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

Re: **Ex Parte Notice – SoundBite Communications, Inc., Petition for Declaratory Ruling in CG Docket No. CG 02-278**

Dear Ms. Dortch:

On May 24, 2012, Monica Desai and Maria Wolvin of Patton Boggs, LLP, counsel to SoundBite Communications, Inc. ("SoundBite"), and SoundBite executives Bob Leahy (Chief Operating Officer and Chief Financial Officer) and John Tallarico (Vice President of Product Management) met with individuals from the Consumer and Governmental Affairs Bureau, including: Kris Monteith (Acting Bureau Chief); Mark Stone (Deputy Bureau Chief); Kurt Schroeder (Acting Chief, Consumer Policy Division); John B. Adams (Acting Deputy Chief, Consumer Policy Division); Michael Jacobs (Senior Legal Advisor to the Bureau Chief); and Richard Smith (Attorney-Advisor), and from the Office of General Counsel, including: Julie Veach (Deputy General Counsel), Marcus Maher (Assistant General Counsel) and Raelynn Remy (Attorney-Advisor).

During the meeting, SoundBite discussed its Petition for Declaratory Ruling ("Petition") requesting an expeditious ruling on the narrow issue raised in its Petition: in the limited circumstance when a subscriber sends a text message choosing to opt-out of receiving future text messages, and a one-time immediate reply is sent back via text to confirm the opt-out, that confirmation message is not a violation of the Telephone Consumer Protection Act ("TCPA") or Section 64.1200 of the Commission's rules.[1] SoundBite addressed several topics, including:

[1] *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); *see also* Reply Comments of SoundBite Communications, Inc., CG Docket No. 02-278 (filed May 15, 2012).

Consumers Expect to Receive an Opt-Out Confirmation, the FCC Expects Organizations to Send Such Confirmations, and the Practice is Widespread.

In the meeting, SoundBite explained that not only is there widespread agreement that having a "receipt" for opt out confirmations is a good practice and wise public policy, but that such confirmation texts are required by the Mobile Marketing Association (MMA) as part of its guidelines on consumer best practices,[2] required by CTIA,[3] and even by the Florida Attorney General in a settlement with Verizon Wireless.[4]

In addition, in other TCPA contexts, the Commission has expressed the importance of consumers receiving some type of confirmation that a company has received their opt-out request, specifically emphasizing that telemarketers should confirm that they have recorded a confirmation request at the time the consumer makes an opt-out request:

> We decline at this time to require telemarketers to make available a toll-free number or website that would allow consumers to register company-specific do-not-call requests or verify that such a request was made with the marketer. We also decline to require telemarketers to provide a means of confirmation so that consumers may verify their requests have been processed at a later date. Telemarketers should, however, confirm that any such request will be recorded at the time the request is made by the consumer.[5]

Therefore, the Commission's emphasis on providing the consumer with a confirmation must apply in the text messaging opt-out context as well. And this only makes sense. A receipt is a basic acknowledgement of a transaction. Receipts have been part of everyday life for at least 100 years - from grocery stores to buying a phone, a consumer gets a record of a transaction, proving that an action was taken or a service was provided.

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

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

[4] *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 (The Florida Attorney General explicitly required Verizon Wireless to contractually bind companies that provide mobile marketing services over Verizon Wireless' mobile network, including text message campaigns, to abide by practices "consistent with the MMA Guidelines," which include sending a confirmatory message when a consumer opts out of a marketing program.)

[5] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of1991,* Report and Order, FCC 03-153, 18 FCC Rcd 14014, ¶ 93 (2003) ("2003 TCPA Order") (emphasis added).

Providing a confirmatory opt-out is part of the receipt process that consumers come to expect when taking an action. Without the receipt, there is uncertainty in whether the transaction was completed which can lead to additional communication for clarification.

As a result, the practice of sending confirmatory opt-out messages is widespread, engaged in by consumer groups (including Consumers Union and the National Consumers League), political organizations (including the Obama for America and Romney for President campaigns), government agencies (including the FCC, USA.gov and the Federal Emergency Management Agency), and non-profit and for-profit entities (including the American Automobile Association and Black Entertainment Television). These messages are sent either as part of individual text messaging campaigns or campaigns initiated via twitter.

SoundBite's Equipment Does Not Have the Capacity to Generate or Dial Random or Sequential Numbers.

SoundBite sends only targeted messages through equipment that is not "an automatic telephone dialing system" under the statute. SoundBite explained that the system it uses for sending a confirmatory opt-out message is programmed specifically to send a targeted opt-out "receipt" message specifically only to the individual number that sent the original opt-out request. The system is not capable of generating or dialing any random or sequential numbers, is not intended to be used for such purposes, and is specifically designed not to be used for such purposes. Therefore, as a factual matter, the TCPA does not apply.

The FCC has acknowledged that in evaluating "capacity" it should consider how a system operates when hardware is paired with software.[6] This is the correct approach – otherwise the idea of "capacity" would be meaningless, particularly in an age of technology when any piece of hardware connected to a network (including an iPhone, a television set-top box, an answering machine system) could be altered with different software to add the ability to generate and dial random or sequential numbers.

In order for the SoundBite system become "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,"[7] SoundBite would have to go through a multi-step internal product release process that generally takes four to eighteen months. This process includes the following steps:

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[6] *See id.*, ¶ 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.").

[7] 47 U.S.C. § 227(a)(1); 64.1200(f)(1).

- The new products team must create a new requirement and create milestones. The Software Development Life Cycle (SDLC) starts out with the writing of a requirements document. This document specifies what the intent of the software is and what purpose it will serve. On a high-level, use cases are created that illustrate how the system with interact with the various users. Milestones are then created for each of the stages in the SDLC which will ultimately commence in the implementation of the software.

- A steering committee has to sign off on the new requirements. As part of the process described above, an internal steering committee must review each request to build new products. The steering committee evaluates the revenue opportunity for creating new products and balances that against the costs of delivery, and evaluate whether the resources and necessary skill sets are currently available to develop the product.

- Design specifications are written by the software team - This phase is one of the more critical elements in the overall SDLC. An engineer must take what is requested in the requirements document and understand how the code will be written in order for the hardware to perform as specified in the requirements. A Software Engineer must understand the physical hardware resource requirements, network requirements, and capacity requirements and determine if there will need to be upgrades or additions to existing infrastructure.

- The design requirements undergo several review cycles prior to sign-off. Once there is sign-off on the design the coding can commence.

- The coding phase varies in length based on the complexity of what is being built and how many code modules are being impacted. Very simple features can be coded in days, whereas more complex features can take weeks. It is important to understand that the actual coding is only a small part in the overall SDLC.

- Once the code is complete, it is subject to several iterations of testing. This starts with developer unit tests, followed by regression test and then moved to the Quality Assurance department for cycles of complete regression and load testing.

- Throughout the entire SDLC, the Product Launch Team (PLT) is responsible for overseeing the process, ensuring all steps are followed, mitigating any roadblocking issues and ensuring time commitments are met.

- Launch is the software cutover phase where all deployment and migrations tasks are completed. These tasks cover all of the operational, marketing, sales and financial tasks. Software is built based on detailed and complete requirements, but its rollout into production impacts every department in the company.

These steps reflect that changing the SoundBite system to give it 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" is an involved process that takes numerous people several months to over a year to finalize.

Sending an Immediate Single Text Confirmation of an Opt-Out Applies Under the Applicable Grace Period.

SoundBite reiterated 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.[8] To the extent that the FCC treats texts as calls,[9] the 30-day grace period for opt-out requests that the FCC applies to calls must also apply to text messages.[10] However, while SoundBite made clear that it defers to the Commission regarding what length of time should be the appropriate grace period for text messages, it emphasized that under whatever grace period the FCC ultimately chooses to apply, a one-time confirmation text message sent within minutes of receiving an opt-out request should fall within that grace period.

The FCC Should Not Distinguish Between Free-to-End User Text (FTEU) Messages and Standard Rate Text Messages in Evaluating TCPA Applicability.

The FCC should not evaluate compliance based on whether or not the text is ultimately FTEU. That distinction does not make a difference under the legal theories presented by SountBite and others in support of SoundBite's Petition. As a practical matter, industry-wide, the vast majority of text messages sent to consumers apply standard rates, including the messages cited as examples in SoundBite's comments, such as from the Center for Disease Control, US Fish & Wildlife Service, the History Channel, Obama for America, Romney for President, USA.gov, and the FCC. If the Commission declares that only free–to-end user confirmation text messages fall outside the scope of the TCPA, all of the hundreds of thousands of standard rate text messages that have been sent over the past four years confirming an opt-out by any entity prior to the ruling - sent pursuant to the requirements of the MMA and carriers – may be vulnerable to litigation. Thus, such a distinction may exacerbate the number of lawsuits filed as plaintiff attorneys seek to capitalize on

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[8] *See, e.g.,* Comments of CTIA -The Wireless Association®, CG Docket No. 02-278, at 8-9 (filed Apr. 30, 2012) ("CTIA Comments").

[9] *See* 2003 TCPA Order, ¶ 165.

[10] *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).

the ruling's implications for past practices.

Moreover, relatively few consumers actually get "charged" a separate individual fee for an individual separate text message. There are a wide variety of plans that consumers subscribe to, including those that involve unlimited messaging or large buckets of texts. Indeed, under the majority of such plans there is no separate charge for most texts. Sprint, AT&T, Verizon Wireless and T-Mobile charge the relatively few post paid consumers who do not have texting in a monthly plan only 20 cents per standard message.[11]

It would be a perversion of the TCPA and contrary to its purposes to find that its liability provisions, which generally assess $500 to $1500 for each violation, would apply to a confirmatory opt-out message - a consumer-friendly message required under the consumer best practices of leading organizations, required by carriers, required by the Florida State Attorney General, and being sent as a matter of course, applying standard rates, by the United States Federal Government, consumer organizations, non-profit organizations and for-profit entities. It would be punitive and wholly disproportionate to subject SoundBite and others to the millions of dollars it costs to defend and settle litigation related to a one-time text message confirmation receipt that usually costs no more than zero to twenty cents additional to the consumer.

CAN-SPAM Rules as Policy Guidance.

SoundBite agrees with Verizon and other commenters who argue that text messages confirming a consumer's decision to opt-out are within the scope of the consumer's consent to participate in the text messaging campaign in the first place. As Verizon explained, "once a consumer has provided his or her number to a campaign, consistent with prior Commission decisions, the consumer has consented to receive transactional messages related to that campaign":[12]

> When the subscriber has opted in to receive messages from the campaign, the better view, which the FCC should follow, is that the confirmatory opt-out message is part of the interaction between the campaign and consumer and is incorporated within

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[11] *See* Sprint, Sprint Services – Texting, http://shop.sprint.com/mysprint/services_solutions/details.jsp?detId=texting&catId=service_messaging&catName=Messaging&detName=Texting&specialCat; AT&T, AT&T Residential Wireless – Pricing for text messaging, http://www.att.com/esupport/article.jsp?sid=52588&cv=820&_requestid=1038421#fbid=9as38904UrH; Verizon Wireless, http://www.verizonwireless.com/b2c/explore/?page=text-plan; T-Mobile, Text Messaging Value Bundles | Mobile Phone Texting Bundles | T-Mobile, http://www.t-mobile.com/shop/addons/services/information.aspx?passet=messaging&tp=svc_tab_textmessaging.

[12] Comments of Verizon and Verizon Wireless, CG Docket No. 02-278, at 6 (filed Apr. 30, 2012) ("Verizon Comments").

> his prior express consent to participate in the campaign. Once a subscriber has consented to participate in the campaign, he has consented to receive not only the substantive sales and advocacy messages, but also any informational messages regarding the campaign.[13]

As further explained by Verizon, this interpretation is consistent with the CAN-SPAM Act, which permits sending informational messages without prior consent:

> These interpretations of the consent requirement are consistent with the parallel protections offered by the CAN-SPAM Act and the Commission's rules implementing CAN-SPAM for messages sent to electronic mail addresses. Those rules permit the sending of "transactional or relationship messages" to electronic mail addresses without any prior consent. Such messages include messages the primary purpose of which is "to provide . . . notification of a change in the recipient's standing or status with respect to . . . a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender." Confirmatory messages responding to opt-out requests provide notification of a change in the consumer's relationship with the SMS-based campaign. In the CAN-SPAM Act, Congress recognized that such relationship messages are not the types of messages that consumers object to as unwanted. That should be equally true in the limited circumstances raised by the Petition.[14]

Moreover, we discussed that the "primary purpose" test in the FTC's CAN-SPAM rules also provide a useful analogous context for evaluating such messages.[15] Under the MMA Consumer Best Practices Guidelines, an out-out confirmation is required,[16] and the text of such messages should be a concise confirmation informing the subscriber they will no longer receive messages from the entity, with the inclusion of a contact point for questions. NACA (which ironically itself sends confirmation of opt-outs via its twitter feed all though it does not want other companies to do the same) provides examples of confirmatory messages its claims are mixed messages that include a

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[13] *Id.* at 5. *See also* CTIA Comments at 4-9; Comments of The Future of Privacy Forum, CG Docket No. 02-278, at 4-5 (filed Apr. 30, 2012); Comments of Twilio Inc., CG Docket No. 02-278, at 5-6 (filed Apr. 30, 2012).

[14] Verizon Comments at 6-7.

[15] 16 C.F.R § 316.3. *See also* 47 C.F.R. § 64.3100(c)(2), (c)(8).

[16] *See* Mobile Marketing Association, U.S. Consumer Best Practices, Version 6.0, § 1.6-4 (March 1, 2011*), available at* http://mmaglobal.com/bestpractices.pdf ("When STOP, or any of the opt-out keywords above, is sent to a program, the program must respond with an [mobile-terminating] message, whether or not the subscriber is subscribed to the program.")

confirmation plus what it does to be a "marketing" message.[17]

Under the CAN-SPAM rules, the agency looks to the "primary purpose" of the message. This is a logical approach. Otherwise, the FCC will get drawn into a complicated analysis and parsing of whether, for example, the Obama for America confirmation message, which says "Sorry to see you go. You will no longer receive texts from Obama for America. If you change your mind text back JOIN. Learn more at www.barakobama.com," or the USA.gov confirmation message, which states "We've recd your request to end your subscription. Alerts to your phone will end now. Change your mind? Txt word PUB to 872468 to enroll again" contain language that would be contrary to good consumer policy. A class action lawyer may consider certain language to be "marketing" while others may consider the same language to be "informational" – but in either case, the primary purpose of the text would be to confirm the fact of the opt-out.

Expeditious Action on SoundBite's Narrow Request is Necessary.

SoundBite described the status of pending litigation based on the narrow issue of single confirmatory text messages of an opt-out. Such disputes are costing SoundBite, a relatively small company, hundreds of thousands of dollars in legal fees alone. The fees are growing exponentially and tremendous pressure is mounting on the company. An expeditious ruling would have enormous benefits. Because the TCPA generally has a four year federal statute of limitations period, such a clarification would eradicate the possibility of companies and organizations – including all the ones listed above – of facing lawsuits based on confirmation texts that may have been sent years ago.

SoundBite noted that the comment cycle for its Petition has closed and that the time is ripe for a ruling clarifying that a single confirmation text of an opt-out is not a violation of the TCPA or Commission rules. Broader issues related to the TCPA that go beyond this narrow question can be addressed by the Commission in a new rulemaking. As each day passes, more and more resources are being diverted from investing in the company and in jobs, and instead being spent defending against mounting frivolous lawsuits.

Respectfully submitted,

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[17] Comments of National Association of Consumer Advocates, CG Docket No. 02-278, at 7-12 (filed Apr. 30, 2012).

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