's cellular phone, but it not OK to send the same message as a text because it is not a transactional or relationship message. Given the 2004 CAN-SPAM statements, the Commission should retract its 1992 conclusion and state that the TCPA prohibits ATDS calls to cellular telephones even when the consumer is not charged for the call. The prohibition is not just cost shifting but also a privacy concern. Exercising its authority under 47 U.S.C. § 227(b)(2)(C), the Commission may exempt CAN-SPAM "transactional and relationship" messages when the subscriber is not charged for the call.

The Commission should also consider whether a third party can data mine, capture, or otherwise obtain a subscriber's cellular telephone number and then use that number with a wireless carrier's cooperation to transmit free-to-end-user prerecorded voice messages or texts that fall into the transactional and relationship classes. I would say the calls should not be permitted.

## **V. Definition of Automatic Telephone Dialing Systems**

The definition of automatic telephone dialing system is a perennial issue brought before the FCC. It doesn't take much to bring it up, and a win would be a huge win for businesses and a catastrophic loss for consumers. The FCC should make a clearer statement about interpreting ATDS.

### **A. TCPA definition of ATDS**

The Commission revisited the interpretation of ATDS in the 2003 Report and Order.<sup>46</sup> It reaffirmed that position in 2007.<sup>47</sup> The statutory definition is:

- (1) The term "automatic telephone dialing system" means equipment which has the capacity –
  - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
  - (B) to dial such numbers.

The Commission stated, "The statutory definition contemplates autodialing equipment that either stores or produces numbers." There are two prongs to the definition. The Commission noted that "[i]n the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily". That statement refers to the producing telephone numbers prong. The Commission also noted that "the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective." That statement speaks to storing telephone numbers rather than producing them arbitrarily.

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<sup>46</sup> 2003 Report and Order, FCC 03-153, ¶¶ 131—133.

<sup>47</sup> 2007 Declaratory Ruling (ACA Petition), FCC 07-232, ¶¶ 12—14.

The issue is how the dangling, comma-spliced, modifier “using a random or sequential number generator” should attach to the preceding “to store or produce telephone numbers to be called”. In my earlier comments, I argue that most attachments do not make sense. The phrase needs to modify something sensible without making other parts of the definition pointless.

If the modifier attached to “called” (the act of calling would require a random or sequential number generator), then the phrase would logically have gone in (B) instead of (A). Congress would simply require the dialing to use a number generator. Using a generator for the actual calling/dialing also does not comport with the machines Congress knew about in 1991 – machines that, as the FCC explained, arbitrarily produced 10-digit telephone numbers to call.

If the modifier attached to “telephone numbers”, it also does not make sense. Telephone numbers are not actors, so they do not use anything – especially not number generators.

“Using a random or sequential number generator” is an adverbial that describes how some action is done, so it makes sense for it to attach to a verb. In this case, the verbs are “store” and “produce”.

The dangling modifier describes how telephone numbers are produced; it does not impact how telephone numbers are stored.

It makes perfect sense to produce telephone numbers using a random or sequential number generator. That’s what autodialers did in 1991. Matthew Broderick’s character in the MGM/United Artists 1983 movie *WarGames* used an IMSAI 8080 to sequentially scan area code and prefix combinations for carrier tones. For each telephone exchange, it sequentially generated telephone numbers.<sup>48</sup> The machine didn’t have to store the numbers first; it just generated them on the fly. Such “war dialing” clearly violates the TCPA.<sup>49</sup>

It does not make sense to store numbers to be called using a number generator. Storing is simply recording the information. It could make sense to produce numbers using a random number generator and then store those produced numbers, but then using a number generator is still modifying the production of numbers. The disjunction is awkward. Furthermore, the word “store” becomes irrelevant. Congress could have simply prohibited producing telephone numbers with a number generator and then dialing them. Whether they were stored in the interim would be irrelevant: the violation would be for a machine that called telephone numbers that were randomly or sequentially generated.

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<sup>48</sup> [http://www.youtube.com/watch?v=ABYemfK\\_qD4](http://www.youtube.com/watch?v=ABYemfK_qD4)

<sup>49</sup> 2003 Report and Order, FCC 03-153, ¶ 135, about using autodialers to dial large blocks of telephone numbers to find facsimile machines.

The appropriate interpretation for (A) is that an ATDS as the capacity (i) to store telephone numbers to be called or (ii) to produce, using a random or sequential number generator, telephone numbers to be called. The interpretation makes sense, it gives every word a purpose, and it fits the historical context. Those statements make sense. The interpretation also fits the common sense meaning of an automatic dialing system. Either the automatic dialer can store a bunch of numbers to call, or it can produce some numbers to call using a number generator.

### ***B. Other statutory definitions of automatic dialing***

As stated in my original comments, California had an automatic dialer law before the TCPA was enacted and before there were cellular telephones. The aim was to define the machine that automatically called and delivered prerecorded messages. California Public Utilities Code § 2871 defines an “automatic dialing-announcing device”:

2871. As used in this article, "automatic dialing-announcing device" means any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called.

Congress, when it passed the TCPA, would have been aware of the California law. Clearly, Congress saw the need to include “to store” in its statutory definition of ATDS, and the California law provides some context about what “to store” means.

There are other state definitions covering automatic dialing.<sup>50</sup>

Pennsylvania<sup>51</sup> statute: 52 Pa. Code § 63.1 Definitions:

*Automatic dialing-announcing device*—Automatic equipment used for solicitation which has a storage capability of multiple numbers to be called or a random or sequential number generator that produces numbers to be called and has the capability, working alone or in conjunction with other equipment, of disseminating a prerecorded message to the number called.

Iowa Code § 476.57:

1. *Definition.* As used in this section, "ADAD equipment" means automatic dialing announcing device equipment which is a device or system of devices used, either alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers

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<sup>50</sup> See also <http://saos.nictusa.com/aodocs/1087771.pdf>; <http://dnc.com/legal/statutes/>

<sup>51</sup> Chapter 63, Telephone Service.

<http://www.pacode.com/secure/data/052/chapter63/chap63toc.html>

without the use of a live operator to disseminate prerecorded messages to the numbers selected or dialed.

2. *Prohibition.*

a. Except as provided in paragraph "b", a person shall not use, employ, or direct another person to use, or contract for the use of ADAD equipment.

b. Except for ADAD equipment which randomly or sequentially selects the telephone numbers for calling, the prohibition in paragraph "a" does not apply to any of the following:

(1) Calls made with ADAD equipment by a nonprofit organization or by an individual using the calls other than for commercial profit-making purposes or fund-raising, if the calls do not involve the advertisement or offering for sale, lease, or rental of goods, services, or property.

New York<sup>52</sup> does not include a number generator – just storage:

NY Gen. Bus. § 399-p. Telemarketing; use of automatic dialing-announcing devices and placement of consumer telephone calls

1. Definitions. As used in this section, the following terms shall have the following meanings:

(a) "automatic dialing-announcing device" means any automatic equipment which incorporates a storage capability of telephone numbers to be called and is used, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called without the use of an operator;

South Carolina:

S.C. Code § 16-17-446. Regulation of automatically dialed announcing device (ADAD).

(A) "Adad" means an automatically dialed announcing device which delivers a recorded message without assistance by a live operator for the purpose of making an unsolicited consumer telephone call as defined in Section 16-17-445(A)(3). Adad calls include automatically announced calls of a political nature including, but not limited to, calls relating to political campaigns.

Virginia:<sup>53</sup>

§ 59.1-518.1. Definitions.

As used in this chapter:

"Automatic dialing-announcing device" means a device that (i) selects and dials telephone numbers and (ii) working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.

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<sup>52</sup> <http://codes.lp.findlaw.com/nycode/GBS/26/399-p>

<sup>53</sup> <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+59.1-518.1>

Kansas K.S.A 50-670(a)(4):<sup>54</sup>

(4) "Automatic dialing-announcing device" means any user terminal equipment which:

(A) When connected to a telephone line can dial, with or without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator; or

(B) when connected to a telephone line can disseminate a recorded message to the telephone number called, either with or without manual assistance.

## VI. Conclusion

First, the Commission should clarify the definition of ATDS to make it clear that random or sequential number generators are not required for the store prong of an ATDS.

Second, in the interest of judicial economy, the Commission should find that SoundBite's STOP confirmation text messages are sent using an Automatic Telephone Dialing System. Ordinarily, factual determinations should be left to the courts. Courts allow the parties to cross examine witnesses, and courts are the place where evidence is weighed. In this situation, however, the statements of SoundBite show that it is using an automatic telephone dialing system. SoundBite's declaration to the contrary is self-serving. SoundBite claims that its system does not have the capacity to store numbers to be called. However, SoundBite describes a system where opt-out requests are received, and "the system is programmed to put the individual number on a separate list".<sup>55</sup> The system is storing the number in that separate list. Some minutes later, a confirmation text is sent out. SoundBite's system has retrieved the telephone number and dialed it. SoundBite says a "one-time confirmation text message sent only to that number", but that a telephone number is only called once is irrelevant to the issue of an ATDS.

Third, the Commission should find that a STOP text message, in the absence of any other agreement,<sup>56</sup> revokes any prior express consent and prohibits subsequent calls to the subscriber for which he is charged. After receiving the STOP, the sender knows the subscriber has revoked consent. The revocation should be processed expeditiously, but there should be a grace period for texts that are transmitted in ignorance; it may take a brief amount of time for knowledge of the STOP request to propagate through the system. SoundBite and Varolii suggest that processing time takes minutes, so the STOP request should complete in a reasonable time that does not exceed one hour.<sup>57</sup> The grace

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<sup>54</sup> [http://kansasstatutes.lesterama.org/Chapter\\_50/Article\\_6/50-670.html](http://kansasstatutes.lesterama.org/Chapter_50/Article_6/50-670.html)

<sup>55</sup> Petition, page 6.

<sup>56</sup> A STOPCONFIRM message might, for example, express consent for a confirmation message but prohibit any other texts. It may be reasonable for some specialized services, such as identity theft protection companies, to contractually require a confirmation text.

<sup>57</sup> This time is essentially how long it takes to distribute the do-not-text information to all the servers (which might be scattered in several states). The servers would be able to

period does include messages that are transmitted with the knowledge of a STOP request.<sup>58</sup>

Other elements of the *Sager* and similar lawsuits, such as the prior express consent for the messages prior to the STOP message, whether the confirmation text was charged to the subscriber, and whether a free confirmation text was commercial, transactional, or relationship, are factual issues that are best left to the sound discretion of the district court.

Finally, The Commission should reject its 1992 conclusion that the TCPA did not intend to prohibit calls to cellular telephones if the subscriber is not charged. It should use its CAN-SPAM conclusion.

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place calls anywhere in the country in a matter of seconds, so it is not unreasonable to expect that they could communicate with each other within an hour.

<sup>58</sup> The Commission's authority to do this is implied in the same way as it was implied for porting cellular telephone numbers. Laws cannot require the impossible; the Commission can determine a reasonable upper bound on the time for a transition.