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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554  
MAY 26 1992

Federal Communications Commission  
Office of the Secretary  
ORIGINAL  
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In the Matter of )  
The Telephone Consumer Protection )  
Act of 1991 ) CC Docket No. 92-90

COMMENTS OF CENTEL CORPORATION

I. INTRODUCTION

Centel Corporation ("Centel") hereby submits its comments in response to the Notice of Proposed Rulemaking, FCC 92-176, released April 17, 1992 ("Notice"), in the above-referenced proceeding. In the Notice, the Commission proposes regulations to implement the requirements of the Telephone Consumer Protection Act of 1991 ("TCPA").<sup>1/</sup> The TCPA's goal is to protect consumers from unrestricted telemarketing practices, which can invade consumers' privacy.<sup>2/</sup> In furtherance of that goal, the TCPA restricts the use of automatic telephone dialing systems and telephone facsimile machines for telemarketing purposes.

Centel is a major provider of local exchange telephone and cellular services to consumers throughout the United States. Centel applauds the Commission's efforts to promulgate rules that "balance the privacy concerns which the TCPA seeks to protect and

<sup>1/</sup> 47 U.S.C. § 227.

<sup>2/</sup> The TCPA provides that consumers' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of consumers and permits legitimate telemarketing practices. TCPA, Finding number (9).

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the continued viability of beneficial and useful business services." Notice at ¶ 34. In doing so, the Commission is fulfilling its obligation to encourage the responsible use of a valuable asset, the nation's telecommunications network. Set forth below are Centel's comments on certain aspects of the proposed rules.

## II. DISCUSSION

### A. Restrictions on the Use of Auto Dialers

The rules proposed by the Commission accurately reflect the language of the TCPA. The text of the Commission's Notice, however, appears to be inconsistent with the TCPA regarding the restrictions on the use of automatic telephone dialing systems ("auto dialers").

Throughout the Notice, the Commission states that the TCPA prohibits calls made by auto dialers to residences. See e.g., Notice at ¶¶ 8, 18. However, neither the TCPA nor the proposed rules expressly prohibits calls from auto dialers to residences. Under Section 227(b)(1)(A) of the TCPA, the use of auto dialers is prohibited to: emergency telephone lines, telephone lines of a health care facility, a paging service or other specialized mobile radio services, and any service for which the called party is charged for the call.<sup>3/</sup>

While Section 227(b)(1)(B) places restrictions on calls to residential lines, it does not expressly prohibit calls made from auto dialers. Rather, that section only prohibits calls "using an artificial or prerecorded voice to deliver a message."

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<sup>3/</sup> 47 U.S.C. § 227(b)(1)(A).

Section 64.1100(a)(2) of the Commission's proposed rules contains this same language: "No person may initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message...."

Although the legislative history states that the TCPA is intended to ban "automated or prerecorded telephone calls" to the home,<sup>4/</sup> it is unclear whether these terms include auto dialers. According to the definition in the TCPA, an automatic telephone dialing system is equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.<sup>5/</sup> That definition does not include or refer to the use of an artificial or prerecorded voice. Therefore, Section 227(b)(1)(B) of the TCPA, which prohibits only calls to residential lines using an artificial or prerecorded voice, does not explicitly prohibit the use of auto dialers.

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<sup>4/</sup> See e.g., Congressional Record, November 7, 1991, S 16208; Congressional Record, November 27, 1991, S 18784.

<sup>5/</sup> 47 U.S.C. § 227(a)(1). Under the TCPA's definition, predictive dialers, which do not use a "random or sequential number generator," seem to be excluded from the prohibitions applicable to auto dialers. This conclusion appears to be consistent with the discussion of predictive dialers in the Notice. There the Commission noted that the use of predictive dialers may involve non-telemarketing activities that are not intended to be prohibited by the TCPA. Notice at ¶ 15. Currently, predictive dialers are being used by local exchange carriers ("LECs"), which program them to dial customer telephone numbers. After the call is answered, a live representative from the business office verifies an installation or repair of service and seeks comment on the customer's satisfaction with the work performed. Centel requests the Commission to confirm that the use of predictive dialers does not fall within the statutory prohibitions of the TCPA or the Commission's rules.

The Commission should clarify its intent and the proposed application of the rules by specifying whether the term "automatic telephone dialing systems" refers to both auto dialers and calls using an artificial or prerecorded voice. Specifically, if the Commission finds that the intent of the TCPA was to prohibit the use of auto dialers to place calls to residential lines even if a live operator (rather than a prerecorded voice) handles the call, it should amend Section 64.1100(a)(2) of its proposed rules to expressly include auto dialers.

**B. Exceptions to Prohibited Transmission of Prerecorded Messages**

Under the authority granted by the TCPA, the Commission proposes to exempt from liability certain categories of calls that use an artificial or prerecorded voice.<sup>6/</sup> Centel supports the adoption of the proposed exemptions and agrees with the Commission that those categories of calls "were not intended to be prohibited by the TCPA and do not constitute a risk to public safety or an undue burden upon privacy."<sup>7/</sup>

Commercial calls that do not transmit an advertisement. The Commission proposes to exempt from the prohibitions of the TCPA commercial messages that do not include the transmission of any unsolicited advertisement. As the Commission notes, "[s]ome messages, albeit commercial in nature, do not seek to sell a product or service and do not tread heavily upon privacy

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<sup>6/</sup> Notice at ¶ 9.

<sup>7/</sup> Id.

concerns."<sup>8/</sup> Good examples of this are the prerecorded messages sent by market research companies. While ultimately such messages may have a commercial purpose, their immediate purpose is to obtain market information and not to offer a product or service. Centel believes that such calls do not tread heavily upon privacy concerns. Accordingly, it supports the adoption of this proposed exemption.

Calls to former or existing clientele. The Commission proposes an exemption to liability for calls placed by a caller, or on behalf of a caller, to parties with whom the caller has or had a voluntary business relationship.<sup>9/</sup> Adoption of this exemption is crucial since it will enable LECs to continue to make calls to customers marketing new service offerings. In connection with its proposal, the Commission seeks comment on the definition of "business relationship". Centel agrees with the Commission that a business relationship may exist without an exchange of consideration between the parties.<sup>10/</sup> Centel also agrees that, at a minimum, a business relationship "requires a voluntary two way communication between the client and the business."<sup>11/</sup> Therefore, Centel believes that the latter

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<sup>8/</sup> Notice at ¶ 11.

<sup>9/</sup> Notice at ¶¶ 13-16.

<sup>10/</sup> Notice at ¶ 14. For example, a business relationship exists when an end user presubscribes its telephone line to a long distance carrier even though the end user may not place any long distance calls over the carrier's network.

<sup>11/</sup> Id.

benchmark should be used in determining when a business relationship exists.

The Commission also seeks comment on whether the proposed exemption should encompass former, current, or both former and current customers.<sup>12/</sup> Obviously, the exemption should apply to current customers, who have an on-going business relationship with the caller. A more difficult question is presented with respect to former customers. While the exemption should also apply to those customers, it should be limited to customers with whom the caller has had a business relationship within the past five years. Limiting the universe of former customers in this manner would lessen the possibility that the called party, not remembering the prior business relationship with the caller, would feel that his or her privacy rights had been invaded.

In addition, Centel agrees with the Commission's tentative conclusion that a debt collection call is a commercial call that falls under the proposed exemption for calls to former or existing clientele.<sup>13/</sup> Therefore, no separate express exemption for debt collection is necessary. Nevertheless, the Commission should make it clear, in the order adopting the rules, that debt collection is a permissible activity under the exemption for calls to former or existing clientele. It is essential that businesses be allowed to place such calls without fear of violating the TCPA.

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<sup>12/</sup> Id.

<sup>13/</sup> Notice at ¶ 16.

### C. Relief for Cellular Carriers

The TCPA expressly prohibits the use of auto dialers to place calls to numbers assigned to cellular telephone services.<sup>14/</sup> Thus, cellular carriers cannot use auto dialers to call their own customers, even when customers are not charged for the calls. Among other things, this prohibition puts cellular carriers at a great disadvantage vis-a-vis LECs and interexchange carriers which can call their own customers directly regarding service or marketing matters. The prohibition also presents a fundamental disparity with the exceptions proposed for residential telephone lines, including commercial calls that do not transmit an advertisement. As mentioned above, a good example of this is a prerecorded message sent by a market research company. The logic of permitting similar calls to cellular telephones, as long as the subscribers are not charged, is inescapable.

Centel has read and supports the comments being filed in this proceeding by the Cellular Telecommunications Industry Association ("CTIA"). In particular, Centel joins with CTIA in urging the Commission to "critically consider every avenue within its authority and to exercise its discretion to the greatest extent possible to correct the disparities between the treatment of wire based telecommunications and cellular." CTIA Comments at 3-4. By adopting rules that give cellular carriers as much

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<sup>14/</sup> 47 U.S.C. §227(b)(1)(A)(iii). This section prohibits auto dialer calls to telephone numbers assigned to a paging service, cellular service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

flexibility as possible, the Commission will enable cellular carriers to continue to provide the highest quality of service to their customers.

**D. Regulatory Alternatives Available to Restrict Telephone Solicitation**

The TCPA requires the Commission to compare and evaluate alternative methods for protecting residential telephone customers' privacy rights.<sup>15/</sup> The Commission seeks comment on five options that it has identified to restrict live operator telephone solicitation to residential customers. They are: (1) national or regional databases of persons who object to receiving solicitations, (2) network technologies that enable called parties to avoid calls from certain numbers, (3) company generated "do not call me" lists, (4) special directory markings, and (5) time of day restrictions.

Centel prefers adoption of the company generated "do not call me" lists.<sup>16/</sup> Under this option, companies engaging in telemarketing would be required to establish and maintain "do not call" lists. A significant advantage of this option is that companies that benefit from telemarketing would bear the costs of

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<sup>15/</sup> 47 U.S.C. § 227(c)(3).

<sup>16/</sup> While industry-wide lists might be more efficient, they would be more cumbersome and expensive to establish and operate. This is especially true given the proprietary nature of a company's marketing list the anticompetitive consequences that open access to such information could cause. Industry participants would have to agree upon an entity to establish and maintain the list, and confidentiality, operational and funding issues would have to be resolved. This would be very time-consuming to the detriment of residential telephone customers. Accordingly, Centel prefers the company generated list option.

establishing and maintaining these lists. The option also has the advantage of being simple and easy to implement.

Residential telephone customers should be added to the list when a company becomes aware of the customer's wishes through a prior telemarketing contact during which the customer asked not to be contacted in the future. During such contacts, companies should be required to ask customers if they wish to be contacted in the future. By requiring companies to do this, customers will be advised that they are entitled to be put on a "do not call" list. Requiring companies to ask the question will also avoid any possible ambiguity on the part of companies regarding the customers' wishes.

Furthermore, the "do not call" list option makes good business sense. It should limit customer frustration and annoyance with a particular company's telemarketing efforts. It should also benefit the telemarketer since it would avoid the cost of repeatedly calling customers who refuse to purchase a company's goods or services.<sup>17/</sup>

With respect to the other options, Centel believes that they: (1) would be too complex and time-consuming to implement (e.g., the database and network technologies options); (2) would not impose the costs and burdens on the entities benefiting most from telemarketing (e.g., the directory listing option); or (3) would be ineffective in reducing consumer frustration with telemarketing practices (e.g., the time of day option).

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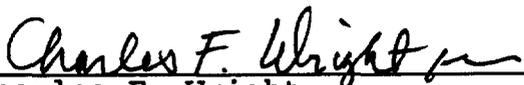
<sup>17/</sup> For these reasons, Centel believes that "do not call" lists also should be employed by tax-exempt organizations engaging in telemarketing.

**III. CONCLUSION**

Centel believes that if the Commission adopts the proposed rules, with the modifications and clarifications suggested herein, the Commission will go a long way in achieving a balance between consumers' right to privacy and the legitimate telemarketing needs of businesses.

Respectfully submitted,

CENTEL CORPORATION

  
\_\_\_\_\_  
Charles F. Wright  
Vice President - Corporate  
Development  
8725 Higgins Road  
Chicago, Illinois 60631

**Of Counsel:**

Theodore D. Frank  
Vonya B. McCann  
Arent Fox Kintner Plotkin & Kahn  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5339  
(202) 857-6401

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