

October 15, 2012

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VIA ELECTRONIC FILING

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

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

Dear Ms. Dortch:

This letter memorializes a discussion that took place on Thursday, October 11, 2012, between Elizabeth Andrion, Acting Chief Counsel and Senior Legal Advisor to Chairman Genachowski, and Monica Desai, counsel to SoundBite Communications. The primary purpose of the meeting was to provide background to Ms. Andrion related to the legal and policy arguments in support of SoundBite's Petition for Expedited Declaratory Ruling ("Petition").¹ SoundBite requests clarification that when a subscriber sends a text message choosing to opt-out of future text messages and within minutes receives a one-time immediate reply via text message confirming the opt-out request, that opt-out confirmation text message is not a violation of the Telephone Consumer Protection Act² or FCC rules.³

Ms. Desai emphasized the urgent need for the Commission to act expeditiously on its Petition in light of the tremendous pressure mounting on the company caused by existing pending litigation and the uncertainty of future TCPA liability over one-time, opt-out confirmation texts. Two lawsuits directly impacting SoundBite have been stayed pending FCC

¹ SoundBite Communications, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) ("Petition").

² Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2000 & Supp. 2005) ("TCPA").

³ 47 C.F.R. § 64.1200.

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resolution of the Petition, but other lawsuits are actively proceeding.⁴ The costs to defend these lawsuits are tremendous, causing millions of dollars to be spent in litigation fees that could be spent on growing business and creating jobs.

Ms. Desai also discussed judicial support for SoundBite's position as evidenced by the recent *Ibey v. Taco Bell Corp.* decision.⁵ In *Ibey v. Taco Bell Corp.*, the court squarely addressed and supported the position taken by SoundBite in its Petition for Declaratory Ruling, concluding "the TCPA does not impose liability for a single, confirmatory text message."⁶ In granting Taco Bell Corporation's Motion to Dismiss, the court stated:

Defendant argues that the legislative history of the TCPA indicates that the statute cannot be read to impose liability for a single, confirmatory opt-out message. (Doc. No. 15.) The Court agrees. The Court concludes that the TCPA does not impose liability for a single, confirmatory text message. The TCPA's statutory and legislative history emphasize that the statute's purpose is to prevent unsolicited automated telemarketing and bulk communications. Further, the Ninth Circuit has explained that "the purpose and history of the TCPA indicate that Congress was trying to prohibit use of ATDSs in a manner that would be an invasion of privacy." Here, Plaintiff expressly consented to contact by Defendant when he initially texted 91318 to Defendant. When Plaintiff decided he no longer wanted to receive in text communications, Plaintiff allegedly notified Defendant that he wished to stop communications, and Defendant allegedly confirmed its receipt of the message and Plaintiff's removal from Defendant's text-message communication list. Defendant's single, confirmatory text message did not constitute unsolicited telemarketing; Plaintiff had initiated contact with Defendant. Further, Defendant's sending a single, confirmatory text message in response to an opt-out request from Plaintiff, who voluntarily provided his phone number by sending the initial text message, does not appear to demonstrate an invasion of privacy contemplated by Congress in enacting the TCPA. To impose liability under the TCPA for a single, confirmatory

⁴ See, e.g., *Holt v. Redbox Automated Retail, LLC*, 11-cv-3046 (S.D. Cal.) (stayed pending FCC resolution of Petition); *Karayan v. GameStop Corp. and GameStop, Inc.*, Case No. 12-cv-1555 (N.D. Tx.) (stayed pending resolution of Petition); *Annoni v. FYIsm.com, LLC*, Case No. 11-cv-1603 (N.D. Ill.) (actively proceeding); *Ryabyshchuk v. Citibank, (South Dakota) N.A.*, 11-cv-1236 (S.D. Cal.) (actively proceeding).

⁵ See *Ibey v. Taco Bell Corp.*, Case No. 12-CV-0583-H (WVG)(S.D. Cal. 2012)(granting Defendant's Motion to Dismiss).

⁶ See *id.* at 4.

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text message would contravene public policy and the spirit of the statute—
prevention of unsolicited telemarketing in a bulk format.⁷

The court also addressed whether a single text message sent by Taco Bell in direct response to a specific user's request for an opt-out was placed via an "automatic telephone dialing system" as required for liability under the TCPA. Similar to SoundBite's position, the court reasoned that the confirmatory opt-out text message "did not appear to be random but in direct response to Plaintiff's message" and, without making a final determination, "it appears Defendant could be entitled to summary judgment because there does not appear to be a genuine dispute of material fact."⁸

Finally, Ms. Desai noted that ironically, the only consumer group opposing the Petition, the National Association of Consumer Advocates ("NACA"), which is a group supported by trial lawyers, itself sends out confirmation text messages when consumers opt out of their Twitter-based campaigns.⁹ SoundBite's responses to the positions taken by NACA are detailed in SoundBite's Comments, Reply Comments and numerous ex parte filings.¹⁰

⁷ See *id.* at 4-5 (citations omitted)(emphasis added).

⁸ *Id.* at 6. Plaintiff filed a Motion for Reconsideration which was denied on August 1, 2012. Plaintiff filed a Notice of Appeal to the Ninth Circuit on August 10, 2012. The appeal is currently pending and briefing is set to be complete by January 2, 2013.

⁹ SoundBite Reply Comments (May 15, 2012). Ms. Desai also noted that in addition to NACA, opposition filings were submitted by three individual consumers – Gerald Roylance, Joe Shields, and Robert Biggerstaff.

¹⁰ NACA asserted that sending a confirmation of an opt-out violates the TCPA without prior express consent. See generally NACA Comments (April 30, 2012). As detailed by SoundBite in various filings, the type of one-time opt-out confirmation text message sent to a subscriber within minutes of receiving an opt-out request do not violate the TCPA. They are targeted messages that are not sent through an automated dialing system. They fall under the grace period that the FCC has applied previously. And they are not what Congress was concerned about when passing the TCPA: preventing unsolicited automated telemarketing and bulk communications. More fundamentally, SoundBite's equipment does not have 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." 47 U.S.C. § 227. Developing such capacity requires an involved and resource-intensive process involving software design, network and capacity review cycles, a coding phase, quality assurance, rounds of testing, product launch phases, and coordination among different internal and external groups, which would take 4-18 months. See SoundBite Ex Parte filing (May 29, 2012), at 3-5.

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By contrast, Consumer Action, which describes itself as a “champion of underrepresented consumers nationwide since 1971,”¹¹ supports one-time confirmations of opt-out requests as “a good practice”:

“We liken a confirmatory text message to a receipt, or evidence that a transaction has occurred. This message provides an opportunity to provide the consumer who has opted out with an affirmative record that his or her preferences have been honored.”¹²

Similarly, the Future of Privacy Forum, an organization focused on advancing responsible data practices, notes that a confirmation of an opt-out advances TCPA’s individual privacy goals by providing a formal record of the opt-out, and helping prevent invasions of privacy and identity theft stemming from the use of wireless phones.¹³

Moreover, there is implicit support of SoundBite’s position by 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 – because all of these organization send out an opt-out confirmation text message either

¹¹ Consumer Action Comments, CG Docket No. 02-278, at 1, footnote 1.

¹² Consumer Action Comments at 2. Although Consumer Action states that such messages should be free-to-the-end-user, and that any declaratory ruling should be forward-looking, this does not make sense as a practical matter, particularly in the context of a declaratory ruling. First, a confirmation of an opt-out either is or is not allowed under the TCPA – that does not change depending on when the confirmation was sent. Also, the vast majority of text messages sent to consumers apply standard rates, including the confirmations of opt-outs cited as examples in SoundBite’s comments, such as from the Center for Disease Control, the 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 opt-out confirmation text messages fall outside the scope of the TCPA, all of the millions 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 Mobile Marketing Association and carriers and at least one state attorney general – may be vulnerable to further class action litigation. Thus, such a distinction may exacerbate the number of lawsuits filed as plaintiff attorneys seek to capitalize on the ruling’s implications for past practices. Moreover, relatively few consumers actually get “charged” a separate individual fee for an individual separate text message.

¹³ Future of Privacy Forum Comments (April 30, 2012) at 2 and 3.

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in connection with a direct text message to the entity or in connection with an opt-out request through Twitter.¹⁴

Ms. Desai also emphasized that sending one-time confirmation texts is required by the Mobile Marketing Association as part of its guidelines on consumer best practices,¹⁵ required by CTIA -The Wireless Association®,¹⁶ and even required by the Florida Attorney General in a settlement with Verizon Wireless - all in an effort to protect consumers.¹⁷ This makes sense – consumers expect acknowledgement of their online requests,¹⁸ and without a confirmation, consumers will likely worry their request had not been received, causing them to have to spend more time trying to verify their request.

In conclusion, given that the comment cycle for its Petition has closed, the overwhelming support in the record,¹⁹ the nearly ubiquitous practice of sending opt-out confirmation texts, the recent court decision supporting the arguments raised by SoundBite, bi-partisan Congressional support,²⁰ and the consumer benefits associated with receiving opt-out acknowledgements and as

¹⁴ SoundBite Comments (April 30, 2012); SoundBite Reply Comments (May 15, 2012).

¹⁵ See Mobile Marketing Association Consumer Best Practices, § 1.6 and examples of “Stop” confirmation messages at page 23, *available at* mmaglobal.com/bestpractices.pdf.

¹⁶ CTIA Compliance Monitoring and Enforcement Playbook (Oct. 25, 2011), *available at* http://www.wmcglobal.com/images/CTIA_playbook.pdf.

¹⁷ 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) (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.)

¹⁸ SoundBite Ex Parte Filing (June 8, 2012) at 8-9 (describing studies reflecting at providing confirmation of an opt-out request is part of the receipt process that consumers expect and value).

¹⁹ See, e.g., Comments, Reply Comments, and ex parte filings in this proceeding by entities collectively representing thousands of organizations and businesses, as well as consumers, including Consumer Action, CTIA -The Wireless Association®, the Retail Industry Leaders Association, the Mobile Marketing Association, Future of Privacy Forum, Consumer Bankers Association, and the Council of Better Business Bureaus.

²⁰ SoundBite Ex Parte Filing (June 8, 2012) (attaching letter from Senator John F. Kerry (D-MA) and Senator Scott P. Brown (R-MA) urging the FCC to issue a definitive ruling stating that confirmation of an opt-out is not only allowable, but should be encouraged).

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supported by surveys and research placed in the record, the time is ripe for a ruling clarifying that a single confirmation of an opt-out request is not a violation of the TCPA or Commission rules.

Respectfully submitted,



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