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May 22, 2012

VIA ECFS

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

Re: *SoundBite Communications, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278

Dear Ms. Dortch:

By this letter, Clickatell, Inc. ("Clickatell")[1] urges the Federal Communications Commission ("FCC" or "Commission") to expeditiously grant the Petition for Expedited Ruling filed by SoundBite Communications, Inc. ("SoundBite").[2] In granting the SoundBite Petition, the Commission should declare that text messages sent to confirm that a consumer has opted out of receiving future services or advertising through SMS does not violate the Telephone Consumer Protection Act ("TCPA")[3] or the Commission's rules implementing the TCPA.[4] Such Commission action would settle current uncertainty that has led to a conflict between industry-established best practices, and class action plaintiffs' inaccurate TCPA interpretation. Absent Commission clarification, companies may need to ignore best practices – practices established to prevent consumer confusion – to avoid class action litigation.

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[1] Clickatell is a global leader in providing informational alerts. Clickatell enables its customers to alert, interact, and transact with their customers, businesses partners, and communities. Utilizing its global footprint, Clickatell can deliver short message services ("SMS") through the Clickatell Mobile eXchange to nearly every mobile phone user in the world. Clickatell also provides transactional services through its Clickatell Transaction eXchange, providing the essential link between mobile consumers and their financial institutes. Clickatell's services save lives, prevent fraud, keep people informed, and help people stay in touch all over the world. *See* http://www.clickatell.com for more information.

[2] Petition for Expedited Declaratory Ruling of SoundBite Communications, Inc., CG Docket No. CG 02-278 (filed Feb. 16, 2012) ("SoundBite Petition"). The Federal Communications Commission ("FCC" or "Commission") released a public notice seeking comment on the Petition on March 30, 2013. *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from SoundBite Communications, Inc.*, Public Notice, CG Docket No. 02-278, DA 12-511 (rel. Mar. 30, 2012) ("*Public Notice*").

[3] Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA").

[4] 47 C.F.R. § 64.1200.

As SoundBite correctly points out, messages confirming that a consumer has opted out are in the public interest and consistent with sound public policy.[5] The messages are intended to verify and confirm that consumers opted out of future SMS messages. In addition, such messages provide a record of the opt-out choice for the consumer and the company.

Industry has adopted confirmatory opt-out messages as a consumer best practice.[6] The Mobile Marketing Association ("MMA"), which counts 700 member companies across the world, publishes Consumer Best Practices as a guideline for business usage of text messaging. The Consumer Best Practices provide that a company receiving an opt-out request via text message should remove the phone number from the system, and respond with a confirmation text message stating that the consumer has opted-out and will no longer receive messages from that entity.[7]

Similarly, CTIA has adopted a Compliance Monitoring and Enforcement Playbook to ensure that certified carriers have taken proactive steps to protect consumers from unwanted SMS. A "[f]ailure to confirm service termination" in response to a user opt-out message is listed as a compliance violation.[8]

The record overwhelmingly supports the SoundBite Petition.[9] Commenters underscore that confirmatory opt-out messages are a pro-consumer policy and are consistent with the public

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[5] SoundBite Petition at 7-9.

[6] As SoundBite points out, the Commission itself has previously expressed the importance of consumers receiving some type of confirmation that the company has received their opt-out request. *See* Comments of SoundBite Communications Inc., CG Docket No. 02-278, at 3 (filed Apr. 30, 2012) ("SoundBite Comments") (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 93 (2003) ("Telemarketers should, however, confirm that any [do-not-call] request will be recorded at the time the request is made by the consumer.")). SoundBite also notes that entities that send opt-out confirmation text messages include: the American Automobile Association; the Center for Disease Control and Prevention; the Chicago Transit Authority; the Federal Emergency Management Agency; the Fish and Wildlife Services; the History Channel; the National Healthy Mothers, Healthy Babies Coalition; Obama for America; Romney for President; and the United States government through USA.gov. SoundBite Comments at 4.

[7] *See* Mobile Marketing Association, U.S. Consumer Best Practices, Version 6.0, § 1.6-4 (Mar. 1, 2011), *available at* http://mmaglobal.com/bestpractices.pdf.

[8] CTIA Compliance Monitoring and Enforcement Playbook (Oct. 25, 2011), *available at* http://www.wmcglobal.com/images/CTIA_playbook.pdf.

[9] There appear to only be two commenters that provided substantive comments against the SoundBite Petition. One such commenter, the National Association of Consumer Advocates ("NACA"), incorrectly argues that the TCPA is clear on the issue and that no interpretation is necessary. *See* Comments of the National Association of Consumer Advocates, CG Docket No. 02-278, at 2-3 (filed Apr. 30, 2012). As noted below, however, the record is full of analysis by commenters suggesting otherwise. NACA itself

interest. For example, MMA suggests that an FCC ruling that "a confirmatory opt-out text message is not only allowed under existing TCPA rules, but is also encouraged, will remove unnecessary impediments that are stifling a healthy and vibrant drive of jobs, income, and opportunity ... [and] would also help continue to provide certainty and comfort to consumers...."[10] Verizon and Verizon Wireless correctly note that the opt-out confirmation text message is "akin to the standard practice followed by email marketers who typically respond to requests to unsubscribe from email campaigns with a confirmation that the requests have been received and processed"[11] – a practice that most consumers are familiar and comfortable with, and, in fact, expect. The Future of Privacy Forum suggests that "opt-out confirmation text messages advance the TCPA's goal of protecting individual privacy" by "providing a formal record of the opt-out" and helping to "prevent invasions of privacy and identity theft stemming from the use of wireless phones."[12]

In addition to highlighting the pro-consumer and public interest benefits of confirmatory opt-out messages, commenters also confirm that such text messages do not violate the TCPA. Specifically, commenters note that opt-out confirmation messages are sent with the prior express consent of the consumers, are not sent using an autodialer, and otherwise would fall under the

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even acknowledges that, in certain circumstances, confirmatory messages "may be helpful and even appropriate." *Id.* at 12. NACA's position that confirmatory text messages are not "[b]enign" and that the MMA guidelines "do not reflect what is truly in the consumer's best interest" are in sharp contrast with the position of Consumer Action, which "views a one-time text message confirming a consumer's request to 'opt out' as a good practice." *Compare id.* at 7 *with* Comments of Consumer Action, CG Docket No. 02-278, at 2 (filed Apr. 25, 2012). Both NACA and Consumer Action are concerned with the cost of such a text message – an issue unrelated to the purpose of the TCPA and thus outside of the focus of this proceeding and the SoundBite petition. *See* S. REP. NO. 102-178, at 5 (1991) ("The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services."). The other commenter who has filed against the SoundBite Petition, Gerald Roylance, appears to have an active role in bringing lawsuits against various companies for alleged violations of the TCPA. *See, e.g., Roylance v. ADT Security Services, Inc., et al.*, Case No. 107-CV-102283 (Cal. Sup. Ct. filed Dec. 31, 2007); Gerald Roylance's Comments on SoundBite's Petition, CG Docket No. 02-278 (filed Mar. 30, 2012).

[10] Reply Comments of the Mobile Marketing Association In Support, CG Docket No. 02-278, at 3 (filed May 15, 2012).

[11] Comments of Verizon and Verizon Wireless, CG Docket No. 02-278, at 4 (filed Apr. 30, 2012) ("Verizon Comments").

[12] Comments of the Future of Privacy Forum, CG Docket No. 02-278, at 2-3 (filed Apr. 30, 2012) ("Future of Privacy Forum Comments").

TCPA grace period.[13] Accordingly, comments in the record overwhelmingly demonstrate that such messages are not prohibited by a proper interpretation of the TCPA.

Because of the pro-consumer benefits of confirmatory opt-out text messages and because such messages do not violate the TCPA, the Commission should expeditiously grant the SoundBite Petition.

Sincerely,

PIETER DE VILLIERS
CEO
Clickatell

[13] *See, e.g.*, SoundBite Comments at 7-10; Comments of CTIA-The Wireless Association, CG Docket No. 02-278, at 3-9 (filed Apr. 30, 2012); Future of Privacy Forum Comments at 4; Reply Comments of Neustar, CG Docket No. 02-278, at 2-5 (filed May 15, 2012); Comments of Twilio Inc., CG Docket No. 02-278, at 5-9 (filed Apr. 30, 2012); Verizon Comments at 4-7; Comments of WMC Global, CG Docket No. 02-278, at 2-3 (filed Apr. 30, 2012).