

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Rules and Regulations Implementing the ) CG Docket No. 02-278  
Telephone Consumer Protection Act of 1991 )

**COMMENTS OF QWEST SERVICES CORPORATION**

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Pursuant to the Federal Communications Commission’s (“Commission” or “FCC”) request for comment in the *Notice of Proposed Rulemaking* (“*Notice*”),<sup>1</sup> Qwest Services Corporation (“Qwest”) respectfully submits these comments. The Commission’s existing rules implementing the Telephone Consumer Protection Act (“TCPA”) of 1991 generally strike the right balance between the interests of consumers, telemarketing organizations and their business clients. The most significant exception is the rule imposing a ten-year retention period for a telephone number to remain on a Do Not Call (“DNC”) list. The Commission should reduce that period. Other changes to the Commission’s existing rules are not warranted.

I. **INTRODUCTION AND SUMMARY**

By requiring companies to create and maintain internal-company DNC lists, the Commission’s current rules<sup>2</sup> are intended to promote the interests of consumers who do not wish to be disturbed by telemarketing calls.<sup>3</sup> The internal-company DNC model constitutes narrowly-

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<sup>1</sup> *In the Matter of Implementation of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Notice of Proposed Rulemaking*, FCC 02-250, rel. Sep. 18, 2002. 67 Fed. Reg. 62667 (Oct. 8, 2002).

<sup>2</sup> 47 U.S.C. § 64.1201, *et seq.*

<sup>3</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd. 8752, 8765 ¶ 23 (1992) (“we conclude that the company-specific [DNC] list alternative is the most effective and efficient means to permit telephone subscribers to avoid unwanted telephone solicitations,” “would best protect residential subscriber confidentiality”) (“*TCPA Order*”).

tailored government regulation that suppresses only those commercial communications expressly declared to be unwanted by the intended recipients. The Commission has concluded that this approach respects the interests of consumers who wish not to receive telemarketing calls without unduly burdening commercial activity.<sup>4</sup> This DNC model should not be changed to a more national approach.

The Commission should modify and reduce, however, its ten-year retention requirement for telephone numbers on DNC lists. It should adopt a three-year retention period, in light of evidence of telephone number changes. The ten-year retention period results in telephone numbers being classified as *incommunicado* long after the subscriber who originally asked to be put on a DNC list becomes unassociated with a number. Keeping a telephone number on a DNC list beyond the point of association between the person asking to be on the list and the number does nothing to protect the privacy of the original DNC-requesting subscriber and adversely affects unrelated communications between two potentially willing parties. Failing to achieve even the Commission's original DNC objectives, the regulation should be changed.

With the exception of a reduction in the period of time governing retention of telephone numbers on DNC lists, no other major changes to the rules are necessary or desirable, including the range of potential changes discussed in the *Notice*. In these comments, Qwest focuses on but two of those proposed changes, *i.e.*, mandated confirmations for DNC requests and the possibility of a national DNC database. As necessary, Qwest will address additional matters in reply.

First, the Commission should not impose DNC confirmation for all carriers and their telemarketing agents with respect to every individual DNC request. To minimize industry costs,

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<sup>4</sup> *Notice* ¶ 13.

which in turn are passed on to consumers, the Commission should limit any prescription for DNC confirmations to those carriers whom the Commission finds consistently fail to comply with its rules regarding the accurate and complete compilation of DNC lists.

Second, the Commission should dampen any interest in revisiting a national DNC list. This model was appropriately rejected when the Commission first reviewed it. The passage of time has not altered the impropriety of such a communication-suppressing and burdensome administrative approach to telemarketing privacy. If anything, the proliferation of state DNC rules and regulations makes a national approach even less attractive. Unless the Commission can craft a national DNC structure that supercedes state mechanisms -- something unlikely either through preemption or good faith cooperation -- there is no benefit to carriers or their telemarketers in creating a DNC national regime.

Finally, if the Commission decides to make numerous changes or adopt major modifications to its existing rules, including pursuing a national DNC database, it should establish a *Further Notice* inviting comment on the details and implementation of such modifications. A *Further Notice* would be beneficial to all participants in this proceeding because the Commission could more clearly identify specific rules it continues to target for amendment and parties could focus their analysis and comments on those specific proposals. Especially if a national DNC structure is proposed, a *Further Notice* seeking comment on a defined national DNC proposal would be helpful for commentors and the Commission. Such *Notice* could articulate in greater detail how the database would be developed, who would administer it, how it would be funded, whether inconsistent or redundant state regulation would be preempted and other matters. This fundamental information is essential for sound analysis and to the ultimate establishment of any national DNC mechanism.

II. THE COMMISSION SHOULD REDUCE THE TEN-YEAR RETENTION PERIOD FOR TELEPHONE NUMBERS ON DNC LISTS AND SHOULD REFRAIN FROM PRESCRIBING A BLANKET DNC CONFIRMATION OBLIGATION

A. The Ten-Year Retention Requirement Should Be Reduced To Three Years

The Commission should reduce to three years the length of time that a telephone number must remain on DNC lists, regardless of what type of DNC-list methodology remains at the conclusion of this proceeding. The current ten-year retention requirement for telephone numbers on DNC lists<sup>5</sup> is too long, particularly in light of telephone number disconnections and churn.

The current *Notice* acknowledges that subscribers change telephone numbers with some constancy, referencing the initial TCPA proceeding.<sup>6</sup> And the Commission has held that its DNC rules “should reflect the fact that residential telephone numbers are recycled.”<sup>7</sup> Yet in its *Reconsideration Order*, establishing the ten-year retention requirement, the Commission made no explicit reference to the record evidence regarding telephone number churn of approximately

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<sup>5</sup> 47 C.F.R. § 64.1200(e)(2)(vi). *And see Notice* at n.16, ¶ 17, ¶ 49 and n.178. In its *TCPA Order*, the Commission required telephone numbers to be kept on DNC lists indefinitely. *TCPA Order*, 7 FCC Rcd. at 8766-67 ¶ 24. On reconsideration, the Commission rejected petitions arguing for a five-year time frame in part because of telephone number additions and disconnections. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order*, 10 FCC Rcd. 12391, 12398 ¶ 15 (1995) (“*TCPA Reconsideration Order*”). The Commission ultimately decided that ten years was an appropriate retention period.

<sup>6</sup> *Notice* ¶ 51, referencing *TCPA Order*, 7 FCC Rcd. at 8758-59 ¶ 12. In the *TCPA Order*, the Commission cited to AT&T Comments, CC Docket No. 92-90, filed May 26, 1992 at 13 (20 percent of its subscribers changed telephone numbers each year). *See also* Reply Comments of Sprint, CC Docket No. 92-90, filed June 25, 1992 at 6 (“In the United Telephone companies 25 percent of the customer base churns each year”); *id.* at 6 n.10 (“The United Telephone companies have slightly more than four million access lines. In 1991 over one million lines were installed and over 900,000 lines were disconnected”). *And see TCPA Reconsideration Order*, 10 FCC Rcd. at 12397-98 ¶¶ 14-15.

<sup>7</sup> *Id.* at 12398 ¶ 15.

20% per year.<sup>8</sup> The ten-year retention requirement, even when adopted, was at odds with a possible 60% churn in telephone numbers nationwide over a three-year period.

Based on the evidence, it is clear that at the end of ten years a significant volume of telephone numbers on DNC lists are no longer associated with the individual who first requested placement on any particular list. As a result, for a significant volume of telephone numbers on DNC lists, the Commission's purpose in requiring the number to be on a DNC list in the first instance -- "to ensure that a consumer's request not to be called is respected"<sup>9</sup> is no longer salient since the consumer no longer is related to the telephone number not being called.

The Commission should reduce to three years the length of time that telephone numbers remain on DNC lists. After the expiration of a three-year period, carriers should be permitted to remove telephone numbers from DNC lists. If an individual thereafter objects to receiving a telemarketing call from a carrier or its agent once the three-year period has elapsed, the carrier would not be liable for a DNC violation, but would be required to place the number back on the DNC list.

The Commission should adopt this approach because it strikes a reasonable balance between speech and privacy interests. A three-year retention requirement appropriately accommodates the interests of customers who prefer not to receive telemarketing calls and the legitimate interests of carriers in marketing their services through this important means of communication.

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<sup>8</sup> See note 5, *supra*.

<sup>9</sup> *TCPA Reconsideration Order*, 10 FCC Rcd. at 12398 ¶ 15.

B. Carriers Should Not Be Required To Confirm DNC Choices

The Commission asks whether companies should be required to confirm individuals' DNC requests.<sup>10</sup> When an individual asks Qwest to confirm his/her request to be put on a DNC list, Qwest does so.<sup>11</sup> Commission confirmation prescriptions regarding all DNC requests are not warranted by either the language of the statute or the conduct of most carriers or their telemarketers.

The language of the TCPA is silent on the subject of confirmations. Yet the statute reflects an expectation that carriers having "established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed" should experience only an occasional error resulting in noncompliance, and affords them a defense in this situation.<sup>12</sup> It would be inconsistent with the statutory scheme that affords the benefit of the doubt regarding noncompliance to carriers who establish sound DNC practices -- which need not include a confirmation obligation -- to add such an obligation.

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<sup>10</sup> *Notice* ¶ 17. The inquiry appears to extend to all individuals' DNC requests, because it is not confined to only those situations where a person affirmatively requests a confirmation.

<sup>11</sup> When asked by an individual, Qwest's business office service representatives verbally confirm that an individual has been placed on its internal DNC list. Beyond this process, Qwest has not established a more formal or systemized confirmation process for DNC requests. The development of any such processes would involve time and money. And to the extent the confirmation methodology would involve individuals directly retrieving information from Qwest's DNC database, that database would have to be modified and secured against unauthorized access and action. 47 C.F.R. § 64.1200(e)(2)(iii). ("In order to protect the consumer's privacy, persons or entities must obtain a customer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made"). *And compare TCPA Order*, 7 FCC Rcd. at 8758-71 ¶¶ 12-15, 8765-66 ¶ 23 (at 8760 ¶ 14, noting additional complications associated with online databases and DNC information). Thus access and authentication processes would be essential to any confirmation "system."

<sup>12</sup> 47 U.S.C. § 227(c)(5). *And see TCPA Order*, 7 FCC Rcd. at 8766-67 ¶ 24.

At a minimum, the Commission should not impose a confirmation obligation on all carriers without a cost/benefit analysis. Even when a carrier can choose the confirmation methodology, confirmations entail costs.<sup>13</sup> Evidence of specific costs depend on a carrier's decision of the most appropriate confirmation mechanism. For example, an automated voice outbound calling process will involve different costs than a postcard mailing approach. And still more significant costs would be anticipated with confirmation processes involving any type of direct retrieval of information from carriers' DNC databases.

Costs that are incurred by all carriers are the most likely to be passed on to customers.<sup>14</sup> Yet the marginal benefit of imposing confirmation obligations on carriers that already have reasonable DNC processes in place would be minimal, since it would be expected that there would be relatively few instances of noncompliance.

Of course, when a carrier or telemarketer is found to have engaged in a significant number of violations, the Commission may well deem it appropriate and be justified in imposing a confirmation requirement on that carrier as part of the enforcement process. But barring similar evidence regarding carriers and their marketers overall, the Commission should not adopt broadly-applicable confirmation obligations.

### III. ESTABLISHING A NATIONAL DNC LIST AT THIS TIME WOULD BE VERY DIFFICULT AND SHOULD NOT BE PURSUED

In its previous TCPA proceeding, the Commission considered and rejected the establishment of a national DNC list or database, largely on cost and administrative grounds.<sup>15</sup> The 1991-enacted TCPA has not changed in the ensuing decade, and there is no basis for the

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<sup>13</sup> See *ex parte* letter to Ms. Marlene H. Dortch, Secretary, FCC, from Mr. Bill Johnston, Executive Director, Qwest, dated July 9, 2002, CC Docket Nos. 96-115 and 96-149.

<sup>14</sup> *TCPA Order*, 7 FCC Rcd. at 8760 ¶ 14 (addressing costs associated with a national DNC database and noting that costs most likely “would be passed on to consumers”).

Commission to revisit its prior decision adopting company-specific DNC lists and rejecting a national DNC database.

The *Notice* cites a variety of factors that might contribute to a reconsideration of the Commission's prior decision not to adopt a national DNC list, including its perception of a change in the telemarketing marketplace, combined with increased concerns regarding consumer privacy.<sup>16</sup> Added to these factors are the existence of increasing state regulations of DNC lists, and the Federal Trade Commission's ("FTC") current initiative regarding the possible creation of a national DNC registry under that Commission's auspices.<sup>17</sup>

None of these factors should persuade the Commission to deviate from its current approach to unwanted telemarketing. Internal-company DNC lists reflect the appropriate privacy and commercial balance and should be retained over a more costly and burdensome national DNC database.

While the Commission may have realized increased numbers of consumer complaints around telemarketing since its *TCPA Order*,<sup>18</sup> the number of complaints remains quite small in comparison to the volume of consumers served by carriers. Moreover, without analyzing each complaint to determine exactly what about the telemarketing contact generated the complaint,<sup>19</sup> attempts to remedy such anecdotal situations through a wholesale overhaul of the current rules jeopardizes the careful consumer/industry balance previously achieved by the Commission.

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<sup>15</sup> *Notice* ¶ 51.

<sup>16</sup> *Id.* ¶ 1.

<sup>17</sup> *Id.* ¶¶ 9-10 (states and FTC), ¶¶ 55-59 (FTC), ¶¶ 60-66 (states).

<sup>18</sup> *Id.* ¶ 8 (noting 26,900 TCPA-related inquiries and over 11,000 complaints "about telemarketing practices". No specificity regarding these complaints is provided.).

<sup>19</sup> *See* American Teleservices Association's Motion for Extension of Time, CG Docket No. 02-278, filed Nov. 13, 2002 and the *ex partes* appended thereto.

The Commission's current rules operate favorably in their narrow tailoring and requirement for targeted decision making.<sup>20</sup> In addition, a number of states have imposed their own DNC list requirements. In these circumstances, a national DNC list is neither necessary nor desirable. Such a list would merely increase industry costs, which ultimately would be borne by consumers. Further, unless the Commission were willing and able to preempt state DNC initiatives and related requirements, the adoption of a national DNC list would result in an additional and possibly inconsistent layer of regulation.<sup>21</sup>

Those wishing to change the current equilibrium bear a considerable evidentiary burden. At a minimum, they would need to provide a cost/benefit analysis supporting their advocacy. This would be a formidable task in light of the fact that, right now, any costs of a national DNC database would be additive to those already being incurred for state DNC compliance.

#### IV. THE COMMISSION SHOULD PROCEED WITH A *FURTHER NOTICE* ONCE IT HAS A CLEARER VISION REGARDING SPECIFIC RULE CHANGES

To promote clarity of analysis, and the value of submitted comments in aid of that analysis, the Commission should promulgate a *Further Notice* proceeding at the conclusion of this *Notice* round of comments. In contrast to the very detailed *Notice* that seeks comment on almost every aspect of the existing rules, sometimes proposing multiple or various future interpretations or applications, a *Further Notice* should provide a framework for specific

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<sup>20</sup> *Notice* ¶ 14 (“under the company-specific do-not-call approach, consumers must repeat their request not to be called on a case-by-case basis as calls are received”); ¶ 16 (a company specific approach “allow[s] residential subscribers to selectively halt calls from telemarketers”).

<sup>21</sup> The Commission's legal authority to preempt state TCPA-type initiatives is not clear. 47 U.S.C. § 227(e)(1). See also *Notice* ¶¶ 48, 66. Thus, preemptive action would undoubtedly result in protracted litigation.

proposed rules changes and associated comment.<sup>22</sup> And should the Commission remain interested in a national DNC list, the *Further Notice* should provide more detailed information about what such a database would entail, how it would be developed and maintained, how its costs would be recovered and how businesses funding the creation of such database/list would themselves recover their costs. Indeed, Congress has framed these issues as essential elements for Commission deliberations regarding the establishment of a national DNC database.<sup>23</sup> It is critical that such information be put on the record for comment so that any remaining and relevant inquiries can be investigated and articulated and to secure cost/benefit information that extends beyond speculation.

#### V. CONCLUSION

The Commission need not make wholesale changes to its existing TCPA-implementing rules. It should reduce from ten years to three the length of time that telephone numbers remain on DNC lists. And it should not then proceed to increase burdens elsewhere, such as by prescribing industry-wide DNC confirmation obligations.

At this time, the Commission should not proceed with the development of a national DNC database which would only burden carriers already encumbered by a variety of state DNC mandates. Finally at the conclusion of this proceeding, if the Commission proposes major or

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<sup>22</sup> The approach of the current *Notice*, essentially asking for comments and hinting at potential rule changes on all aspects of the current rules, is not calculated to provide focused commentary on those rule changes the Commission is most *likely* to undertake.

<sup>23</sup> 47 U.S.C. § 227(c)(3).

numerous amendments to its existing rules, it should establish a *Further Notice* seeking focused comment on specific rule amendments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST SERVICES CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System, and 2) served via email on the FCC's duplicating contractor.

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