

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of NorthStar Alarm Services, LLC's)	
Petition for Expedited Declaratory Ruling)	
)	CG Docket No. 02-278
In the Matter of Rules and Regulations)	DA 19-74
Implementing the)	
Telephone Consumer Protection Act)	
)	

Comments of

National Consumer Law Center
on behalf of its low-income clients
and
Consumer Reports
Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
National Association of Consumer Advocates
Public Knowledge

In Opposition to the Petition for Declaratory Ruling
Filed by NorthStar Alarm Services, LLC's

March 15, 2019

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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 Reports, Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, the National Association of Consumer Advocates, and Public Knowledge**. NorthStar Alarm Services, LLC. (NorthStar) requests in its petition³ 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 and limitations imposed on calls with a prerecorded voice under the Telephone Consumer Protection Act (TCPA).⁴

On behalf of our clients, our members, and consumers throughout the United States, we urge the Federal Communications Commission to deny the petition in all respects. NorthStar's request is directly contrary to the clear language of the TCPA which explicitly covers calls using a prerecorded voice.⁵ Granting this petition would contradict the careful determination of the staff of the Federal Trade Commission (FTC) that these calls *are* made with a prerecorded voice.⁶ The petition's request seeks to eradicate a major protection of the TCPA, and it would open new floodgates adding to the many billions of unwanted and unconsented-to robocalls already assaulting Americans.

I. The Statute is Clear: Calls with Prerecorded Voices Are Regulated Under the TCPA.

NorthStar's petition is based on the mistaken view that the TCPA regulates only prerecorded *messages*,⁷ rather than calls made using prerecorded voice. Indeed, NorthStar uses the term

¹ See <https://ecfsapi.fcc.gov/file/02122326111087/DA-19-74A1.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 <https://ecfsapi.fcc.gov/file/10103290733918/NorthStar%20FCC%20Petition.pdf>

⁴ 47 U.S.C. § 227.

⁵ 47 U.S.C. § 227.

⁶ <https://www.ftc.gov/policy/advisory-opinions/letter-lois-greisman-associate-director-division-marketing-practices>

⁷ Unlike what is stated in the petition (at 3), the system of regulation in the TCPA does not

“prerecorded message” some sixty-two times in its petition. However, the TCPA does not just regulate prerecorded messages, it regulates any telephone call which uses a prerecorded voice. Congress was quite clear in requiring that all calls with a prerecorded voice are only permitted with consent (unless the calls are for an emergency purpose):

(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--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

...

(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, unless the call is initiated for emergency purposes,⁸

NorthStar’s conflation of the term “prerecorded messages” with messages which use a prerecorded voice is the basis for much of its argument that the soundboard system should be somehow excluded from the TCPA’s explicit requirement to limit and restrict calls which include any prerecorded voice. Both the TCPA and the regulations promulgated by the Federal Communications Commission (FCC) implementing the TCPA,⁹ quite unmistakably cover all messages that include use of a prerecorded voice. And as admitted by Petitioner, its system uses prerecorded voices.¹⁰

Petitioner argues that it is “implicit” that the TCPA’s regulation of calls with a prerecorded voice “is limited to those calls in which ‘human intervention will not continue beyond the call’s initiation.’”¹¹ There is no such implication in the statute. The word “human” is nowhere mentioned in the TCPA. The petition repeatedly highlights the interactive nature of the soundboard technology, to support its argument that these calls are somehow less intrusive and less obnoxious than other

“foreclose the use of recorded messaging.” The law very specifically permits messages with a prerecorded voice, but only if the caller complies with the consent and other requirements for those messages.

⁸ 47 U.S.C. § 227(b)(1); *also see* 47 C.F.R. §§ (a)(2) and (3).

⁹ 47 U.S.C. § 64.1200.

¹⁰ *See e.g.* “Soundboard technology involves the use of snippets of recorded message . . . “at Petition”; “First, the use of recorded messages” Petition at ii.

¹¹ Petition at 7.

calls involving a prerecorded voice.¹² Yet, there is nothing about interactivity between the caller and the person called that determines coverage of calls by the TCPA. Indeed, in its regulation of prerecorded telemarketing calls, the FCC has explicitly required that those calls must include an interactive component. The regulations mandate that prerecorded voice telemarketing calls must include “an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request”.¹³ So the fact that there may be some interaction between the called party and the caller in a soundboard call does not in any way support an argument that soundboard calls with prerecorded voices are not or should not be covered by the TCPA.

Moreover, under the TCPA a call does not have to be made using an artificial or prerecorded voice at all to be covered, if it is made using an automated telephone dialing system (ATDS).¹⁴ The call could connect with a live human agent who interacts directly with the called party. So clearly the fact that there is human interaction during a call is not relevant to whether the call is or should be governed by the TCPA. It is not the interaction between the caller and the called party that determines whether these calls are annoying or covered by the TCPA. Congress was focused on the fact that computerized calls lead to the aggravating proliferation of unwanted intrusions into our privacy.¹⁵

¹² See e.g. petition at 2, 8, 10, 11, 14.

¹³ 47 C.F.R. § 64.12000(b)(3): “(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request,”

¹⁴ 47 U.S.C. § 227(b)(1)(A).

¹⁵ As was forcefully stated by Senator Hollings, the TCPA’s sponsor, “[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.” 137 Cong. Rec. S16204, S16205 (Nov. 7, 1991) (also quoting Justice Brandeis, in *Olmstead v. U.S.*, 277 U.S. 438, 479, 48 S. Ct. 564, 72 L. Ed. 944 (1928), declaring “the right to be let alone is the most comprehensive of rights and the one most valued by civilized men”). See also S. Rep. 102-178, at 5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1972–1973 (“The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.”); 137 Cong. Rec. S18781-02 (1991) (quoting Sen. Hollings as stating “These calls are a nuisance and an invasion of our privacy.”); *Mims v. Arrow Fin. Services, L.L.C.*, 565 U.S. 368, 370 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012) (noting that the TCPA bans certain

II. The FTC Has Extensively Considered This Exact Issue and Rejected It

The petition requests a “declaratory ruling from the Commission . . . to provide certainty and clarity to the industry, to prevent conflicting judicial rulings, and to protect the development of technological advancements that have tremendous public interest benefits to consumers as well as to the economy.”¹⁶ This is disingenuous, at best. There are no public interest benefits to consumers from robotic telemarketing calls. In reality, Petitioner is just forum shopping. The soundboard industry failed to persuade the Federal Trade Commission (FTC) to characterize these calls as something other than what they unquestionably are: calls using a prerecorded voice. And, Petitioner is facing significant liability in a court in Oklahoma after making millions of telemarketing calls without the required prior written consent for prerecorded telemarketing calls to residences.¹⁷

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 exactly the question presented to the FCC by the NorthStar petition.¹⁸ 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.¹⁹

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 staff²⁰ 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.²¹

practices invasive of privacy?”).

¹⁶ Petition at 1.

¹⁷ *Braver v. Northstar Alarm Servs., LLC*, 2018 WL 6929590, at *1 (W.D. Okla. Oct. 15, 2018).

¹⁸ <https://www.ftc.gov/policy/advisory-opinions/letter-lois-greisman-associate-director-division-marketing-practices> (hereinafter FTC letter).

¹⁹ *Id.* at 3, citing 16 C.F.R. § 310.4(b)(1)(v).

²⁰ The letter explained that it contained the views of the FTC staff charged with enforcement of the TSR, alone, “subject to the limitations in 16 C.F.R. § 1.3,” and that the letter had not been approved or adopted by the commissioners of the FTC. FTC letter at 5.

²¹ 16 C.F.R. § 310.4(b)(1)(v).

The letter described the exact same technology—soundboard technology—as is addressed by the 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.”²² This FTC letter was a reversal from a letter the FTC staff had issued in September 2009,²³ in which FTC staff had articulated their determination that this technology was not subject to the prerecorded call provisions of the TSR. 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.”²⁴

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.²⁵ 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:

- [S]taff has received a steadily increasing volume of formal and informal complaints from consumers about telemarketing calls utilizing soundboard technology.²⁶
- Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments.²⁷
- 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

²² FTC letter at 1. Compare to Petition at 1: “Soundboard technology involves the use of snippets of recorded messages by a live operator.”

²³ http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion09011.pdf

²⁴ FTC letter at 1.

²⁵ 16 C.F.R. § 310.4(b)(1)(v).

²⁶ FTC letter at 1.

²⁷ Id.

adequately address consumer questions, or the call is terminated in response to consumers questions.²⁸

- 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.²⁹
- 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.³⁰
- 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.”³¹

The FTC staff also specifically addressed the second issue raised in the subject petition, 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, does not constitute the use of an artificial or prerecorded voice that delivers a message for purposes of coverage under the TSR. Regarding this question, the FTC staff explicitly found that it would not. 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 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.³²

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

²⁸ Id.

²⁹ *Id.* at 2.

³⁰ Id.

³¹ *Id.* at 3.

³² Id at 3, (emphasis added).

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.”³³

III. Consumers Hate Prerecorded Messages Of All Kinds, Which Dictates Against Exempting Them From Coverage Under The TCPA.

The calls made by NorthStar that are the subject of the case pending in Oklahoma—*Braver v. Northstar Alarm Servs., LLC*³⁴—illustrate why it is so important that these calls continue to be treated as what they are: calls made for telemarketing purposes with a prerecorded voice, and therefore regulated by the TCPA. According to the complaint, NorthStar was responsible for over 75 million soundboard calls to sell home security systems to people with no prior relationship to the company; the telephone numbers were all purchased from a data seller. The telemarketer used caller ID spoofing to display bogus telephone numbers to consumers.³⁵

A search of the FCC’s own electronic filing database under the TCPA proceeding (02-278) reveals 611 complaints specifically mentioning and objecting to “robot” calls.³⁶ A few examples of these objections include:

- . . . Finally, the latest scam of using robotic AI type of systems, that mimic actual humans, should also be outlawed. . . . Millions of Americans receive these annoying and unwanted calls on a daily basis. I hope the FCC will act swiftly to stop as many robocalls as possible. Thank you for your time.³⁷
- I have a small business and a landline. Some weeks I face almost daily harassment from creepy people who sound far away, robots pretending to be people, and the annoying sound of nothing. . . .³⁸
- I am SO tired of answering my phone to have a robot speak to me about windows or solar power or do I need home improvements or can I make a donation to one party or another

³³ FTC letter at 3-4, (emphasis added).

³⁴ *Braver v. Northstar Alarm Servs., LLC*, 2018 WL 6929590, at *1 (W.D. Okla. Oct. 15, 2018).

³⁵ *Braver v. Northstar*, 15-cv-383, Doc. 42 (W.D. Okla.).

³⁶ https://www.fcc.gov/ecfs/search/filings?proceedings_name=02-278&q=robot&sort=date_disseminated,DESC

³⁷ <https://www.fcc.gov/ecfs/filing/1062995708365>

³⁸ <https://www.fcc.gov/ecfs/filing/1062911731399>

or do I want to switch cable carriers? It's gotten to the point where I am considering removing our home phone. The only reason we have one now is for medical reasons-make this stop now. We are so tired of being afraid to answer our phone.³⁹

- I am petitioning to stop robot calls. I receive them regularly even though I am on the no call list. They are threatening and designed to scare. I get so many that my line is too busy for real business calls that I rely on.⁴⁰

Indeed, as explained *infra*, in Section II of these comments, the 2016 FTC letter noted that the number of complaints about these calls has been steadily increasing since the issuance of their 2009 letter; and this increase in complaints was a supporting reason why these calls should be included in the definition of prerecorded calls: “Given the actual language used in the TSR, *the increasing volume of consumer complaints*, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter.”⁴¹

Conclusion

The issue presented in NorthStar’s petition is currently before a federal district court in Oklahoma, in *Braver v. Northstar Alarm, LLC*.⁴² The court has specifically indicated that it is poised to decide the ultimate issue here: whether the calls made using the soundboard technology are prerecorded calls that implicate the consent requirements of the TCPA:

Based on the evidence heard to date, it appears that all of the calls at issue delivered a prerecorded soundboard message. *See* doc. 67, TR at 84:14 – 91:2 (numerous measures taken to ensure that only calls which delivered a prerecorded soundboard message are included in the class). Whether the use of this technology violates the TCPA is common question for all of the calls in the proposed class.⁴³

A court is the appropriate forum for determining this issue of statutory interpretation, where it can be determined based on specific facts; where the evidence presented, including sworn testimony, from experts and others, can be subjected to cross-examination. The FCC is not a fact-finding body. It does not take evidence, review transcripts, hear testimony, and evaluate the facts

³⁹ <https://www.fcc.gov/ecfs/filing/10629496601786>

⁴⁰ <https://www.fcc.gov/ecfs/filing/10602252531016>

⁴¹ FTC Letter at 3, *emphasis added*.

⁴² *Braver v. Northstar Alarm Servs., LLC*, No. CIV-17-0383 -F, 2018 WL 6929590 (W.D. Okla. Oct. 15, 2018).

⁴³ *Id.* at *6 (*emphasis added*).

based on conflicting evidence presented by adversary parties. The FCC does not have the capacity to do a deep dive into the evidence presented by litigants.

The FCC has said repeatedly (including in a tweet this week⁴⁴) that—

Unwanted calls – including illegal and spoofed robocalls - are the FCC's top consumer complaint and our top consumer protection priority.⁴⁵

Yet, if the FCC 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. We urge the FCC to deny both of Petitioner's requests.

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⁴⁴ <https://twitter.com/FCC/status/1105880189622517760>

⁴⁵ <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts>