

Before the  
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In the Matter of )

SoundBite Communications, Inc. )

Petition for Declaratory Ruling )

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CG Docket No. CG 02-278

To: The Commission

**REPLY COMMENTS OF SOUNDBITE COMMUNICATIONS, INC.**

Robert Leahy  
John Tallarico  
SoundBite Communications, Inc.  
22 Crosby Drive  
Bedford, MA 01730

Monica Desai  
Patton Boggs LLP  
2550 M Street NW  
Washington, DC 20037  
(202) 457-7535

*Counsel to SoundBite Communications, Inc.*

Dated: May 15, 2012

## EXECUTIVE SUMMARY

The record before the Federal Communications Commission demonstrates widespread and overwhelming support for SoundBite's narrow request for a declaratory ruling. Indeed, a range of commenters - including Consumer Action, CTIA -The Wireless Association®, the Retail Industry Leaders Association, the Mobile Marketing Association, Future of Privacy Forum, Verizon Wireless, and WMC - and others all agree: when a subscriber sends a text message choosing to opt-out of future text message marketing and within minutes receives a one-time immediate reply via text message confirming the opt-out request, that confirmation message is not a violation of the Telephone Consumer Protection Act. Ironically, even the National Association of Consumer Advocates, which opposed the filing, sends out confirmation text messages when consumers opt out of their Twitter-based campaigns.

Furthermore, a broad range of other government, political, consumer and other organizations - including the American Automobile Association, Center for Disease Control and Prevention, Chicago Transit Authority, Federal Emergency Management Agency, U.S. Fish and Wildlife Service, History Channel, National Healthy Mothers Healthy Babies Coalition, Obama for America, Romney for President, United States Government (USA.gov), AARP, Black Entertainment Television, Consumers Union, the Federal Communications Commission, National Consumers League, and the National Trial Lawyers - also must agree, as each sends out opt-out confirmation texts either in response to regular text campaigns or in response to a Twitter opt-out. And the State of Florida also must agree, as the Florida Attorney General required certain service providers to send such confirmatory text messages through a settlement agreement.

Unfortunately, SoundBite and other companies have been targeted with multi-million dollar class action lawsuits based, at least in part, on these one-time confirmation messages. As a result of these lawsuits, and additional lawsuits that have been threatened, companies that lawfully utilize mobile marketing strategies to sustain and grow their businesses are exposed to hundreds of millions of dollars of potential liability, and that exposure is growing by the day. SoundBite respectfully reiterates its request for an expedited declaratory ruling that such a limited confirmation message sent back to the individual requesting an opt-out does not violate the TCPA.

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**REPLY COMMENTS OF SOUNDBITE COMMUNICATIONS, INC.**

SoundBite Communications, Inc., through counsel, submits these reply comments supporting its Petition for Expedited Declaratory Ruling in the above referenced proceeding.<sup>1</sup> The record demonstrates widespread and overwhelming support for SoundBite’s request for a narrow declaratory ruling: when a subscriber sends a text message choosing to opt-out of future text message marketing and within minutes receives a one-time immediate reply via text message confirming the opt-out request, that confirmation message is not a violation of the Telephone Consumer Protection Act (“TCPA”)<sup>2</sup> or Section 64.1200<sup>3</sup> of the Commission’s rules.<sup>4</sup>

Furthermore, a broad range of other government, political, consumer and other organizations - including the United States Government (USA.gov), the Obama campaign, and

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<sup>1</sup> *SoundBite Communications, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) (“Petition”); *see also* Comments of SoundBite Communications, Inc., CG Docket No. 02-278 (filed Apr. 30, 2012) (“SoundBite Comments”).

<sup>2</sup> Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2000 & Supp. 2005) (“TCPA”).

<sup>3</sup> 47 C.F.R. § 64.1200.

<sup>4</sup> *See generally* SoundBite Comments.

the Romney campaign, and even the Federal Communications Commission, National Consumers League, and National Trial Lawyers - also must agree such one-time confirmation text messages are lawful and good public policy, as each sends out opt-out confirmation texts either in response to regular text campaigns or in response to a Twitter opt-out. Even the National Association of Consumer Advocates (“NACA”), which opposed the filing, sends out confirmation text messages when consumers opt out of their Twitter-based campaigns.

Based on the arguments in the comments, the overwhelming record support, and the widespread practice of opt-out confirmations from a variety of consumer, government, and industry groups, we respectfully urge the Commission to grant SoundBite’s Petition and expeditiously clarify that a one time confirmation text message sent within minutes of an opt-out request does not violate the TCPA or Commission rules.

**I. COMMENTERS WIDELY AGREE THAT SENDING ONE-TIME CONFIRMATION TEXT MESSAGES PROTECTS CONSUMERS AND PROMOTES SOUND PUBLIC POLICY.**

A range of commenters - including Consumer Action (a non-profit organization focusing on financial education for low to moderate income and limited English-speaking consumers), CTIA -The Wireless Association® (“CTIA”) (an international nonprofit organization representing wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products), the Retail Industry Leaders Association (“RILA”) (members include more than 200 retailers, product manufacturers, and service suppliers, which together account for \$1.5 trillion in annual sales), the Mobile Marketing Association (“MMA”) (members include more than 700 companies involved in all phases of the mobile marketing value chain), Future of Privacy Forum (a Washington, DC-based think tank led by privacy leaders focused on advancing responsible data practices), and WMC Global (a third-party organization

that specializes in monitoring the compliance of premium and standard rate short code message services via carrier policies and industry standards) - and others all agree: when a subscriber sends a text message choosing to opt-out of future text message marketing and within minutes receives a one-time immediate reply via text message confirming the opt-out request, that confirmation message is not a violation of the Telephone Consumer Protection Act (“TCPA”) or Section 64.1200 of the Commission’s rules. For example, Consumer Action concludes “a one-time text message confirming a consumer’s request to ‘opt out’ [is] a good practice,” that provides consumers with “evidence that a transaction has occurred.”<sup>5</sup> As emphasized by the MMA, confirmation of opt-outs “ensures that the consumer has a ‘receipt’ for his or her opt-out request and ensures that the consumer knows he or she will not receive any future text messages from that particular marketer. Closing this circle of communication protects the consumer and is therefore good public policy.”<sup>6</sup>

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<sup>5</sup> Comments of Consumer Action, CG Docket No. 02-278, at 2 (filed Apr. 25, 2012) (supporting SoundBite’s Petition because a one-time confirmation message also provides consumers with an affirmative record that a consumer preference has been honored). Once the FCC clarifies that a one time text confirmation of an opt out does not violate either the TCPA or FCC rules, there is no basis to adopt the suggestion made by Consumer Action that such clarification should only apply “going forward.” *See id.* at 1. Either the one time confirmation is consistent or not consistent with the TCPA and FCC rules; once the FCC clarifies that such a practice is lawful then it is logically irrelevant when the practice occurred.

<sup>6</sup> Comments of Mobile Marketing Association in Support, CG Docket No. 02-278, at 1-2 (filed Apr. 30, 2012). *See also* Comments of Varolii Corporation, CG Docket No. 02-278, at 2 (filed Apr. 30, 2012) (stating that “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 nonmarketing 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.”); Comments of CTIA -The Wireless Association®, CG Docket No. 02-278, at 7 (filed Apr. 30, 2012) (emphasizing that “The Commission itself has stated that parties should confirm the receipt of an opt-out request, preferably at the time the request is made. . . . Because a text message is a one-way store-and-forward communication, however, the acknowledgment and related processing of the opt-out request can only be provided via a confirmatory text message.”)

Furthermore, a broad range of other government, political, consumer and other organizations - including the American Automobile Association, Center for Disease Control and Prevention, Chicago Transit Authority, Federal Emergency Management Agency, U.S. Fish and Wildlife Service, History Channel, National Healthy Mothers Healthy Babies Coalition, Obama for America, Romney for President, United States Government (USA.gov), AARP, Black Entertainment Television, Consumers Union, the Federal Communications Commission, National Consumers League, and National Trial Lawyers - also must agree, as each sends out opt-out confirmation texts either in response to regular text campaigns or in response to a Twitter opt-out.<sup>7</sup> Even the National Association of Consumer Advocates (“NACA”), which opposed the filing, sends out confirmation text messages when consumers opt out of their Twitter-based campaigns. And the State of Florida also must agree, as the Florida Attorney General required certain service providers to send such confirmatory text messages through a settlement agreement.<sup>8</sup>

Consumers are not only protected by receiving a confirmation of their choice to no longer receive future unwanted texts, but such confirmations also protect consumers by ensuring they do not inadvertently opt out of a service that they rely on for informational messages. As pointed out by the Future of Privacy Forum, many wireless subscribers now rely on “payment reminders, fraud alerts, account updates, and other services that protect user privacy and prevent identity

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(“CTIA Comments”). Indeed, consumers have come to expect confirmations of transactions, and without a receipt is likely to either make repeated requests or phone the call center, increasing efforts by the consumer and cost to the company.

<sup>7</sup> SoundBite Comments at 4-5.

<sup>8</sup> See In the Matter of Verizon Wireless Services LLS & Alltel Communications, LLC, CASE NO. L08-3-1035 (June 19, 2009) (Assurance of Voluntary Compliance) available at [http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7TAJQ2/\\$file/VerizonAVC.pdf](http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7TAJQ2/$file/VerizonAVC.pdf).

theft,” and an opt-out confirmation will confirm that a consumer who relies on these “highly desirable” services intended to, and did not “inadvertently, opt-out.”<sup>9</sup>

The Commission recognized these important consumer benefits in 2003 by requiring telemarketers to confirm do-not-call requests immediately “at the time the request [is] made,” even while rejecting alternative confirmation requirements as “unduly costly to businesses.”<sup>10</sup> Such opt-out confirmations fall into a similar informational category as “bank account balance, credit card fraud alert, package delivery, and school closing information” which the FCC recognizes as “types of information calls” that it “do[es] not want to unnecessarily impede.”<sup>11</sup>

Consumers benefit from receiving instant confirmation of an opt-out choice with minimal disturbance in a manner that does not conflict with Congress’s original intent in enacting the TCPA - protecting consumers against invasions of privacy while in their homes, and eliminating calls that cause consumers to feel annoyed by “hang-ups” or “dead air,” or feel “frightened, threatened and harassed.”<sup>12</sup>

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<sup>9</sup> Comments of the Future of Privacy Forum, CG Docket No. 02-278, at 3 (filed Apr. 30, 2012) (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1841 ¶ 29 (2012)). For example, a person may rely on the National Healthy Mothers, Healthy Babies Coalition mobile service for prenatal care text messages, or the AAA mobile service for gas alerts.

<sup>10</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14069 ¶ 93 (2003) (“2003 TCPA Order”).

<sup>11</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1838 ¶ 21 (2012).

<sup>12</sup> S.Rep. No. 102-178, reprinted in 1991 U.S.C.C.A.N. 1968, 1976 (1991) (noting also that a primary justification of the TCPA is that, at the time the legislation was considered, a “substantial proportion of the public believe[d] that these calls are a nuisance and an invasion of one’s privacy right in the home... and telemarketers who place telephone calls to the home can be considered ‘intruders’ upon that privacy”); 2003 TCPA Order, ¶ 2 (emphasis added).

## II. SOUNDBITE'S EQUIPMENT FOR SENDING OPT-OUT CONFIRMATION TEXT MESSAGES IS NOT CAPABLE OF GENERATING AND DIALING RANDOM OR SEQUENTIAL NUMBERS.

SoundBite reiterates that its system cannot be an "autodialer" under the TCPA because it does not have the capacity to generate and dial random or sequential numbers, and consequently, the Commission should find that confirmatory opt-out text messages do not violate the TCPA.<sup>13</sup> By definition, SoundBite cannot send messages "randomly or sequentially"<sup>14</sup> because only subscribers that have first authorized and requested text message communications, and then later opted out of those communications, receive opt out confirmations.<sup>15</sup> The equipment merely reacts to an input, and is not programmed to be able to store or generate random or sequentially ordered numbers. By definition then, the SoundBite technology cannot be deemed an automatic telephone dialing system within the meaning of the TCPA and the Commission's rules implementing it.<sup>16</sup> Indeed, as noted by one commenter, in the smart phone era almost all modern telecommunications equipment could be altered to have the ability through software or hardware

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<sup>13</sup> See 47 U.S.C §227(a)(1).

<sup>14</sup> Merriam-Webster dictionary defines "random" as "lacking a definite plan, purpose, or pattern" and "sequential" as "following in sequence." Confirmation text messages sent only to specific individuals who make a specific opt out request are neither "random" nor "sequential." See Merriam-Webster Online, <http://www.merriam-webster.com/> (last visited May 14, 2012).

<sup>15</sup> SoundBite Comments at 8-10.

<sup>16</sup> See also Comments of Verizon, at 8 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8776 (1992) for the proposition that: "A text message directed at a single telephone number, for the purpose of responding to a request from that number, uses neither a 'random' nor a 'sequential' number generation process" and fails the TCPA test for a prohibited "call" under the statute).

installations to autodial random or sequential numbers without human interaction; but without proactive alterations, there simply is no such inherent capacity.<sup>17</sup>

Plaintiffs engaged in multi-million dollar class-action lawsuits have asked courts to expand the TCPA's reach beyond the outer bounds that Congress and the Commission have previously imposed.<sup>18</sup> However, it is a stretch to suggest Congress intended to attach TCPA liability to previously unimagined confirmatory opt-out text messages sent through equipment that does not and can not make random or sequential calls absent hardware or software alterations. Instead, the Commission should make clear that neither the TCPA nor FCC rules can be violated by a single, individually targeted text confirmation of an opt out request.

### **III. SOUNDBITE'S CONFIRMATION TEXT MESSAGES FALL UNDER THE APPLICABLE GRACE PERIOD FOR TCPA OPT-OUT REQUESTS.**

SoundBite reiterates, and commenters agree, that the same considerations that justify a grace period for implementing telemarketing "do not call" requests, also justify a grace period for processing and confirming text opt out requests.<sup>19</sup> Because the FCC treats texts as calls,<sup>20</sup> the 30-day grace period for opt-out requests that the FCC applies to voice calls must also apply to

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<sup>17</sup> See Comments of Twilio Inc., CG Docket No. 02-278, at 7 (filed Apr. 30, 2012) (Twilio Comments) (emphasis added).

<sup>18</sup> Some courts have concluded that the TCPA does apply to machines that have a technological capacity to store, generate or call random or sequential numbers even if the machine was not programmed to use that function to make calls to a receiving party. See e.g. *Griffith v. Consumer Portfolio Serv., Inc.*, No. 10 C 2697, 2011 WL 3609012, \* 3-4 (N.D. Ill. Aug. 16, 2011) (relying upon previous FCC orders that applied TCPA to predictive dialer technology that, when used with a dialer, have "the capacity to dial numbers without human intervention"). The better view, however, is that the TCPA was never intended to reach so broadly, and in any event, should not reach the technology applied by SoundBite and others that simply send subscribers a one-time text message confirming a decision to opt-out of a previously agreed upon contract. The FCC should clarify this point in granting SoundBite's Petition.

<sup>19</sup> See, e.g., CTIA Comments at 8-9.

<sup>20</sup> See 2003 TCPA Order, ¶ 165.

text messages.<sup>21</sup> To conclude otherwise would mean that “the TCPA would be inconsistently applied between voice calls and text message ‘calls’ - to the detriment of text message senders.”<sup>22</sup>

SoundBite defers to the FCC regarding what length of time should be the appropriate grace period for text messages. Whatever grace period the FCC ultimately chooses to apply, SoundBite seeks a declaration that a one-time confirmation text message sent within minutes of receiving an opt-out request should fall within the applicable grace period.

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<sup>21</sup> See *id.*, Appendix B, ¶ 32 (“[W]e determined to require that both large and small businesses must honor do-not-call requests within 30 days from the date such a request is made, instead of requiring that businesses honor requests in less time.”) (emphasis added); see also FCC Guide: Unwanted Telephone Marketing Calls, available at <http://www.fcc.gov/guides/unwanted-telephone-marketing-calls> (“Telemarketers covered by the National Do-Not-Call Registry have up to 31 days from the date that you register your telephone number to remove it from their call lists and stop calling you.”) (emphasis added).

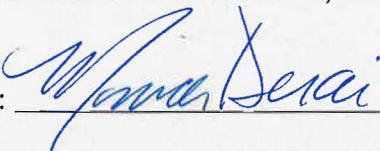
<sup>22</sup> See Twilio Comments at 8.

## CONCLUSION

The overwhelming weight of commentary in the record supports SoundBite's argument that an immediate, one-time confirmatory text message sent only to a customer who has requested an opt out is consistent with the TCPA and the public interest. With the foregoing in mind, and in light of the arguments already raised and the mounting lawsuits on this issue, SoundBite respectfully requests the Commission grant its request for an expedited declaratory ruling that one-time text messages confirming opt-out requests do not violate the TCPA.

Respectfully submitted,

SoundBite Communications, Inc.

By:  \_\_\_\_\_

Robert Leahy  
John Tallarico  
SoundBite Communications, Inc.  
22 Crosby Drive  
Bedford, MA 01730

Monica Desai  
Patton Boggs LLP  
2550 M Street NW  
Washington, DC 20037  
(202) 457-7535

Its Counsel

Dated: May 15, 2012

**DECLARATION OF JOHN TALLARICO**  
**SOUNDBITE COMMUNICATIONS, INC.**

I, John Tallarico, declare the following is true and correct to the best of my knowledge and belief:

I am the Vice President, Product Management of SoundBite Communications, Inc. I have reviewed the Reply Comments and attest, under penalty of perjury, that the facts contained therein are known to me and are accurate.

Executed on this 15th day of May 2012.

  
\_\_\_\_\_  
John Tallarico  
Vice President, Product Management  
SoundBite Communications, Inc.