

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991
NorthStar Alarm Services LLC’s Petition for
Expedited Declaratory
Yodel Technologies LLC’s Petition for Expedited
Ruling or in the Alternative Retroactive Waiver
CG Docket No. 02-278

DECLARATORY RULING AND ORDER

Adopted: December 18, 2020

Released: December 18, 2020

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. The Telephone Consumer Protection Act (TCPA) prohibits initiating “any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message” absent certain exceptions such as obtaining the prior express consent of the called party.1 Petitioner NorthStar Alarm Services, LLC (NorthStar) seeks a ruling that the use of “soundboard technology” is not use of an artificial or prerecorded voice that delivers a message under the TCPA because soundboard requires a live agent to play multiple short recorded messages instead of one continuous prerecorded message.2 Petitioner Yodel Technologies LLC (Yodel) seeks a ruling that a call made using soundboard is not a prerecorded call of the type prohibited by section 227(b)(1)(B) of the TCPA.3 In the alternative, Yodel seeks a retroactive waiver of the Commission’s rules for calls it made using soundboard technology.

2. With this Declaratory Ruling, we confirm that the TCPA applies to any telephone call to a residential telephone line initiated using an artificial or prerecorded voice message. If such a call is initiated using an artificial or prerecorded voice message—whether made using soundboard technology or otherwise—the caller must obtain the called party’s prior express consent for such a call unless an exemption applies. This is true even if a live agent controls the initial artificial or prerecorded voice

1 See 47 U.S.C. § 227(b)(1)(B). The TCPA is codified at section 227 of the Communications Act of 1934, as amended. See 47 U.S.C. § 227.

2 See Petition for Expedited Declaratory Ruling Clarifying 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act of NorthStar Alarm Services LLC, CG Docket No. 02-278, at 2 (filed Jan. 2, 2019) (NorthStar Petition).

3 See Petition for Expedited Declaratory Ruling Regarding the Application of 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act or in the Alternative Retroactive Waiver of Yodel Technologies LLC, CG Docket No. 02-278, at 1 (filed Sept. 13, 2019) (Yodel Petition).

message using soundboard technology. We therefore deny NorthStar and Yodel's requests for a declaratory ruling and deny Yodel's request for a retroactive waiver.

II. BACKGROUND

3. Congress enacted the TCPA to address certain calling practices that invade consumer privacy and threaten public safety. In relevant part, the TCPA prohibits initiating “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”⁴ or is otherwise exempted by the statute or by a rule or order issued by the Commission.⁵

4. In January 2019, NorthStar, a home security company, asked the Commission to find that “calls using audio clips specifically selected and presented by human operators in real-time, a tool generally referred to as ‘soundboard technology,’ do not deliver a ‘prerecorded message’ under the [TCPA].”⁶ NorthStar makes three arguments. First, the TCPA’s use of the term “initiate” indicates that the statute’s restriction on prerecorded messages is not meant to encompass interactive technologies that rely on human intervention after the call is initiated.⁷ Second, soundboard technology does not “deliver a message” via a prerecorded voice but a live agent selects multiple prerecorded messages as part of an interactive process.⁸ Last, the TCPA’s use of “a message,” means Congress intended to restrict only those calls that play “a uniform, singular message” instead of multiple individual messages.⁹ NorthStar argues that the legislative history of the TCPA demonstrates that the statute was not intended to regulate soundboard technology and further that public policy supports permitting calls using soundboard technology.¹⁰

5. NorthStar’s petition states that it is subject to a class action lawsuit alleging that NorthStar hired Yodel to make telemarketing calls on its behalf to residential telephone lines without the prior express consent of the called party.¹¹ In July 2019, the district court in that case granted summary

⁴ See 47 U.S.C. § 227(b)(1)(B) (emphasis added).

⁵ Pursuant to its authority under section 227(b)(2)(B) of the TCPA, the Commission has exempted certain calls from the general prohibition on artificial or prerecorded voice messages to a residential telephone line, including such calls when they: are not made for a commercial purpose; are made for a commercial purpose but do not include an unsolicited advertisement or constitute telemarketing; are made by or on behalf of a tax-exempt nonprofit organization; or deliver a “health care” message as described in the rule. See 47 U.S.C. § 227(b)(2)(B); 47 CFR § 64.1200(a)(3)(ii)-(v).

⁶ See *NorthStar Petition* at 1; see also Letter from Daniel S. Blynn, Counsel for Northstar Alarm Services, to Marlene H. Dortch, Secretary, FCC, CG Docket 02-278 (Apr. 30, 2019). NorthStar alleges that soundboard technology does not involve the use of “passive prerecorded messages that play from start to finish without any intervention by a human operator. Rather, soundboard technology requires careful attention of a well-trained operator who responds with appropriate audio snippets to a call recipient, creating a unique, individualized experience.” *NorthStar Petition* at 3. It further states that “[s]oundboard technology works by allowing call center agents to interact and converse with consumers on a real-time basis using recorded audio clips in lieu of or in combination with the agent’s own voice.” *Id.*

⁷ *NorthStar Petition* at 7.

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ See *id.* at 8-11.

¹¹ *Id.* at 5 (citing a complaint filed by Robert H. Braver in the U.S. District Court for the Western District of Oklahoma in April 2017). NorthStar states that the complaint was amended in June 2017 to identify Yodel as another named defendant. See *id.*

judgment to the plaintiffs on the count alleging that the calls at issue in the litigation violated section 227(b)(1)(B) of the Communications Act and section 64.1200(a)(3) of the Commission's rules.¹²

6. In September 2019, Yodel, which provides call center services using soundboard technology, sought the same clarification as NorthStar or, in the alternative, a retroactive waiver.¹³ According to Yodel, a live agent always monitors the call and, when necessary, can intervene by speaking directly to the call recipient or by playing a prerecorded voice response.¹⁴ As a result, Yodel suggests, these are not "wholly prerecorded calls" that deprive consumers of the ability to interact with the party making the call.¹⁵

7. Yodel contends that the TCPA and prior Commission rulings should be interpreted to mean that only those calls that are entirely prerecorded and lack any human interaction fall within the prohibition of section 227(b)(1)(B) and that this position is consistent with a 2009 Federal Trade Commission (FTC) staff opinion letter applying that agency's Telemarketing Sales Rule to soundboard technology and a 1995 decision of the U.S. Court of Appeals for the Ninth Circuit interpreting section 227(b)(1)(B).¹⁶ Alternatively, Yodel seeks retroactive waiver of the Commission rules prior to May 12, 2017.¹⁷ Yodel claims its use of soundboard was fully consistent with a reasonable understanding of the applicable law and that it "would be fundamentally unfair for Yodel to face crippling liability based on its reliance on FCC, FTC, and Ninth Circuit statements."¹⁸

8. The Consumer and Governmental Affairs Bureau (Bureau) sought comment on these petitions.¹⁹ The majority of commenters oppose relief.²⁰ Many of these commenters contend that the TCPA and Congress were clear that *any* call using a prerecorded voice to deliver a message must be made with the prior express consent of the called party, absent an exception.²¹ Some commenters also argue there is no functional difference between a call with one uninterrupted prerecorded voice and a call with multiple prerecorded voice phrases.²² Commenters note that consumers have complained about calls using soundboard technology for telemarketing that have resulted in a class action suit against the

¹² See *Braver v. NorthStar Alarm Services, LLC*, Case No. CIV-17-0383-F, 2019 WL 3208651, at *15 (W.D. Okla. July 16, 2019).

¹³ See *Yodel Petition* at 1-2; see also Letter from Paul C. Besozzi, Counsel for Yodel Technologies, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (Nov. 27, 2019).

¹⁴ *Yodel Petition* at 2.

¹⁵ *Id.*

¹⁶ *Id.* at 4-5; Letter from Lois Greisman, FTC, to Michael Bills, Call Assistant (Sept. 11, 2009). The FTC reversed its 2009 finding in a 2016 letter that became effective May 12, 2017. See Letter from Lois Greisman, FTC, to Michael Bills (Nov. 10, 2016) (*FTC 2016 Letter*).

¹⁷ *Yodel Petition* at 7-9. Although Yodel cites to 47 CFR § 64.1200(a)(1), see *id.* at 9, the applicable Commission rules are in section 64.1200(a)(3).

¹⁸ *Id.* at 8.

¹⁹ See *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling by NorthStar Alarm Services, LLC*, CG Docket No. 02-278, Public Notice, 34 FCC Rcd 344 (CGB 2019); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling or Retroactive Waiver by Yodel Technologies LLC*, CG Docket No. 02-278, Public Notice, 34 FCC Rcd 8172 (CGB 2019).

²⁰ See, e.g., Braver Comments; CAS Comments; NCLC Comments; Shaw Comments; Shields Comments.

²¹ See, e.g., NCLC (Yodel) Comments at 4; Sawyer Comments at 1; Shaw (Yodel) Comments at 3.

²² See, e.g., Braver (Yodel) Comments at 5-6; NCLC (Yodel) Comments at 4; Paulson Comments at 1.

petitioners.²³ In addition, these commenters indicate that the live agent rarely, if ever, speaks on such calls, and they offer examples of prerecorded responses to consumer questions via soundboard technology that are often nonsensical.²⁴ Thus, these commenters dispute the claim that soundboard technology provides the functional equivalent of an interactive one-on-one conversation with a live agent.²⁵

9. Commenters supporting relief reiterate the arguments made by the petitioners that focus on the interactive capability of soundboard technology, noting the ability of the live agent to intervene either directly or via a prerecorded response.²⁶ These commenters contend that this interactive capability distinguishes soundboard technology from the types of prerecorded messages that Congress intended to address in the TCPA, which afforded call recipients no ability to interact with a live agent.²⁷

III. DISCUSSION

10. We confirm that the TCPA applies to any telephone call to a residential telephone line initiated using an artificial or prerecorded voice message.²⁸ The TCPA requires prior express consent for “any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message” unless an exception applies.²⁹ The record confirms that soundboard callers use a prerecorded voice to deliver a message.³⁰ In fact, the petitioners themselves describe soundboard technology as using “prerecorded messages” or “recorded messages.”³¹ For reasons explained below, we also decline to grant Yodel a retroactive waiver.

A. Declaratory Ruling

11. We find that the TCPA applies to any telephone call that is initiated using an artificial or prerecorded voice message.³² We thus agree with the many commenters who oppose the petitions.³³

²³ See, e.g., NCLC (NorthStar) Comments at 7 (indicating that NorthStar was responsible for over 75 million calls to sell home security systems).

²⁴ See, e.g., Braver (Yodel) Comments at 9-10; CAS Comments at 6; NCLC (Yodel) Comments at 9-10 (citing a 2016 Federal Trade Commission letter); Shields (Yodel) Comments at 3.

²⁵ See, e.g., Braver (Yodel) Comments at 9-10; CAS Comments at 6; NCLC (Yodel) Comments at 9-10 (citing a 2016 Federal Trade Commission letter); Shields (Yodel) Comments at 3.

²⁶ ACCA Comments at 1-2; CWT Comments at 2-3; Soundboard Comments at 2-3.

²⁷ ACCA Comments at 1-2; CWT Comments at 2-3; Soundboard Comments at 2-3.

²⁸ As noted above, the petitioners were sued for using a prerecorded voice to deliver unsolicited telemarketing messages in calls made to residential telephone lines. As a result, the focus of the petitions is on the TCPA’s prohibition on prerecorded voice messages to residential telephone lines. We note, however, that there are similar TCPA prohibitions on using artificial or prerecorded voice messages in any call made to certain other telephone lines including wireless telephone numbers. See 47 U.S.C. § 227(b)(1)(A). Our analysis herein applies equally in those situations.

²⁹ See 47 U.S.C. § 227(b)(1)(B).

³⁰ See, e.g., CAS Comments at 2-3; NCLC Comments at 1-2; Paronich Comments at 2-3; Shaw Comments at 2.

³¹ See *Yodel Petition* at 8; *NorthStar Petition* at ii, 10; see also *Yodel Petition* at 2 (explaining that soundboard technology responds to call-recipient questions by “selecting one or more often short recorded responses during live calls”).

³² Our ruling is consistent with that of a recent federal district court decision in the *Braver* class action lawsuit, which held that the calls Yodel made using its soundboard technology on behalf of NorthStar required consent under the TCPA. See *Braver*, 2019 WL 3208651 at *4-6.

12. Beginning with the statute’s text, the TCPA makes it unlawful “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 a statutory exception applies.³⁴ There is no doubt that soundboard technology “uses” a prerecorded voice to deliver a message to the consumer—the petitioners do not argue this point. As a result, if a live agent initiates the call with a prerecorded voice message using soundboard technology, the caller must obtain the called party’s prior express consent. In other words, the mere presence of a live operator with soundboard technology does not negate the clear statutory prohibition against initiating a call using a prerecorded or artificial voice. Nowhere does the TCPA text exempt calls where a human selects a prerecorded voice message for the called party.

13. Our decision is consistent with the FTC staff opinion on the applicability of its parallel Telemarketing Sales Rule to soundboard technology. Specifically, the FTC staff found that soundboard technology “delivers a prerecorded message” under the plain language of the rule and that, based on consumer complaints and press reports, does not “represent a normal, continuous, two-way conversation” because, among other things, the recordings do not always respond to consumer questions and the call is terminated in response to such questions.³⁵

14. We reject the petitioners’ arguments. First, we disagree that the TCPA’s use of “initiate” means that any live agent action after the call is “initiated” removes it from the TCPA’s reach. Petitioners offer no analysis of the TCPA’s text to support the argument; for example, they do not explain how a live agent’s playing of a prerecorded voice is not the “using” of such a message that triggers the consent requirement. Second, we disagree that the TCPA’s use of the singular “message” in the phrase “to deliver a message” demonstrates that Congress did not intend the TCPA to restrict calls that involve multiple prerecorded or artificial voice messages as opposed to one uninterrupted message using such technologies.³⁶ Calls that include multiple such messages by necessity include single messages. The “Dictionary Act,” which guides interpretation of ambiguity in federal law, instructs that a singular term in legislation also includes the plural. Specifically, “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the singular include and apply to several persons, parties, or things.”³⁷ To find otherwise could lead to an absurd result, e.g., a caller playing two sound snippets back-to-back to avoid obtaining consumer consent.

15. We also disagree with Yodel that the Commission’s implementation of the TCPA limits its restrictions to entirely prerecorded calls.³⁸ First, Yodel infers from the Commission’s use of “prerecorded calls” that such calls must be fully automated.³⁹ But Yodel provides no support for why its interpretation is required or squares with the TCPA’s text. Second, Yodel argues that the Commission’s disclosure obligations on artificial or prerecorded telephone messages “assumes that the TCPA applies only to fully automated calls.”⁴⁰ Again, Yodel provides little analysis to support its conclusion.

³³ See CAS Comments at 2; NCLC (NorthStar) Comments at 1-2; Paulson Comments at 1; Shaw (Yodel) Comments at 3; Sawyer Comments at 2.

³⁴ See 47 U.S.C. § 227(b)(1)(B).

³⁵ *FTC 2016 Letter* at 2-3.

³⁶ See *NorthStar Petition* at 8.

³⁷ See 1 U.S.C. § 1.

³⁸ See generally *Yodel Petition* at 4-5.

³⁹ See *Yodel Petition* at 4-5.

⁴⁰ *Yodel Petition* at 5.

16. Northstar next argues that soundboard technology results in the functional equivalent of a conversation between the consumer and another human.⁴¹ Setting aside the relevance of the argument (because the TCPA does not carve such functional equivalents out from its dictates), the record does not support such a finding. Rather, the record indicates that soundboard agents routinely monitor multiple telephone calls simultaneously while rarely, if ever, speaking on these calls, and that the prerecorded messages they use are sometimes nonsensical to the consumer.⁴² In fact, Yodel suggests that one of the advantages of soundboard technology includes minimizing any direct communication by a live agent on the call.⁴³ In 2016, FTC staff said that “[c]onsumers complain that during these [soundboard] calls they are not receiving appropriate recorded responses to their questions or comments. Consumers also 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 consumer questions.”⁴⁴ FTC staff noted that industry representatives acknowledged that call centers “routinely use soundboard technology to allow a single live agent to handle more than one call at the same time.”⁴⁵ The record here confirms that soundboard technology has not changed in this regard.⁴⁶

17. Nor does Yodel’s reliance on *Moser v. FCC* help.⁴⁷ There, the Ninth Circuit stated that the TCPA permits use of “taped messages introduced by live speakers.”⁴⁸ Yodel argues that this statement means “that the statute did not ban prerecorded messages introduced by a live operator.”⁴⁹ Our ruling, however, is limited to calls that are initiated using an artificial or prerecorded voice message that the record suggests is the common practice on calls using soundboard technology.⁵⁰ And we note that the petitioners offer no such example of artificial or prerecorded messages having been introduced by a live operator on a call using soundboard technology before playing an artificial or prerecorded message.

18. Lastly, we disagree with commenters that argue that applying the TCPA to soundboard technology effectively prohibits the use of that technology by subjecting users to potential liability under the TCPA’s private right of action.⁵¹ The petitioners merely need to obtain consumer consent prior to

⁴¹ See *NorthStar Petition* at ii (arguing that an agent can speak directly to a called party “if needed”).

⁴² See, e.g., Braver (Yodel) Comments at 9-10; CAS Comments at 3-4; Shields (NorthStar) Comments at 11. We note that NorthStar asks us to also pass on whether “1-to-1” calls require consent. *NorthStar Petition* at 2. We exercise our discretion to not address this fact pattern here as it appears contrary to how callers actually use the technology.

⁴³ See *Yodel Petition* at 3 (noting that “[soundboard] technology is desirable from a business perspective because it assures human agents will not go ‘off script’ with improper, inaccurate, or incomplete assertions”).

⁴⁴ *FTC 2016 Letter* at 1-2.

⁴⁵ *Id.* at 3.

⁴⁶ See, e.g., Braver (Yodel) Comments at 9-10 (providing transcripts of conversations involving soundboard system that demonstrate nonsensical responses to questions); CAS Comments at 6; Shields (Yodel) Comments at 2-3; Shaw (Yodel) Reply Comments at 2.

⁴⁷ See *Yodel Petition* at 5-6 (citing *Moser v. FCC*, 46 F.3d 970, 974-75 (9th Cir. 1995) (*Moser*)).

⁴⁸ *Moser*, 46 F.3d at 975 (emphasis added).

⁴⁹ *Yodel Petition* at 5.

⁵⁰ See *Yodel Petition* at 3 (noting that “[soundboard] technology is desirable from a business perspective because it assures human agents will not go ‘off script’ with improper, inaccurate, or incomplete assertions”).

⁵¹ See CWT Comments at 4-7; Soundboard Comments at 5.

using their technology.⁵² And callers may use soundboard technology to call residential telephone lines without consent if an exemption applies.⁵³

B. Waiver Request

19. The Commission may waive its rules for good cause shown.⁵⁴ We may grant a waiver if: (1) the waiver will serve the public interest; and (2) special circumstances warrant a deviation from the general rule.⁵⁵ We decline to grant Yodel a retroactive waiver of the prior-express-consent requirement for Yodel's soundboard calls.

20. We find no public interest or special circumstances that warrant deviation from our rules. First, Yodel does not specify the rule it wishes us to waive. Second, assuming it has section 64.1200(a)(3)'s consent requirement in mind, we cannot waive the rule because it implements a statutory requirement. More broadly, the record here suggests petitioners made millions of calls without consumer consent.⁵⁶ We cannot conclude that the public interest would be served to waive our rules for the numerous calls that caused the exact harms Congress sought to prevent. To do so would undermine a policy objective of the rule.

21. Finally, Yodel states that it relied on *Moser* and the 2009 FTC staff opinion and that it is thus entitled to a waiver.⁵⁷ Court and other agencies' opinions can be instructive regarding Commission interpretation of the TCPA, but do not necessarily bind the Commission. Further, as discussed above, our ruling today does not contravene the decision in *Moser* as it is limited to calls that are initiated using an artificial or prerecorded voice message. As a result, we see no grounds for granting a retroactive waiver.

IV. ORDERING CLAUSES

22. For the reasons stated above, IT IS ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2, 1.3, and 64.1200 of the Commission's Rules, 47 CFR §§ 1.2, 1.3, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 CFR §§ 0.141, 0.361, that this Declaratory Ruling and Order is ADOPTED.

23. IT IS FURTHER ORDERED that the Petition for Expedited Declaratory Ruling filed by NorthStar Alarm Services on January 2, 2019, IS DENIED.

⁵² See 47 U.S.C. § 227(b)(1)(B); 47 CFR § 64.1200(a)(3).

⁵³ Our rules exempt calls that are: not made for a commercial purpose; made for a commercial purpose but do not include or introduce an advertisement or constitute telemarketing; made by or on behalf of a tax-exempt nonprofit organization; or deliver a "health care" message as described in the rule. See 47 CFR § 64.1200(a)(3).

⁵⁴ 47 CFR § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) ("limited waivers or exceptions" to a general rule may be granted "only pursuant to a relevant standard," which can include "considerations of hardship, equity, or more effective implementation of overall policy"); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("The FCC has authority to waive its rules if there is 'good cause' to do so" *i.e.*, "where particular facts would make strict compliance inconsistent with the public interest.").

⁵⁵ *Northeast Cellular*, 897 F.2d at 1166.

⁵⁶ See, e.g., Braver (NorthStar) Reply Comments at 2 (noting that the call records produced in Braver's litigation indicated that Yodel's soundboard system frequently made more than a million calls per day on NorthStar's behalf); NCLC (Yodel) Comments at 14 (indicating that the trial court concluded that the "[u]ndisputed evidence shows that during the NorthStar telemarketing campaign, Yodel made 77,912,856 calls using its soundboard system").

⁵⁷ See *Yodel Petition* at 6.

24. IT IS FURTHER ORDERED that the Petition for Expedited Declaratory Ruling or Retroactive Waiver filed by Yodel Technologies on September 13, 2019, IS DENIED.

25. IT IS FURTHER ORDERED that this Declaratory Ruling and Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Patrick Webre
Chief
Consumer and Governmental Affairs Bureau

Appendix A

List of NorthStar Commenters

Commenters	Abbreviation
American Customer Communications Assoc.	ACCA
Robert Braver	Braver
Consumer Advocate Society – Berkeley School of Law	CAS
National Consumer Law Center	NCLC
NorthStar Alarm Services	NorthStar
Anthony Paronich	Paronich
John Shaw	Shaw
Joe Shields	Shields
Soundboard Association	Soundboard

Appendix B**List of Yodel Commenters**

Commenters	Abbreviation
Robert Braver	Braver
Consolidated World Travel	CWT
National Consumer Law Center	NCLC
Carl Paulson	Paulson
Christopher Sawyer	Sawyer
John Shaw	Shaw
Joe Shields	Shields
Tantillo Law PLLC	Tantillo
Yodel Technologies LLC	Yodel