

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<i>In the Matter of</i>	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	DA 17-1054
	)	
Petition for Declaratory Ruling by ContextMedia, Inc. d/b/a	)	
Outcome Health (“Outcome”).	)	

**Comments**

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

**and**

**Consumer Action  
Consumer Federation of America  
National Association of Consumer Advocates  
Public Citizen  
Public Knowledge  
U.S. PIRG**

**In Opposition to the Petition for Declaratory Ruling Filed by ContextMedia, Inc.,  
d/b/a Outcome Health**

**I. Introduction.**

Pursuant to the Public Notice<sup>1</sup> issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC)<sup>2</sup> files these comments on behalf of its low-income clients and **Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, Public Citizen, Public Knowledge, and U.S. PIRG**. We respectfully

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<sup>1</sup> Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeking Comment on ContextMedia, Inc. d/b/a Outcome Health Petition for Clarification or Declaratory Ruling Under the Telephone Consumer Protection Act of 1991, *available at* [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-17-1054A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-17-1054A1.pdf)

<sup>2</sup> 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.

oppose, in all respects, the requests Outcome Health made in its Petition.<sup>3</sup> Outcome has requested that the Federal Communications Commission (Commission) clarify that “an unknowable technical error is protected from liability [under the Telephone Consumer Protection Act<sup>4</sup> (TCPA)] pursuant to the *SoundBite*<sup>5</sup> decision” or, in the alternative, that “an undetected and inadvertent technical error satisfies the requirements for a safe harbor.” Respectfully, we believe that the Commission should do neither.

There is no provision in the TCPA that would permit an exemption of the type Outcome seeks here. There is no language in this consumer protection statute authorizing an exemption from liability if the Commission finds that the caller or texter of messages that are otherwise unquestionably illegal under the TCPA should avoid liability because of a mistake either pursuant to the *Soundbite* decision, or through a safe harbor. To the contrary, the TCPA places the onus on callers to make sure they have consent before transmitting automated messages. The requirement for express prior consent for the automated calls and texts to cell phones is not some minor provision in the TCPA. It is the essence of the consumer protection in the statute.

Outcome’s reliance on the *SoundBite* decision is wholly misplaced, as evident from both the text of the declaratory ruling itself, and from Chairman Pai’s concurring statement. *SoundBite* dealt

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<sup>3</sup> Petition of ContextMedia, Inc. d/b/a Outcome Health For Clarification, or, in the Alternative, for Declaratory Ruling (hereinafter, “Outcome Petition”), *available at* <https://ecfsapi.fcc.gov/file/1020387607949/Outcome%20Petition%2010-20-17.pdf>.

<sup>4</sup> The TCPA is codified at 47 U.S.C. § 227. The Commission’s implementing rules are codified at 47 CFR § 64.1200. The TCPA prohibits any call, other than a call made for emergency purposes, to a telephone number assigned to a “paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call” using any automatic telephone dialing system or an artificial or prerecorded voice without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii). *See also* 47 CFR § 64.1200(a)(1)-(2). There is also an exception for calls made solely to collect a debt owed to or guaranteed by the United States.

<sup>5</sup> *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 27 FCC Rcd. 15391 (2012) (“SoundBite”).

with confirmation text messages, sent immediately after an opt-out request that were determined to be both desirable and included within the scope of the original consumer's consent. Indeed, the consumer groups supported the request made in *Soundbite*.

Outcome's petition, on the other hand, seeks to expand the limited and logical exception established in *Soundbite* to cover *any* text message sent after revocation, no matter how many and no matter over how long a period, so long as the sending company can point to some technical error that may have contributed to these text messages. This request seeks to shift the risks of using an autodialer onto the unwitting consumer rather than the business that chose to use the autodialer in the first place.

Further, Outcome's proposed exemption is unworkable, and would be detrimental to both consumers and the calling industry. There is no negligence standard in the TCPA, and establishing one is both unauthorized and would be unworkable. The issue of where negligence ends and a "technical error" begins is a fact specific question which is only appropriately determined by a court, which can take sworn testimony, evaluate the truthfulness of the statements, weigh the evidence against the requirements of the TCPA. The Commission cannot replace the court's critical role of fact-finder. Nor should it. If the Commission were to allow an exemption for "inadvertent errors" that the Commission determines to have occurred without engaging in an intensive fact-finding process, that would be a breach of due process for the litigants who would be denied their day in court. Further, to inject such uncertainty into an untold number of current and future legal proceedings would increase costs on all litigants and tax the time and resources of the courts. It would do nothing to reduce the number of filed TCPA actions, a purported goal of Outcome's petition.

Finally, Outcome equates the increase in the number of lawsuits with the notion that such lawsuits are frivolous (and, by implication, based on some technical error such as that Outcome

claims to have happened in its case). This is not so. Instead, the increase in the number of lawsuits is more likely a direct response to the sheer number of unwanted robocalls, as reflected in the increased complaints to government agencies about these robocalls.<sup>6</sup>

## II. The TCPA Does Not Permit Outcome's Requested Exemption.

There are multiple problems with Outcome's request. Its fundamental error is that it treats the TCPA as a statute to facilitate calls from business to consumers. But the TCPA is a consumer protection statute, the goal of which is to protect consumers from the invasions of privacy caused by automated calls. As such, the prefatory language in § 227(b)(2), giving the Commission authority to "prescribe regulations to implement the requirements of this subsection," must be read to refer to regulations *which will protect consumers*. The proposed exemption does not protect consumers.

The TCPA's regulatory framework is quite explicit: the only "exemptions" permitted from the requirement of prior express consent for robocalls to cell phones are set out in § 227(b)(2)(C). That subsection gives the Commission authority *only* to exempt calls to cell phones "that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the *privacy rights this section is intended to protect*" (emphasis added). As much as Outcome Health might like there to be one, there is simply no authority in the statute for a get-out-jail free exemption for texts to cell phones because the texter goofed. The fact that Congress

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<sup>6</sup> 22.5 billion robocalls were made during the first nine months of 2017 alone. *Youmail Robocall Index*, last accessed November 27, 2017, available at <https://robocallindex.com/>. In 2016 there were over five million complaints about unwanted calls filed with the Federal Trade Commission, increasing from three and one half million the previous year. *See* Federal Trade Commission, National Do Not Call Registry Data Book for Fiscal Year 2016 (Dec. 2016), available at [https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2016/dnc\\_data\\_book\\_fy\\_2016\\_post.pdf](https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2016/dnc_data_book_fy_2016_post.pdf). Unwanted calls are the leading cause of complaints to the FCC, triggering over 165,000 complaints in 2016 alone. *See* Federal Communications Commission, Consumer Complaint Data Center, Quarterly Reports-Consumer Inquiries and Complaints, Consumer Complaint Data – Unwanted Calls, <https://opendata.fcc.gov/Consumer/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e> (last visited Aug. 24, 2017).

expressly gave the Commission broader authority to create exemptions to the prohibition of prerecorded calls to residential telephones (§ 226(b)(2)(B)), and did not authorize a similar exemption for robocalls (or by extension—texts) to cell phones, is a clear indication that the Commission has no such exemption authority for texts to cell phones.

### III. *SoundBite* Does Not Support Outcome’s Petition.

The *SoundBite* ruling into which Outcome seeks to shoehorn its request is simply not applicable to the situation Outcome presents. In *SoundBite*, the Commission considered and granted a request to confirm “that sending a *one-time* text message *confirming a consumer’s request that no further text messages will be sent* does not violate the [TCPA].”<sup>7</sup> In granting this request, the Commission explained that “a consumer’s prior express consent to receive text messages from an entity can be reasonably construed to include consent to receive a final, one-time text message confirming that such consent is being revoked at the request of that consumer.”<sup>8</sup> The Commission found such communications to be an expected and desirable part of the opt-out process, and that the benefits of allowing such texts outweighed any costs to consumers.<sup>9</sup> Even so, the Commission imposed restrictions on such texts: such texts could not contain any marketing material, generally must be sent within five minutes of the opt-out request, and are the only texts sent after opt-out.<sup>10</sup> The Commission specifically emphasized this last point, writing that “after sending an opt-out request, no text messages other than one confirmation of the opt-out request is encompassed within the consumer’s prior express consent.”<sup>11</sup>

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<sup>7</sup> *SoundBite*, 27 FCC Rcd. at 15391, ¶ 1 (emphasis added.)

<sup>8</sup> *Id.* at 15394, ¶ 7.

<sup>9</sup> *Id.* at 15395-97, ¶¶ 8-10.

<sup>10</sup> *Id.* at 15397, ¶ 11.

<sup>11</sup> *Id.* at ¶ 12.

Then-Commissioner Pai (hereinafter, “Chairman Pai”) wrote separately to concur.<sup>12</sup> Chairman Pai wrote that consumers “want” the confirmation texts (indeed, the Commission had received no complaints about such texts), and that, as a result, the order was common sense.<sup>13</sup>

*None* of the above appears applicable to the litigation precipitating Outcome’s petition for an exemption to the Commission. As discussed in the opposing comments of Jeremy M. Glapion on behalf of the consumer-plaintiffs suing Outcome for the offensive texts,<sup>14</sup> the TCPA case in which Outcome is a defendant *expressly* excludes “opt-out confirmation” texts, and instead focuses on the dozens of texts putative class members were sent over the course of 10 months, *after* those putative class members had requested for them to stop sending the texts, often multiple times.<sup>15</sup>

Further, there is nothing in the *SoundBite* analysis applicable to an exemption based on a “technical error.” Outcome claims that its purported technical error caused text messages—unrelated to opting out—to be sent *after* a consumer had revoked consent.<sup>16</sup> Outcome is attempting to recharacterize *SoundBite* to permit exemptions for businesses who act in “good faith.” But *SoundBite* was about consumer consent, what was included in that consumer consent, and whether those communications were desirable. Outcome’s petition is grounded in its claims that it was merely guilty of “technical errors” despite its “good faith efforts” to comply with the TCPA. Outcome’s petition asks the Commission to re-construe the *SoundBite* decision to stand for the proposition that the TCPA authorizes an inquiry into whether a company was trying to “do the right thing” and thus

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<sup>12</sup> *Id.* at 15401.

<sup>13</sup> *Id.*

<sup>14</sup> Comments Opposing the Petition for Declaratory Ruling of ContextMedia, Inc. d/b/a Outcome Health, filed by Jeremy M. Glapion on behalf of Consumer-Plaintiff Christy Griffith, hereinafter “Glapion Opposing Comments,” available at [https://ecfsapi.fcc.gov/file/112718387672/GLF%20Opposition%20\(With%20Exhibits\).pdf](https://ecfsapi.fcc.gov/file/112718387672/GLF%20Opposition%20(With%20Exhibits).pdf).

<sup>15</sup> Glapion Opposing Comments at 6-7.

<sup>16</sup> Outcome Petition at 5-6.

should avoid liability for otherwise illegal messages. It asks the Commission to create an exemption that would apply regardless of a consumer's request to opt-out, of the quantity of messages sent after the opt-out, of the content of the messages, and of the length of time over which those messages are sent so long as the sender can claim that the error was caused in some part by a purported technical error. All of these requests are in direct conflict with the explicit language of *SoundBite*.

#### **IV. Outcome's Requested Exemption is Contrary to the Purposes of the TCPA, Unworkable, and Benefits No One.**

"In regulation, as in sports, it is good to have clear rules."<sup>17</sup> These wise words are particularly relevant here, as Outcome proposes an exemption that would only serve to re-introduce the "ambiguities in the TCPA"<sup>18</sup> that the Commission has previously sought to limit.

It is difficult to fathom a clear rule that would exempt "technical errors" without exempting a company from the results of its own negligence. The two are often intertwined. Yet, to sort through the appropriate distinction would require a deep dive into the evidence presented by the litigants. Expert testimony appears to be essential to determine the veracity of Outcome's claim that Outcome is not a technical glitch for which Outcome, the sender of the texts, should not be held responsible. There appear to be meaningful fact questions regarding how many times recipients of the texts had requested, allegedly repeatedly, that the texts stop before Outcome put a stop to the texts.<sup>19</sup> The Commission's determination process is not equipped to handle inquiries into the veracity of fact-specific statements made by the parties; no statements made in submissions to the Commission are

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<sup>17</sup> *SoundBite*, 27 FCC Rcd. at 15401 (Chairman Pai, concurring).

<sup>18</sup> See Opening Remarks of Commissioner Ajit Pai at the Telecommunications & E-Commerce Committee Roundtable of the U.S. Chamber of Commerce at 3 (*Sept. 14, 2012*), available at <http://go.usa.gov/gT6e>.

<sup>19</sup> Compare Outcome Petition at 6—implying that Outcome had shut down the system the first time they had received a complaint about unwanted text messages, to Glapion Opposing Comments at 6-7—describing several examples of complaints to Outcome about unwanted texts before the shutdown date.

sworn testimony; there is no process for a full and fair evaluation of the facts at issue in these cases.

A request such as Outcome's for a free "Get Out of Jail" card is wholly improper.

Furthermore, were the Commission to create a "technical error" exemption, both consumers and the calling industry would suffer. Such a defense is clearly a fact intensive dispute, subject to discovery, and court cases would proceed just as they do now. Rather than stop TCPA cases from being filed, or providing the calling industry an opportunity to end cases early, the "technical error" defense would only be another item for the parties to address in discovery, motion practice and trial.

## **V. Conclusion.**

Outcome's petition seeks to place the burden on consumers to receive unwanted, and unconsented-to texts without the redress expressly required by Congress. Allowing it would severely undermine the consumer protection purposes of the TCPA. We request that the Commission reject the petition in full.

Respectfully submitted, this the 27<sup>th</sup> day of November, 2017, by

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on behalf of the low-income clients of the National Consumer Law Center, and the following national consumer protection organizations:

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