

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Yodel Technologies LLC's)
Petition for Expedited Declaratory Ruling or in)
the Alternative Retroactive Waiver)
)
In the Matter of Rules and Regulations)
Implementing the)
Telephone Consumer Protection Act)
)

CG Docket No. 02-278
DA 19-931

Comments of

National Consumer Law Center
on behalf of its low-income clients

and

Consumer Action
Consumer Federation of America
Consumer Reports
National Association of Consumer Advocates
National Consumers League
Public Citizen
Public Knowledge

In Opposition to the Petition for Declaratory Ruling
Filed by Yodel Technologies LLC

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Comments

Pursuant to the Public Notice¹ issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC)² files these comments on behalf of its low-income clients and **Consumer Action, Consumer Federation of America, Consumer Reports, National Association of Consumer Advocates, National Consumers League, Public Citizen,** and **Public Knowledge**, opposing in all respects the petition filed made by Yodel Technologies LLC (Yodel).³ In its petition, Yodel requests that calls made with soundboard technology—which uses audio snippets of a prerecorded voice in calls to consumers—should not be governed by the explicit requirements imposed on calls with a prerecorded voice under the Telephone Consumer Protection Act (TCPA).⁴ If that first request is not granted, Yodel then requests that it be granted a retroactive waiver from the liability it faces from a federal court determination that it violated the TCPA by making tens of millions of telemarketing calls without consent. Neither request is justified; both requests would be contrary to the law; and granting either request would unquestionably encourage more unwanted robocalls to plague consumers' telephones.

Introduction and Summary

To assist NorthStar Alarm Services with its telemarketing campaign to sell home security systems, the petitioner, Yodel, made millions of telemarketing calls.⁵ After NorthStar and Yodel were sued for making these calls without the required consent from the called parties, a federal district

¹ See Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling or Retroactive Waiver Filed By Yodel Technologies LLC, CG Docket No. 02-278 (Rel. Sept. 16, 2019), *available at* <https://ecfsapi.fcc.gov/file/091904157951/DA-19-931A1.pdf>.

² The National Consumer Law Center is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace.

³ Petition for Expedited Declaratory Ruling Regarding the Application of U.S.C. § 227(b)(1)(B) or In the Alternative Retroactive Waiver filed by Yodel Technologies LLC, CG Docket No. 02-278 (filed Sept. 13, 2019), *available at* <https://www.fcc.gov/ecfs/filing/1091320379447> [hereinafter Petition].

⁴ 47 U.S.C. § 227.

⁵ *Braver v. NorthStar Alarm Servs., L.L.C.*, 2019 WL 3208651, at *13 (W.D. Okla. July 16, 2019).

court found that the calls Yodel made with its soundboard technology did require this consent, that Yodel was liable for violating the TCPA, and that NorthStar Alarm Services was vicariously liable.⁶ Yodel is also defending against complaints brought by consumers in at least three other pending cases; in all of these cases Yodel is accused of making unwanted telemarketing calls.⁷ Now, Yodel seeks to escape all liability for violating the TCPA by claiming confusion about clear statutory provisions.

Yodel's petition repeatedly maintains that the TCPA regulates only calls that are "entirely prerecorded" rather than calls using prerecorded voices. However, the TCPA unequivocally regulates any telephone call that uses a prerecorded voice. And the distinction that Petitioner seeks to make—between calls that contain one uninterrupted prerecorded voice message, or calls with multiple segments of a prerecorded voice message—is meaningless.

The legislative history of the TCPA shows that Congress considered the issue at the heart of the petition's request: whether a call in which a human being plays a prerecorded audio clip requires explicit consent. The Senate noted that the playing of an audio clip does not violate the TCPA *if a live caller obtains express consent from the called party before playing the clip*. Thus, the Senate Report notes that the law requires prior consent for the exact activity in which Yodel admits being engaged: the playing of an audio clip by a live caller in a telephone call.

Moreover, the Federal Communications Commission (Commission or FCC) has no authority to exempt Yodel's prerecorded voice calls from the TCPA. As Congress made clear, a call in which a human plays an audio clip is prohibited unless the called party gives express consent before the audio clip is played. The only way for Yodel to prevail would be for the Commission to create an exemption for the prerecorded calls in question. However, the law does not provide the Commission with any authority to grant such an exemption.

Both a federal court and the Federal Trade Commission (FTC) have carefully considered the exact issue raised in this petition and determined that these calls require consent. Yodel is just forum shopping with this petition. The soundboard industry failed to persuade the FTC to characterize

⁶ *Id.* at 15.

⁷ *Person v. Lyft, Inc.*, No. 1:2019cv02914 (N.D. Ga. filed June 25, 2019) (calls made to sell Lyft's software services in exchange for usage fees); *Moore v. Club Exploria, L.L.C.*, No. 1:2019cv02504 (N.D. Ill. filed Apr. 12, 2019) (calls selling vacation packages); *Hobbs v. Randall-Reilly L.L.C.*, No. 4:2019cv00009 (M.D. Ga. filed Jan. 22, 2019) (calls soliciting drivers for Uber).

these calls as something other than what they unquestionably are: calls using a prerecorded voice. And, after carefully examining the facts in a case in which this precise issue was before it, a federal district court in Oklahoma found that Yodel’s technology makes calls with a prerecorded voice, which are governed by the TCPA.

Additionally, the FCC has no authority to grant Yodel’s request for a retroactive waiver. Yodel is requesting a waiver of the *statute*, not a rule issued by the Commission, and there is no legal basis for a waiver of a statutory requirement.

Even if the Commission had the authority to waive the statute, any waiver here would be arbitrary and capricious. Waiver is appropriate only in limited circumstances, not one of which is applicable in this instance. Yodel’s petition alleges no special circumstances that would justify the waiver it requests, other than citing irrelevant and immaterial previous FCC orders and one case, none of which address the issues raised by the petition.

I. The Statute is Clear: Calls with Prerecorded Voices Require Consent.

As Yodel’s petition correctly points out, the TCPA specifically protects consumers from calls using any prerecorded voice without the prior consent of the called party:

(b)(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

...

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, . . .⁸

Despite this clear statutory language, Yodel’s petition repeatedly maintains that the TCPA regulates only calls that are “entirely prerecorded” rather than calls using prerecorded voices.⁹ Yodel’s petition makes a distinction between calls that include several segments of recordings of prerecorded voice and calls with one continuous recording of a voice, which it denominates as a “prerecorded message.”¹⁰ However, as much as Yodel might wish it to be otherwise, the TCPA does

⁸ 47 U.S.C. § 227(b)(1)(B) (emphasis added).

⁹ See Petition at 4 (“Since the Commission’s implementation of [§227(b)(1)(A)] it has repeatedly suggested that the phrase ‘prerecorded voice . . . message refers to autodialed and prerecorded voice message calls’—that is calls and messages that were *entirely prerecorded*—and not merely the use of a prerecorded voice segment as part of an otherwise live call.” (emphasis in original)).

¹⁰ See Petition at 4.

not just regulate prerecorded messages, but it regulates any telephone call that uses a prerecorded voice. Congress was quite clear in requiring that any call with a prerecorded voice is permitted only with consent (unless the call is for an emergency purpose, or the Commission has exempted the call pursuant to its narrow exemption authority). Yodel has not claimed that the FCC has exempted its calls.

Yodel strains to find support for its argument that it is the Commission's fault that Yodel believed that only "prerecorded messages" are included in the statute's prohibition, pointing to language in two Commission orders that use the word "message" as support for its argument that only fully prerecorded messages are prohibited by the explicit statutory language.¹¹ However, neither of those orders addressed the distinction that Petitioner seeks to make: that only calls with one continuous prerecorded message are governed by the statute, and calls with multiple snippets of prerecorded voice messages are not.¹² The most important takeaway from these two cited FCC orders is the clear instruction from Congress that telemarketing solicitations, whether made by live calls or by calls with artificial or prerecorded voices, are considered an invasion of privacy and should be strictly limited.¹³ The fact that the Commission might have used the term "prerecorded messages" rather than "calls with prerecorded voice" in these orders does not provide any support for the idea that Yodel's calls with separate segments of prerecorded voices are to be any less regulated than calls with one uninterrupted segment.

Moreover, this distinction that Yodel seeks to make is meaningless. There is no functional difference between a call with one uninterrupted prerecorded voice communication and a call with multiple snippets of prerecorded voice phrases. The *message* from the caller is not contained in the individual snippets. The message that is intended, which is the point of the call from the telemarketer, is to urge the called party to purchase the goods or services the caller is trying to sell.

¹¹ *Id.* at 4 nn.6, 7.

¹² Indeed, the Commission articulated in the seminal 1992 order exactly which TCPA terms it was explaining: "Accordingly, definitions of the following terms are set forth in Section 64.1200(f) of our rules, 47 C.F.R. § 64.1200(f): automatic telephone dialing system ('autodialer'); established business relationship; telephone facsimile machine; telephone solicitation, and; unsolicited advertisement." *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CC Docket No. 92-90, Report & Order, 7 F.C.C. Rcd. 8752, 8755, ¶ 6 (1992).

¹³ *See, e.g., id.* at 8757, ¶ 9 ("We are persuaded by the comments, the numerous letters from individuals, and the legislative history that both live and artificial or prerecorded voice telephone solicitations should be subject to significant restrictions.").

Whether the message is contained in one prerecorded segment or in multiple segments, the *message* is the whole call made by the caller with the goal of selling a product. Even if—for the sake of argument—Commission orders indicated an intent by the Commission to govern only “prerecorded messages,” the fact is that all of the snippets were recorded in advance—which is the definition of prerecorded¹⁴ — and together they delivered one “message.” Yodel’s technology delivers exactly that: prerecorded messages. Yodel’s calls are provided in multiple prerecorded voice segments, and together they make up a message that is prerecorded.

The fact that “a live agent decides and manually controls which prompts are played”¹⁵ in Yodel’s calls is irrelevant. There is nothing about interactivity between the caller and the person called that determines coverage of calls by the TCPA. The TCPA’s prohibitions of calls made using an automated dialer and its prohibitions of prerecorded calls are distinct. The statute uses different words to address prerecorded voice calls than it uses to address calls made with an automatic telephone dialing system (ATDS).¹⁶ There is no language or any legislative history supporting the idea that calls with a prerecorded voice are covered only if they are also fully automated. Further, even the TCPA’s prohibitions on ATDS calls anticipate that many of these calls could be completely human-to-human conversations. The only thing that has to be automated in ATDS calls for them to be covered under the TCPA is the dialing. So the fact that, in Yodel’s calls, a human being is deciding which messages to play is irrelevant to any determination of whether the soundboard calls using prerecorded voices are covered by the TCPA.

The petition’s attempted reliance on a Ninth Circuit case from 1995 is similarly inapt.¹⁷ Nothing in that case supports Yodel’s arguments. The case addressed whether the TCPA violated the First Amendment; the court did not address, nor even consider, the meaning of a call with a “prerecorded voice.”

¹⁴ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/prerecorded>.

¹⁵ Petition at 3.

¹⁶ 47 U.S.C. § 227(a)(1).

¹⁷ Petition at 5 (citing *Moser v. F.C.C.* 46 F.3d 970 (9th Cir. 1995)).

II. Congress Explicitly Imposed the Consent Requirement on Calls in Which a Human Plays a Prerecorded Audio Clip.

The legislative history of the TCPA shows that Congress explicitly considered the issue at the heart of the petition's request: whether a call in which a human being plays a prerecorded audio clip requires explicit consent. The Senate Committee report that was issued at the time of the TCPA's enactment states:

[W]hen a consumer answers the phone, a "live" person can ask the consumer if he or she consents to listening to a recorded or computerized message. If the consumer indicates express consent, the "live" caller may switch to a recorded or computerized message. The Committee does not believe that this consent requirement will be an inordinate regulatory burden on the telemarketer.¹⁸

In this passage, the Senate directs that the playing of an audio clip does not violate the TCPA *if a live caller obtains express consent before playing the clip*. Thus, the Senate treated the playing of an audio clip by a live caller in a telephone call as an act that requires prior express consent. The petitioner wants to play audio clips *without* prior express consent. To grant the petition would fly in the face of the clear intent of Congress.

III. The FCC Lacks Authority to Exempt the Petitioner's Prerecorded Telemarketing Calls from the TCPA.

As noted in the preceding sections, Congress made clear when it enacted the TCPA that a call in which a human plays an audio clip is prohibited unless the called party gives express consent before the audio clip is played. The petition here amounts to a request that the Commission create an exemption for the prerecorded calls in question.

The Commission lacks authority to grant such an exemption. Under the TCPA, the FCC has the authority to dispense with the called party's prior express consent for calls to residential lines that use a prerecorded voice only if the calls *are not made for a commercial purpose*, will not adversely affect the privacy rights that the TCPA is intended to protect, and

¹⁸ S. Rep. No. 178, 102d Cong., 1st Sess., at 8 (1991). *See also* 137 Cong. Rec. 16,204 (Nov. 7, 1991) (comments of Senator Hollings upon introduction and passage of the Telephone Consumer Protection Act: "Such consent also could be obtained by a live person who simply asks the called party whether he or she agrees to listen to a recorded message.").

do not introduce any advertisements.¹⁹ Yodel, which provided the soundboard technology to deluge tens of millions of consumers with unwanted “robot calls”²⁰ to sell home security systems, cannot possibly qualify for an exemption under this provision.

IV. Both a Federal Court and the FTC Have Considered This Exact Issue and Found That These Calls Require Consent.

The petition requests an “expedited declaratory ruling that the use of soundboard or so-called avatar technology—affording the capability for a high degree of human interaction between a live caller using a suite of, in many cases, brief, prerecorded voice messages—is not a prerecorded call of the type prohibited by Section 227(b)(1)”²¹ Petitioner is forum shopping. The soundboard industry failed to persuade the FTC to characterize these calls as something other than what they unquestionably are: calls using a prerecorded voice. And, after carefully examining the facts in a case in which this exact same issue was before it, a federal district court in Oklahoma explicitly found that Yodel’s technology makes calls with a prerecorded voice and, so, is governed by this section of the TCPA.²²

A. A Federal District Court, After Examining the Facts, Found That Yodel Technology Delivers Prerecorded Calls Requiring Consent under the TCPA.

In a recent opinion, the court noted the undisputed facts about these calls:

Yodel's Soundboard Technology.

Yodel's automated predictive dialer initiated the calls in question in this action. A computer dialed the telephone number, detected whether it was answered by a potential customer and, if so, transferred the connected call to a soundboard agent who was trained to play prerecorded wav files (audio files) to deliver messages to the called party by pressing buttons.

The soundboard software (referred to by Yodel as “the Yodel Dialer”) required Yodel's soundboard agents, located in a call center in India, to follow a script which

¹⁹ 47 U.S.C. § 227(b)(2)(B).

²⁰ Calls using soundboard technology such as Yodel’s are often referred to as “robot calls.” See Lexology, *Robot Calling? Better Have Consent*, available at <https://www.lexology.com/library/detail.aspx?g=4fa0ff5c-b1c6-4d13-a002-9e60f14f871d>

²¹ Petition at 1.

²² *Braver v. NorthStar Alarm Servs., L.L.C.*, 2019 WL 3208651, at *5–6 (W.D. Okla. July 16, 2019).

instructed them to press buttons in a certain order thereby delivering prerecorded audio clips to the called party.

After answering the initial call, the first thing a called person (*i.e.* a lead or a prospect) heard was a prerecorded voice stating: “Hello this is [Amy], I am security advisor, can you hear me okay?”²³

The issue before the court was whether summary judgment was appropriate on the exact same issue as the one Yodel is raising in this petition to the Commission: “Defendants argue that the calls initiated by Yodel to generate leads as part of the NorthStar telemarketing campaign are not calls which ‘deliver a message’ within the meaning of § 227(b)(1)(B).”²⁴ As in its petition to the FCC, Yodel argued to the court that the language in the TCPA “was not intended to regulate interactive exchanges of information which defendants contend do not deliver ‘a message’ but instead deliver messages - plural.”²⁵

The court rejected this and all the other arguments advanced by Yodel, specifically finding that the “legislative history . . . does not limit the plain language of § 227(b)(1)(B), which says nothing about any requirement that there be no human interaction for § 227(b)(1)(B) to apply.”²⁶

B. The FTC Determined These Calls to be Prerecorded Calls.

In November 2016, the FTC staff most closely involved with implementing the Telemarketing Sales Rule’s (TSR) strict limitations on prerecorded telemarketing calls issued a letter on the exact question presented to the FCC by the Yodel petition.²⁷ The FTC said:

[O]utbound telemarketing calls that utilize soundboard technology are subject to the TSR’s prerecorded call provisions because such calls do, in fact, “deliver a prerecorded message” as set forth in the plain language of the rule.²⁸

In this letter, the FTC was interpreting a TSR provision—which is almost identical to the analogous provision in the TCPA—limiting telemarketing calls using a prerecorded voice. The FTC

²³ *Id.* at *3 (internal citations omitted; emphasis added).

²⁴ *Id.* at *4.

²⁵ *Id.* at *5.

²⁶ *Id.* at *5–6.

²⁷ Staff Opinion Letter from Lois Greisman, Associate Director, Division of Marketing Practices, Federal Trade Commission, to Michael Bills, CEO, Call Assistant, L.L.C. (Nov. 10, 2016), *available at* <https://www.ftc.gov/policy/advisory-opinions/letter-lois-greisman-associate-director-division-marketing-practices> [hereinafter FTC Letter].

²⁸ *Id.* at 3 (emphasis added) (citing 16 C.F.R. § 310.4(b)(1)(v)).

staff²⁹ determined that the same soundboard technology at issue in this proceeding is indeed covered by the TSR's regulation of calls made with a prerecorded voice.³⁰

The letter described the same technology—soundboard technology—as is addressed by Yodel's petition in this proceeding: technology “that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice.”³¹ This FTC letter was a reversal from a letter the FTC staff had issued in September 2009,³² in which FTC staff had articulated their determination that this technology was not subject to the prerecorded call provisions of the TSR in some circumstances. As the 2016 letter explained, the earlier view was based on “important features that Call Assistant highlighted about its technology—i.e., that for the entire duration of a call made using the technology, a single live agent stays with the call from beginning to end, listens to every word spoken by the call recipient, determines what is heard by the call recipient, and has the ability to interrupt recordings and use his or her own voice to communicate with the call recipient if needed.”³³

The FTC staff's opinion changed in 2016 after it received numerous complaints from consumers about soundboard calls. The 2016 letter included the FTC staff's extensive determination of facts, and their analysis of these facts in light of the TSR's rules on outbound telemarketing calls that deliver prerecorded messages.³⁴ This review resulted in the staff's reversal of its 2009 determination, and a new finding that the TSR's rules for calls with a prerecorded voice clearly apply to calls utilizing soundboard technology.

The 2016 FTC letter noted the following salient points in determining that soundboard calls are covered prerecorded calls under the TSR:

²⁹ The letter explained that it contained the views of the FTC staff charged with enforcement of the TSR, “subject to the limitations in 16 C.F.R. § 1.3,” but that the letter had not been approved or adopted by the commissioners of the FTC. FTC Letter at 5.

³⁰ 16 C.F.R. § 310.4(b)(1)(v).

³¹ FTC Letter at 1. *Compare* Petition at 1 (“Soundboard technology involves the use of snippets of recorded messages by a live operator.”).

³² Staff Opinion Letter from Lois Greisman, Associate Director, Division of Marketing Practices, Federal Trade Commission, to Michael Bills, CEO, Call Assistant, L.L.C. (Sept. 11, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf.

³³ FTC Letter at 1.

³⁴ 16 C.F.R. § 310.4(b)(1)(v).

- [S]taff has received a steadily increasing volume of formal and informal complaints from consumers about telemarketing calls utilizing soundboard technology.³⁵
- Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments.³⁶
- Consumers further complain that often no live telemarketer intervenes to provide a human response when requested to do so, the recorded audio snippets that are played do not adequately address consumer questions, or the call is terminated in response to consumers questions.³⁷
- Staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person.³⁸
- A fundamental premise of our September 2009 letter was that soundboard technology was a surrogate for the live agent’s actual voice. A human being cannot conduct separate conversations with multiple consumers at the same time using his or her own voice.³⁹
- It is indisputable that calls made using soundboard technology deliver prerecorded messages. As such, under the plain meaning of the words in the TSR’s prerecorded call provision, outbound telemarketing calls using soundboard technology are covered because such calls “deliver a prerecorded message.”⁴⁰

The FTC staff also specifically addressed the second issue raised in the subject petition, namely whether the use of soundboard technology on a one-to-one basis, whereby the soundboard agent conducts only one call with one individual at a single time, constitutes the use of an artificial or prerecorded voice that delivers a message for purposes of coverage under the TSR. The FTC staff explicitly found that it did. On this point, their analysis noted:

- First, even with a 1-to-1 limitation in place, such calls would still “deliver a prerecorded message” and therefore would fall within the plain language of 16 C.F.R. 310.4(b)(1)(v). Moreover, in staff’s view, a 1-to-1 limitation would not stop abusive use of the technology.
- Based on preliminary information provided by industry representatives, a significant percentage of the total number of call center seats utilizing soundboard technology are used to make telemarketing or lead generation calls. A 1-to-1 limitation would allow a lead generation operation to use soundboard technology in which live operators simply press a button to play a prerecorded message offering a good or service that asks the consumer to say “yes” or press 1 on their phone if they are

³⁵ FTC Letter at 1.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 2.

³⁹ *Id.* (emphasis added).

⁴⁰ *Id.* at 3 (emphasis added).

interested. If the consumer says yes or presses 1, the live agent would then transfer the call to the seller who makes a telemarketing pitch.

- Such calls are indistinguishable from standard lead generation robocalls that are governed by the TSR and are the subject of a large volume of consumer complaints and significant telemarketing abuse.⁴¹

Of particular relevance is the FTC’s analysis of the consumer’s experience with the soundboard technology. The FTC notes that “the fact that a live operator, instead of a computer, ‘delivers’ the prerecorded message and transfers interested consumers to sellers makes little difference from the call recipient’s perspective. Thus, even a 1-to-1 limitation would permit soundboard technology to be used to deliver calls that are indistinguishable from the telemarketing robocalls that consumers consider to be abusive and that are illegal under the TSR.”⁴²

Yodel offers no justification for its argument that the FCC should adopt a ruling on this question that would unequivocally conflict with the ruling of its sister agency. Indeed, Congress has looked unfavorably on conflicts between the FTC’s telemarketing rules and the FCC’s TCPA rules, going so far as to order the FCC, when that agency was promulgating its do-not-call rule, to “consult and coordinate with the Federal Trade Commission to maximize consistency with” the FTC’s rule.⁴³ It also ordered the two agencies to make a special report to Congress on “any inconsistencies between the rules promulgated by each such Commission and the effect of any such inconsistencies on consumers, and persons paying for access to the registry.”⁴⁴ The FCC should not strike a different path from the FTC without a compelling justification—and, as explained, there is none.

Moreover, the TCPA’s restrictions on calls that use a prerecorded voice are statutory,⁴⁵ and the FCC has only limited authority to grant exemptions.⁴⁶ As a result, the FCC has far less authority to consider granting an exemption for robot calls than does the FTC, which adopted the Telemarketing Sales Rule under an authorizing statute granting it

⁴¹ *Id.* (emphasis added).

⁴² *Id.* at 3-4 (emphasis added).

⁴³ Do-Not-Call Implementation Act, Pub. L. No. 108-10, § 3, 117 Stat. 557 (2003).

⁴⁴ *Id.* at § 4(a)(2).

⁴⁵ 47 U.S.C. § 227(b)(1)(A), (B).

⁴⁶ See section V of these comments, *infra*.

broad discretion to shape a rule. The FTC’s determination that soundboard technology is subject to the restrictions applicable to prerecorded calls is even more persuasive, as the FTC has broad discretion to interpret its own rule.

V. There is No Authority or Adequate Basis for a Retroactive Waiver.

A. No Waiver is Allowed for Non-Compliance with Statutory Requirements.

The petition requests, if the Commission does not declare that Yodel’s technology is not covered by the TCPA’s rules for prerecorded voice calls, that it “waive the application of the rules for the period prior to May 12, 2017.”⁴⁷ The petition cites 47 C.F.R. § 1.3 as the basis for this request. Indeed, section 1.3 allows for waiver: “Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”

Yodel’s problem, however, is that its Petition is requesting a waiver of the *statute*, not a rule issued by the Commission. It is Congress, not the Commission, that specifically articulated the prohibitions against making “a call to a residential telephone line using a prerecorded voice to deliver a message without prior express consent of the called party, . . .”⁴⁸

The FCC has no authority to grant a waiver of a statutory requirement, whether the request is based on a claim that the petitioner misunderstood the requirement or otherwise. As the Commission noted in a request for just such a waiver in 2016, “To the extent [the petitioner] seeks a waiver of section 227(b)(1)(C) of the Act, the Commission may not grant this request because the Commission may not waive statutory requirements.”⁴⁹

B. There Is No Justification for a Waiver in this Circumstance.

Even if the Commission had the authority to waive the statutory prohibition against making calls using a prerecorded voice for telemarketing purposes without consent, it would be arbitrary and capricious to do so here.

⁴⁷ Petition at 7.

⁴⁸ 47 U.S.C. § 227(b)(1)(B).

⁴⁹ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petition of Kohll’s Pharmacy & Homecare, Inc. for Declaratory Ruling and Waiver, CG Docket No. 02-278, Order, 31 FCC Rcd. 13289, ¶ 13 n.55 (Dec. 21, 2016) (declining to grant a waiver for sending unsolicited fax advertisements).

As the Commission has acknowledged,⁵⁰ a limited waiver issued by the Commission is legal if it is not arbitrary and capricious. In *WAIT Radio v. FCC*,⁵¹ the D.C. Circuit Court articulated standards for applying the arbitrary-and-capricious standard in the waiver context.⁵² The court held that although an agency must give “meaningful consideration” to waiver applications, waiver is appropriate only in limited circumstances.⁵³ The court cautioned that “[a]n applicant for waiver faces a high hurdle even at the starting gate,”⁵⁴ and instructed that a waiver is appropriate only when three conditions are fulfilled:

- (1) Special circumstances must justify the waiver, and the waiver applicant must “plead with particularity the facts and circumstances which warrant” a waiver.
- (2) The waiver must be “in the public interest,” as identified by the statute and agency regulation; that is, the waiver must “not undermine the policy, served by the rule that has been adjudged in the public interest.”⁵⁵
- (3) Waivers must be used in “particular, individualized cases,” “pursuant to a relevant standard ... that obviates discriminatory approaches” and does not “eviscerat[e] [the] rule by waivers.”⁵⁶

Yodel’s petition has alleged no special circumstances that would justify the waiver it requests. The petition cites only irrelevant and immaterial previous FCC orders and one case, none of which included any consideration of any relevant issue or mechanism resembling the prerecorded robot calls made by Yodel.

As the TCPA law was clear on the point, the fact that the FTC issued an informal staff letter in 2009 stating that, in limited circumstances, some messages using prerecorded voices might not be covered by another law governed and implemented by another agency,⁵⁷

⁵⁰ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission, CG Docket Nos. 02-278 & 05-338, Order, 29 FCC Rcd. 13998, 14008, ¶ 23 n.82 (Rel. Oct. 30, 2014) (conceding framework applies).

⁵¹ 418 F.2d 1153 (D.C. Cir. 1969)

⁵² *Id.* at 1159-60. *See also* *Northeast Cellular Tel. Co. v. F.C.C.*, 897 F.2d 1164 (1990) (applying framework and holding waivers arbitrary and capricious).

⁵³ *WAIT Radio*, 418 F.2d at 1159.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1157. *See also id.* at 1160 n.21.

⁵⁶ *Id.* at 1157, 1159.

⁵⁷ *See* discussion of this 2009 letter in section IV.B, *supra*.

does not provide a justification for calls to be made without consent under the TCPA. If the callers or their platform providers really desired certainty that the analysis by the FTC would be applicable to a law implemented by the FCC, they should have previously petitioned the FCC for clarity. But they did not.

Moreover, even if special circumstances existed, and had been appropriately articulated in the petition, a waiver as requested would not be in the public interest. And if issued, it would most certainly undermine the policy articulated so clearly by Congress to require consent for calls using a prerecorded voice for telemarketing purposes to residential telephone lines. In this case, as the trial court noted, the “[u]ndisputed evidence shows that during the NorthStar telemarketing campaign, Yodel made 77,912,856 calls using its soundboard system.”⁵⁸ These calls produced, at most, fewer than 17,000 actual leads, and only 150 new customers,⁵⁹ meaning that, for almost all these millions of consumers the calls represented the invasion of privacy and annoyance that Congress enacted the TCPA to prevent.

As illustrated by Yodel’s call to the plaintiff (excerpted below), these calls were obnoxious to deal with by the called parties. The trial court noted, when comparing Yodel’s automated calls with those specifically targeted by Congress as requiring consent,⁶⁰ that the calls made using Yodel’s technology “cannot interact with the customer except in preprogrammed [not to mention meaningless] ways,” which is one of the congressional concerns cited”⁶¹ The court used the following excerpts from the call with the plaintiff to illustrate the point:

BRAVER: Okay, and what company did you say you were with?
PRERECORDED VOICE: Are you a US citizen?
BRAVER: Uh yes, what company did you say you were with?
PRERECORDED VOICE: Does your home have at least two bedrooms?
...

⁵⁸ Braver v. NorthStar Alarm Servs., L.L.C., 2019 WL 3208651, at *13 (W.D. Okla. July 16, 2019).

⁵⁹ *Id.*

⁶⁰ *Id.* at *5 n.30 (“These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape or voice recording service, and do not disconnect the line even after the customer hangs up the telephone.” (quoting S. Rep. No. 178, 102d Cong., 1st Sess., at 4-5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972)).

⁶¹ *Id.* at *5 n.30.

BRAVER: Well I guess I'm still not understanding the issue with false alarms in my neighborhood. What is it about my neighborhood? I'm still not understanding. What is it about my neighborhood that's causing false alarms? I don't have any problems with that. That's why I am all confused here.

PRERECORDED VOICE: That's fine. Oh, and I almost forgot one last question. Now do you currently have a home security system?⁶²

Finally, a trial court is the appropriate forum for deciding this issue of the application of the statute. In a trial court, the determination can be based on specific facts presented by evidence taken and considered pursuant to clear and uniformly applicable rules. A trial court can take and consider sworn testimony from experts and others impacted by the actions of the parties, which can be tested by cross-examination. By contrast, the Commission is not a fact-finding body. It does not have a formal process to review transcripts, hear sworn testimony, and evaluate the facts based on conflicting evidence presented by adversary parties. The Commission does not have the capacity to do a deep dive into the evidence presented by litigants. And it would be entirely improper for the Commission to make a decision in this instance directly contrary to that of a federal district court that engaged in multiple hearings and reviewed thousands of pages of evidence, audio files, expert testimony, and extensive oral and written argument by the parties. The Commission should not countenance Yodel's attempt to evade liability for violating the TCPA's clear rules against bombarding consumers with unwanted prerecorded telemarketing calls.

Conclusion

The Commission has said repeatedly (including in a recent tweet⁶³) that”

Unwanted calls—including illegal and spoofed robocalls—are the FCC's top consumer complaint and our top consumer protection priority.⁶⁴

Yet if the Commission were to grant the petition in this case, the result would undoubtedly be an astonishing escalation in unwanted, unconsented-to telemarketing calls to the American public. Telemarketing calls made using soundboard technology would plague our landlines, further reducing

⁶² *Id.*

⁶³ FCC (@FCC), Twitter (Mar. 13, 2019 1:15 PM), <https://twitter.com/FCC/status/1105880189622517760>.

⁶⁴ Federal Communications Comm'n, Stop Unwanted Robocalls and Texts, <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts> (emphasis added).

the privacy we have in our homes, and likely our cell phones as well. We urge the Commission to deny both of Petitioner's requests.

Respectfully submitted, this the 21st day of October 2019, by:

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