

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278-
Telephone Consumer Protection Act of 1991)	CC Docket No. 92-90
)	

COMMENTS OF AT&T WIRELESS SERVICES, INC.

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AT&T Wireless Services, Inc. (“AWS”) hereby submits its comments in response to the Commission’s *Notice of Proposed Rulemaking and Memorandum Opinion and Order* (“NPRM”) in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

The NPRM seeks comment on whether the Commission should revise the regulations it enacted in 1992¹ to carry out Congress’ directives in the Telephone Consumer Protection Act (“TCPA”).² Specifically, the Commission requests comments as to the effectiveness of the company-specific do-not-call list requirement, whether it should reconsider the option of establishing a national do-not-call list, and how a Commission established registry would be administered with the existing company-specific and state do-not-call lists, as well as the proposed Federal Trade Commission’s (“FTC”) registry. Additionally, the Commission seeks comment on whether it should make changes to its rules governing the use of autodialing systems, calls to wireless subscribers and the enforcement of the existing rules. Consistent with the TCPA, the Commission states that its goal of enhancing consumer privacy protections must be achieved without imposing undue costs on the industry and consumers.

¹ See 47 CFR § 64.1200 et. seq.

² See 47 U.S.C. § 227.

AWS is committed to protecting its customers' privacy, including preventing unwanted calls from reaching its customers. AWS has a comprehensive customer privacy policy, and has devoted substantial resources toward its implementation.³ For example, AWS has appointed a chief privacy officer and established a privacy council, comprised of representatives from all of the company's business groups, which meets regularly to examine ways to update, manage and improve the company's privacy protections. In furtherance of AWS' privacy goals, and specific to the NPRM, AWS has established a number of safeguards to comply with the TCPA and to ensure that customers receive solicitations only in the form that they want.

AWS believes that the current Commission rules include a number of important safeguards designed to protect consumers against unwanted solicitation calls. However, consumers registered a high level of dissatisfaction with telemarketing practices in the recent FTC telemarketing proceeding,⁴ suggesting that they believe they are not sufficiently protected from improper telemarketing. Accordingly, AWS supports strengthening certain Commission rules to give consumers greater protection against unwanted telemarketing calls and to make it easier for them to secure such protection.

Perhaps most importantly, AWS favors a Commission-established national do-not-call registry, developed in concert with the FTC, to supplement the Commission's company-specific do-not-call list requirement and proposes that consumers be permitted to add their wireless telephone numbers to the list. It is critical, however, that the Commission absorbs and supercedes the state lists and permits consumers who place themselves on the national registry to

³ AWS' website privacy policy has been certified by TRUSTe, an independent accreditation organization.

⁴ See *Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 67 Fed. Reg. 4492 (2002) (may be codified at 16 CFR pt. 310) (proposed January 20, 2002) ("*FTC Notice*").

consent to receive telemarketing calls from companies they designate. AWS also recommends a number of other minor modifications to the telemarketing rules including the addition of a requirement that telemarketing companies with websites offer consumers do-not-call registration on their sites, and that carriers transmit (or at a minimum do not block) caller identification information when making telephone solicitations. Finally, AWS also urges the Commission to increase its consumer education efforts to ensure that consumers are well informed of their rights and, perhaps most importantly, to ensure that they understand the benefits and limitations of telemarketing protections (*e.g.*, delay in updating lists).

If the Commission adopts new rules, it must be careful not to impose undue costs or erect insurmountable barriers to companies that use telemarketing responsibly. Telephonic communication, including telemarketing, is an effective tool for providing consumers with information regarding new services, price offerings, and/or products that will make it easier for them to communicate, and make their lives more productive. Telephone calls give companies valuable first-hand feedback on their products and/or services. Done responsibly, this type of outreach creates a two-way flow of information that is not always accomplished as efficiently and effectively when done via other means.

In addition, the Commission's rules must be flexible enough that carriers can easily incorporate them into existing business models without having to spend significant and scarce capital resources that could better be spent on network upgrades or compliance with other regulatory mandates, including E-911 or CALEA. Otherwise, customers may pay the costs of the new regulations in higher monthly fees or in a reduction of service offerings. Finally, the Commission must also be cognizant of the potential restraints that could be placed on commercial speech when modifying its regulations.

Lastly, the Commission should take steps to ensure that its telemarketing rules do not unfairly penalize law-abiding carriers. In this regard, AWS urges the Commission to expand the scope of the TCPA's safe harbor provisions in order to protect carriers that have dutifully implemented telemarketing policies in compliance with Commission rules, actively monitor their telemarketing practices and correct mistakes when they occur. In particular, the Commission must shield such carriers from liability for violations of the rules by unaffiliated and unauthorized telemarketers that reference a carrier's name or service without permission, provided the carrier provides reasonable verification that it was not connected with the activity.

II. THE COMMISSION SHOULD MAXIMIZE CONSUMER "DO-NOT-CALL" LIST OPTIONS BY ESTABLISHING A NATIONAL DO-NOT-CALL LIST AND MAINTAINING ITS COMPANY-SPECIFIC LIST REQUIREMENT

The Commission should supplement its existing company-specific do-not-call requirement by allowing consumers the option of placing themselves on a single, national do-not-call registry. Consumers who place themselves on the national list should have an easy way to elect to receive calls from specific-companies, and if possible, categories of businesses. These complementary approaches will allow consumers maximum flexibility in controlling telemarketing calls. Assuming this national do-not-call registry absorbs and supercedes the state do-not-call registries and is coordinated with the FTC,⁵ this method also would be much less burdensome to telemarketers and carriers than the existing patchwork of state lists.

A. Company-Specific "Do Not Call" Lists Provide Valuable Protection to Consumers Today

AWS believes company-specific do-not-call lists provide consumers with valuable protection against unwanted telemarketing calls and maximum choice. Company-specific do-not-call lists enable consumers to tailor the information they receive by eliminating marketing

calls from certain businesses while keeping the telemarketing lines open to others. Although AWS proposes some modest changes to the Commission's current company-specific do-not-call rules, AWS generally believes that such rules are effective at protecting consumers' interests – at least for those companies like AWS which follow them.

In AWS' experience, its do-not-call list has strengthened its relationship with subscribers, enabled the company to more effectively target its telemarketing activities to consumers who wish to receive calls and has enhanced its overall reputation in the industry. In order to maximize the benefits of its do-not-call policy, AWS makes it easy for consumers to add themselves to its do-not-call list and to otherwise state their "means of contact" preferences.

Consumers can add themselves to the AWS do-not-call list in a number of ways, including by placing a toll-free call to AWS' customer care line, by asking any authorized telemarketer marketing AWS' services, by sending an e-mail to the AWS privacy mailbox, or by registering on the AWS website. On the AWS website, consumers can specify how they will (or will not) be solicited through a "Do Not Contact Me" form that enables consumers to opt-out of receiving marketing material in the medium of their choice -- e-mail, short text messages, telemarketing and/or direct mail.⁶ This internet option gives consumers with computer access maximum control over direct marketing from AWS. AWS customers can also verify that they are on the AWS do-not-call list by calling customer care's toll-free number.⁷

⁵ See discussion of state lists below at Section II.B.3(c).

⁶ See http://www.attws.com/privacy/consumer_opt.jhtml

⁷ The NPRM seeks comment about whether technological developments have impacted the effectiveness of the company-specific requirement. NPRM ¶15. AWS believes that the technological advances made in the industry since 1992 have helped rather than hurt the ability of consumers to stop unwanted marketing. For example, the increased accessibility of the internet has made it easier for consumers to add themselves to a do-not-call list. Further, predictive dialing and answering machine detection technology have reduced misdialled calls, facilitated real time updates to do-not-call lists and provided a number of other benefits. We

As stated above, AWS believes that the Commission’s current company-specific do-not-call list requirements, to the extent they are followed, make it relatively easy for consumers to add themselves to a company’s do-not-call list. However, AWS would support the adoption of a Commission requirement that telemarketers with websites allow online registration of “do-not-call” requests. This is a low cost way of giving consumers with internet access an alternate method of requesting not to be called. Further, it will allow consumers to proactively register their preference rather than wait until the company calls, and may make it easier for hearing impaired consumers to add themselves to the do-not-call list.⁸

However, AWS does not support the other modifications discussed in the NPRM, including proposals requiring companies to establish an 800 line for do-not-call requests, adding a confirmation requirement to the “do-not-call” preference, or setting a specific time frame for processing do-not-call requests. Although as discussed above, AWS offers certain of these options to consumers, including a toll free customer care line that consumers may use for placing do-not-call requests, AWS does not believe the Commission should adopt regulations that would require all telemarketers to offer these features. The Commission’s telemarketing rules need to be sufficiently flexible to work across the broad range of types and sizes of businesses that telemarket to consumers – many of which may not be able to support the cost of a toll free lines, much less the cost of providing registration confirmations to consumers. In fact, even for a relatively sizeable company like AWS, the cost and burden of complying with a confirmation requirement would be quite significant.⁹

discuss these benefits below in Section III.

⁸ NPRM at ¶ 14.

⁹ NPRM at ¶ 17. The Commission has rejected a confirmation requirement in similar contexts because of the burden imposed on carriers. *See, e.g., In the Matter of Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996,*

Moreover, many of the Commission's stated objectives could be met by establishing a federally administered national do-not-call list. As is discussed below, the establishment of a national do-not-call list would facilitate consumers' ability to register and verify their registration, thus largely obviating the need for confirmation. Not only should a properly implemented national list address consumer complaints regarding accessibility to companies' do-not-call lists and accountability, it would spread the cost of these consumer protections across the industry and consumers.

B. A National Do-Not-Call List Will Provide Even Greater Protection for Consumers and Could, If Properly Implemented, Reduce the Administrative Burden and Costs on Carriers

The Commission should adopt a single, national do-not-call registry in coordination with the FTC. A single, national do-not-call registry would give consumers greater protection and control against unwanted telemarketing and, if properly implemented, will make compliance with consumer marketing preferences easier and less costly for carriers and telemarketers. Such a list will facilitate responsible telemarketing and establish a well-defined system of accountability for the Commission, consumers and the telemarketing industry.

1. The National Do-Not-Call List Will Give Greater Protection to All Consumers, Including Wireless Subscribers¹⁰

The NPRM states that the Commission has received thousands of consumer inquiries and complaints about telemarketing activity. These consumer complaints, in addition to those received by the FTC, suggest that the Commission should establish a do-not-call list. Many consumers commenting in the FTC telemarketing proceeding allege that: they have been

CC Dckt. No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1583-84 (rel. December 23, 1998) (rejecting as unduly burdensome a proposal to require that long-distance carriers confirm preferred carrier freezes in writing).

¹⁰ See discussion regarding wireless subscribers below at Section VII.

harassed by telemarketing phone calls; companies do not give them the opportunity to be placed on a company-specific do-not-call list; they have requested to be placed on the do-not-call list, but they have been called nonetheless; they had no way to prove that they had asked to be placed on the company-specific call list; they receive “dead air” from telemarketers; or that abandoned calls fill up their answering machines.¹¹

One centralized national do-not-call list, administered by a federal agency, could substantially address these complaints. Consumers would be able to preemptively place their names on a single list and hold any company that telemarkets to them accountable for violating the do-not-call request. A consumer living in a state without a state-operated do-not-call list will only need to make one call to establish his or her do-not-call preferences, instead of having to place calls to different companies. Further, provided that, as described below, the registry includes a verification methodology, consumers should be able to ascertain whether they have been properly added to the list.¹² Not only does this make the process of registering convenient, it should substantially reduce (if not eliminate) the problem of abandoned calls because theoretically customer should be receiving no telemarketing calls and thus no abandoned calls.

2. A National DNC List Would Be More Efficient and Cost Effective For Telemarketers

A single list would be significantly more efficient and cost effective for telemarketers. Today, national telemarketers have to check 20 state do-not-call databases and the list is expanding.¹³ Each of the state lists is updated on a different schedule, and each of these states

¹¹ FTC Notice, 67 Fed. Reg. at 4518.

¹² The NPRM at ¶ 51 also asks whether a national list would be accurate. The accuracy of the list will depend on the list administration, and the requirements that the Commission imposes for consumers to update their entries.

¹³ FTC Notice, 67 Fed. Reg. at 4517 n.239. In addition to the 20 states with lists today, five

has its own set of fees and rules for using the database, including different requirements for when companies must “scrub” their lists against the state lists. All of this variation makes compliance with the state-specific consumer do-not-call lists extremely burdensome for telemarketers. It also increases the possibility for error by the telemarketer, thus increasing the risk of violations and resulting penalties. In contrast, if the Commission establishes a national list and absorbs the state lists, telemarketers would need to check only one list at set intervals. With one list, telemarketers will have the security of knowing that they have a complete, up-to-date list of numbers which will decrease the risk of disturbing someone who does not wish to be called.

The Commission should also consider the efficiency and cost savings of having one centralized list. In addition to the internal administrative costs of having to check multiple state do-not-call databases, many states require companies to pay a fee to access the do-not-call list, which significantly increases the costs of telemarketing for companies operating in multiple states. Although the costs in forming and administering a single national registry might appear high, when considered against the total administration costs to states, consumers (who pay fees in some states) and carriers for the multiple state lists, it should be considerably less expensive.

3. Necessary Features of a National Do-Not-Call List

A national do-not-call list should not impose unnecessary restraints on commercial speech, should allow consumers maximum flexibility, choice and protection from unwanted calls, and provide carriers the greatest ease of use. To accomplish these goals, any new set of Commission rules establishing a national registry must allow consumers to elect to receive telemarketing from certain companies and perhaps even categories of companies; maintain the

states are in the process of implementing a do-not-call list, and there is legislation pending in 16 additional state legislatures proposing do-not-call lists. *See* NPRM n. 48.

company-specific list requirement; eliminate state do-not-call lists; and be developed and operated in coordination with the FTC.

a. The National Do-Not-Call Registry Must Be Easy for Consumers to Use and Must Allow Subscribers to Elect to Receive Telemarketing Solicitations from Designated Companies¹⁴

The national do-not-call list should be easy to use and as accessible as possible.

Consumer registration should be as simple as placing a phone call to a toll free number or visiting a website. The registry should have a verification feature so that consumers can easily determine whether they are on the list and so they would not have to keep their own records of registration. The list should be updated frequently so that customers' calling preferences can be implemented expeditiously.

Consumers who have placed themselves on the national do-not-call list should be allowed to agree to accept telemarketing calls from or on behalf of specific sellers or certain types of businesses they select.¹⁵ At a minimum, the do-not-call list should include a provision permitting consumers to elect to accept telemarketing from individual companies. However, AWS urges the Commission to consider permitting consumers to elect to receive telemarketing from categories of providers. Not only would this provide more flexibility for consumers who may want to receive calls about certain types of products or services, it would be a less restrictive restraint on commercial speech.

¹⁴ NPRM at ¶ 58.

¹⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8765 ¶23 (1992) (“TCPA Order”) (emphasizing importance of allowing “residential subscribers to selectively halt calls from telemarketers”).

In addition, given the broad sweep of a national do-not-call list, consumers should be given substantial flexibility in how they can elect to accept telemarketing calls from specific companies. At a minimum it should be as easy for consumers to elect to receive telemarketing calls from a specific company as it is to register on the national do-not-call list. Such flexibility is particularly important to help ensure that the limitations placed on companies' commercial speech is not overly restrictive.¹⁶ In this regard the FTC's "express verifiable authorization" proposal is simply unworkable and should not be adopted by the Commission.

The FTC proposes a process that would require a company to obtain "express verifiable authorization" from consumers who have placed themselves on the FTC's national do-not-call registry but who want to receive calls from specific companies.¹⁷ The FTC proposes that this "express verification authorization" be either a written authorization with the consumer's signature or oral authorization that is recorded or authenticated by the telemarketer as being made from the telephone number to which the consumer is authorizing access.¹⁸ AWS commends the FTC's proposal to permit consumers to consent to receive telemarketing calls from specific companies, but the "express verification authorization" requirement is too administratively cumbersome, inflexible and costly. It would require any company who wants to telemarket to implement an expensive authorization process. It also would make it too difficult for consumers to elect to receive telephonic solicitations from the companies of their choice and likely would discourage consumers from electing to receive any telemarketing. Consumers would either have to incur the delay and inconvenience of providing written consent to the

¹⁶ See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980) (government regulation on commercial speech is unconstitutional if it is not "narrowly tailored" to advance the government's stated "substantial interest" in regulating the speech).

¹⁷ FTC Notice, 67 Fed. Reg. at 4517.

carrier (i.e., obtaining a written consent form, filling it out and returning it to the company) or ensure that the call they make to provide their oral consent is made from the phone they want to receive solicitations on – and not, perhaps more conveniently, from their work or wireless phones.

b. Company-Specific Requirement Should Complement a National Do-Not-Call List

Even if the Commission develops a national do-not-call registry, the Commission should maintain the company-specific do-not-call list requirement. Together with the election option described above, the maintenance of the company-specific list will help ameliorate the “all or nothing” proposition that a national registry might impose and will increase the consumer’s control over the telemarketing calls they receive. National do-not-call and company-specific lists are complimentary means of meeting TCPA goals and addressing consumer complaints.

Maintaining the company-specific list will allow consumers the option to direct do-not-call requests to specific companies. This is especially effective for consumers who only wish to eliminate calls from selected businesses.¹⁹ The inclusion of such a requirement will also help keep the national list from overly restricting speech.

It is also important to maintain company-specific lists to meet expectations of consumers who have signed up on the company-specific lists. Consumers who are currently on company-specific lists expect companies to abide by the Commission rules, maintain the confidentiality of their names on the lists,²⁰ and not call them for ten years.²¹ The Commission cannot reasonably

¹⁸ *Id.*

¹⁹ The Commission has previously recognized these and other benefits of using company-specific do-not-call lists. *See* TCPA Order at ¶ 23.

²⁰ *See* 47 CFR § 64.1200(e)(iii).

²¹ *See* 47 CFR § 64.1200(e)(ii)(vi).

expect that all consumers on the company-specific do-not-call lists will call the national registry to register themselves.

c. A National Do-Not-Call List Makes State Do-Not-Call Lists Unnecessary and Duplicative

The Commission presents a range of options to reconcile national and state do-not-call lists - from leaving the state-by-state do-not-call list patchwork intact, to having a federal registry co-exist with the state registries, to preempting the state registries.²² As AWS discusses below, the only effective way to avoid the cost and confusion that will result from multiple state lists and to create a straight-forward national regulatory regime is to supercede the state registries and absorb them into a national do-not-call registry. In fact, AWS would oppose the creation of a national do-not-call list that did not supercede and absorb the state lists.

The creation of a single, national do-not-call list, without potentially inconsistent state lists, would be better for consumers and carriers. Consumers would enjoy the ease of having to register on only one list in order to avoid intrusive telemarketing calls – regardless of whether they are interstate or intrastate calls. The maintenance of a national do-not-call list in conjunction with numerous state do-not-call lists, on the other hand, would create consumer confusion and complicate consumer education efforts. Consumers may be uncertain whether they need to register on one list or two and what protections each list would provide. Subscribers that register with a state list may presume that no further action is necessary and fail to register on the national list and *vice versa* for subscribers that register first on the national list. Any confusion likely would be exacerbated if the two lists had different registration processes or were updated on different schedules. The existence of multiple lists also could impede enforcement. Issues undoubtedly would arise regarding whether a particular subscriber was registered on the

particular list used by the telemarketer during the particular time period at issue. State lists are not necessary to protect consumers, and would be duplicative in the presence of a national list.

Maintenance of multiple state lists also results in inefficient use of scarce administrative resources with little or no incremental benefit. Significant funds and staff hours are devoted to maintaining multiple state lists. In contrast, if the Commission establishes a single national list, resources presently expended on the administration of 20 state lists would be preserved leading to greater overall economic efficiency. Furthermore, state interests would not be harmed by elimination of individual state lists. The subscribers currently on a state's list could be simply carried over to the national do-not-call list. In addition, a state would remain free to adopt more restrictive substantive state measures under the TCPA as discussed below.

Any structure that results in a national list and multiple state lists would unduly burden legitimate telemarketers operating at a national or regional level. As the Commission notes, almost half of the states currently maintain do-not-call lists and the trend suggests that this group will continue to grow.²³ Telemarketers currently must comply with each of the state lists, which are updated at different times, maintained in varying formats and accessed in a number of different ways. The need to accommodate these multiple lists is costly, both in terms of time and money, and increases the possibility of error. These problems only will be exacerbated if a national list is adopted and the state lists are left in place. The national list will become just one more list presenting its own unique logistical compliance issues.

Without elimination of state lists, telemarketers effectively would be compelled to adjust their operations to track a national list as well as each and every state list with all of the resulting burdens described above. To force national telemarketers to comply with a national list and

²² NPRM at ¶¶ 48, 61.

multiple state lists would be contrary to the Commission’s goal of “enhanc[ing] consumer privacy protections while avoiding imposing unnecessary burdens on the telemarketing industry, consumers, and regulators.”²⁴ On the other hand, elimination of state registries and adherence to a single national do-not-call list should reduce operational costs and promote efficiency; lower the incidence of errors that result in the inadvertent placement of telemarketing calls to listed consumers; and extend the benefits of a national list to consumers in those states without a list.²⁵

For these reasons, AWS urges the Commission to preempt state do-not-call lists. Such an approach would be consistent with the TCPA and well within the Commission’s authority. The TCPA provides that if the Commission establishes a national do-not-call list, a state may not require the use of a list for state purposes that does not include that portion of the national list that relates to that state.²⁶ However, neither in this provision nor elsewhere does the TCPA guarantee the ability of states to maintain state-specific do-not-call lists.

Section 227(e)(1) of the TCPA further provides that the act shall not preempt “more restrictive” state requirements in the following areas: (1) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (2) the use of automatic telephone dialing systems; (3) the use of artificial or prerecorded voice messages; or (4) the making of telephone solicitations.²⁷ However, the act of maintaining the actual list of subscribers is not a substantive state requirement that is covered by this provision. With preemption of state lists, a

²³ *Id.* at ¶ 66, n. 223.

²⁴ *Id.* at ¶ 1.

²⁵ If the Commission does not preempt state lists, it will need to develop rules to address conflicts between the state lists and the national list and situations where inconsistencies result in errors.

²⁶ 47 U.S.C. § 227(e)(2).

²⁷ 47 U.S.C. § 227(e)(1).

state still would be free to enact more restrictive substantive requirements for intrastate calls of the sort protected by Section 227(e)(1). For example, a state would be permitted to enforce its telemarketing laws for intrastate calls in terms of fines and penalties and any state-specific criteria such as different time-of-day restrictions. Moreover, even if the simple maintenance of a separate, state-specific list constituted a substantive condition, it is a neutral element and not a “more restrictive” condition subject to Section 227(e)(1).

Further, although the TCPA does not expressly preempt state registries, the increasingly interstate nature of telemarketing renders a dual system of registries unworkable and results in the implicit preemption of state do-not-call lists. It is well-established that where dual compliance with state and federal regulations would unduly burden a party engaged in interstate commerce, preemption of the state regulatory structure will be implied even if the federal statute does not expressly provide for such preemption.²⁸ As discussed above, forcing national telemarketers to comply with a national list and the increasing number of state lists would impose significant burdens on their operations which are increasingly interstate in nature. Thus, the TCPA implicitly preempts maintenance of dual state do-not-call lists.

For the foregoing reasons, AWS urges the Commission to preempt state do-not-call lists entirely. The Commission should require states to forward to federal regulators the names of all subscribers on their state-specific registries for inclusion in the national do-not-call list. The Commission should establish some reasonable mechanism by which subscribers are notified of the creation of the national list and whether their name has been included on the list and are provided information on how to register or de-register.

²⁸ See *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

If the Commission elects not to preempt state lists, AWS urges the Commission to require the administrator of the national database to incorporate the state lists into the national list on a monthly basis at a minimum. The Commission should also issue a regulation clarifying that carriers will only have to scrub against the national list. Although not so beneficial as the preemption of state lists, the incorporation of state lists into the national list at least will reduce the administrative burdens on telemarketers and help reduce the incidence of errors.

If the Commission decides not to preempt state lists, it also should provide that any state rules will apply only to intrastate calls while the national rules will apply to all interstate calls.²⁹ In the NPRM, the Commission notes that in the do-not-call proceeding at the FTC the state Attorneys General have asserted that states can apply their do-not-call laws to intrastate as well as interstate communications.³⁰ The state Attorneys General provide no legal support for this assertion which is incorrect and contrary to settled precedent on the jurisdiction of the Commission.³¹ It is well-established that the Commission has “exclusive jurisdiction to regulate interstate common carrier services including the setting of rates.”³² This fundamental principle of federal jurisdiction has been recognized in numerous cases and Commission decisions.³³

²⁹ As discussed above, AWS still would envision carriers only having to scrub against a national list that incorporates the state lists.

³⁰ NPRM at ¶ 64.

³¹ Comments and Recommendations of the State Attorneys General at 10, FTC File No. R411001 (April 15, 2002).

³² *Crockett Tel. Co. v. Commission*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) (emphasis added).

³³ See, e.g., *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 862 (2d Cir. 1986); *In the Matter of Interstate Operator Services Providers of America Petition for Expedited Declaratory Ruling*, Commission 91-185, 1991 WL 638197 (July 11, 1991) ¶ 10.

d. The Commission Must Coordinate the Development and Operation of the National List with the FTC

AWS believes that a Commission developed do-not-call list must be the only government run do-not-call registry. Therefore, it is important that the Commission coordinate its efforts with the FTC so as not to duplicate efforts and undermine the goal of a uniform system. Although the jurisdictional boundaries of each agency likely would require separate enforcement activities, AWS does not believe that the statutory obligations of either agency would prevent it from satisfying its own objectives as a precursor to developing the do-not-call registry.

4. The Do-Not-Call Restrictions Generally Should Apply Even Where a Consumer Consents to Use CPNI for Marketing Purposes, With Some Exceptions

The Commission seeks comments on the interplay between Section 222, which regulates use of customer proprietary network information (“CPNI”)³⁴ for marketing purposes, and Section 227, which governs among other things, telephone solicitations or telemarketing. Specifically, the Commission seeks comment on its tentative conclusion that the do-not-call restrictions of Section 227 should be honored where a consumer has requested to have his or her name placed on a do-not-call list even if that consumer has also consented under Section 222 to have the consumer’s CPNI used for marketing purposes. AWS generally agrees with the NPRM’s tentative conclusions in this regard. AWS notes that the critical factor is the type of consent received.

Sections 222 and 227 govern different carrier obligations, although both address a carrier’s marketing activities to some extent. In part, Section 227 requires telephone solicitors to maintain lists of consumers that do not wish to be called by placing consumers on a list if they

³⁴ CPNI includes information about “where, when, and to whom a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent to which the

ask not to be contacted by the telemarketer.³⁵ Section 222 addresses a carrier's *use* of CPNI for general marketing purposes.³⁶ Based strictly on the text of these sections, consumer consent for use of CPNI for marketing purposes does not translate to consent for the carrier to *telemarket* to that customer, nor does a request not to be called under Section 227 prohibit other types of marketing by the carrier (or the use of CPNI under Section 222).

In its older CPNI orders and recent *CPNI Clarification Order* the Commission was primarily concerned with the methods by which a carrier may obtain customer consent for use of CPNI for marketing purposes (e.g., “opt-out” v. “opt-in”) – and not with obtaining customer consent for a specific method of marketing.³⁷ Accordingly, under the Commission's CPNI rules (assuming that a carrier notifies customers of their CPNI privacy rights only and not of their Section 227 rights), a customer's CPNI consent does not equate to customer consent to receive telemarketing by that carrier. The type of consent received should determine what activity is

service is used.” CPNI Clarification Order at ¶ 1.

³⁵ 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(e)(iii).

³⁶ Section 222 of the Act provides that “[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers.” This section of the Act does not prohibit a carrier from using, disclosing, or permitting access to CPNI received from customers in order to initiate, render, bill, and collect for telecommunications services; to protect the rights or property of the carrier or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or to provide inbound telemarketing, referral, or administrative services to a customer for the duration of the call if the call was initiated by the customer and the customer approves of the use of such information to provide such service.

³⁷ The Commission originally determined in its *CPNI Order* that a carrier must notify the customer of the customer's rights under Section 222 and obtain express written, oral, or electronic customer approval (“notice and opt-in”) before the carrier could use CPNI to market services outside of the customer's existing service relationship. Subsequently this order was appealed to the Tenth Circuit, which remanded to the Commission its requirement of the opt-in approach, finding that serious First Amendment issues were raised by this approach. Accordingly, the Commission currently permits the “opt-out” approach as well – which allows a carrier to notify the customer of privacy rights and if the customer has not “opted-out” after a reasonable period of time, permits the carrier to use the customer's CPNI for marketing

permissible. AWS agrees with the NPRM's tentative conclusion that a carrier must adhere to a customer's request under Section 227 not to be contacted by telephone, even where the customer has impliedly consented (by not opting out) to the use of his or her CPNI for marketing purposes, assuming that the customer has received notification of, and provided consent only with regard to CPNI rights. On the other hand, if a customer has *denied use* of his or her CPNI for marketing purposes but has *not* placed her or his name on the do-not-call list, AWS believes that this means that a carrier may contact the customer (through a variety of means, including telemarketing), so long as the carrier complies with CPNI restrictions. Similarly, AWS further agrees with the NPRM's tentative conclusion³⁸ that a carrier should not contact a customer by telephone if a customer is on a *carrier's* do-not-call list even if the customer expressly opts in to use of CPNI upon notification of her CPNI rights (if there was no notification that the customer may be contacted via telemarketing). AWS believes that this situation is distinguishable from the situation where a customer has placed her name on a *national* do-not-call list but has *expressly opted into* a carrier's use of her CPNI for marketing purposes. In such a circumstance, a customer who has placed her name on a generic, *national* do-not-call list but has taken the affirmative step of expressly opting into a specific carrier's ability to use her CPNI for marketing purposes could anticipate that "telemarketing" would be one of the methods by which the carrier might contact the customer.

Further, in the situation where the express opt-in CPNI consent includes customer consent to be contacted by telephone, AWS believes that the carrier has the permission to contact the customer even if that customer has placed her name on either the carrier's or a national do-

purposes.

³⁸ See NPRM ¶ 19.

not-call list.³⁹ Such express opt-in consent to be contacted via telephone should override the customer's request to be placed on a do-not-call list. Indeed, a contrary interpretation would limit rather than advance the consumer choice objectives implicit in Section 227 by preventing consumers from designating those companies from whom they would like to receive telephone calls while, at the same time, allowing them generally to preclude telemarketing.

Finally, AWS agrees with the NPRM that in a situation where a customer has placed her name on the do-not-call list but has consented to the use of her CPNI under Section 222, a carrier is free to market to the consumer *via* other methods, including direct mail, e-mail or text messages unless the consumer expressly requested not to be contacted via these other methods. Section 227's restrictions on "telemarketing" do not apply to other methods of marketing or the use of CPNI in conducting such marketing campaigns. This result properly recognizes the separate spheres of Sections 222 and Section 227 and balances a customer's desire for privacy and lack of disturbance from telemarketing calls, against the Commission's goals of promoting consumer information about telecommunications services and competition.

III. THE COMMISSION SHOULD CONTINUE TO PERMIT THE USE OF AUTODIALERS, INCLUDING PREDICTIVE DIALERS, BUT SHOULD ESTABLISH SOME ADDITIONAL REASONABLE LIMITATIONS ON THEIR USE

The Commission should not change the definition of "automatic dialing device." The Commission's definition is consistent with the statutory definition and should not be revised. Instead, to the extent that the Commission identifies specific problems with particular types of dialing devices that are not addressed by the current rules, it should adopt targeted regulations to

³⁹ As is discussed in Section II.B(3), AWS believes that other types of specific customer consent also would override the do-not-call list.

address those problems. The Commission should be cautious not to place restrictions on dialing devices that limit their proper and beneficial use.

Autodialers, when used properly, provide a number of benefits. Dialing devices not only provide the obvious benefits to telemarketers of increased efficiency,⁴⁰ but also ultimately help consumers. For example, auto dialing software reduces the number of misdialed calls by obviating the human error inherent to manual dialing. Dialing software can also include abuse management tools that store important data tied to each call.⁴¹ With such software, an automatic record of a call can be made that will be useful in the event that a complaint is made and an investigation needed. The dialing software also makes it easier to accept and honor do-not-call requests expeditiously. Once a consumer says that he or she does not want to be called, the software discards the consumer's number so that it will not cycle through the dialer again; the software also allows telemarketers to generate a daily do-not-call report to send to AWS for the company-specific do not call list.

To the extent that specific problems arise with regard to dialing devices that are not covered by the current definition of "automatic dialing device" or the current regulations, the Commission should adopt regulations in order to address those specific problems. For example, to address the problems of consumers not being able to identify calls from telemarketers, especially in the case where the call is abandoned, AWS would support the adoption of a regulation requiring telemarketers to transmit caller I.D. information (name and telephone

⁴⁰ See NPRM at n. 101 (in which the Commission states that the Direct Marketing Association explains how the companies achieve economies of scale by autodialing, which ultimately allows companies to give consumers better services at lower prices).

⁴¹ Dialing software may show the connect date and time, and result; that contain a traceable and searchable database; record calls on demand; and store agent statistics (making it easier for telemarketers to track agents that have complaints filed against them).

number of calling party) when possible and to prohibit them from blocking or altering the transmission of such information in all cases.⁴² Such a requirement would not only assist consumers in determining which calls to answer and which to avoid, it may also give consumers a means of contacting a telemarketer to request placement on the company do-not-call list.⁴³ What is critical is that the Commission only take action where there is a specific problem identified and then narrowly tailors the regulation to address the problem. Unnecessary restrictions on autodialers should be avoided.

IV. IDENTIFICATION REQUIREMENTS

AWS supports the application of identification requirements to all telemarketing calls in which a connection between the dialer and consumer is made, and would support a modification to the Commission rules to clarify that the requirement applies to prerecorded calls. However, AWS does not believe that the identification requirements should apply to abandoned calls and disagrees with the FTC's interpretation that telemarketers who abandon calls are violating the FTC's identification regulations. Such an interpretation of the FTC's rules would effectively end predictive dialing because the technology cannot easily support such a function.⁴⁴

AWS agrees that it is frustrating and annoying for consumers to receive a call, hear "dead air" and not be able to determine who is calling. However, from a technical perspective, AWS is not aware of a way for the caller to provide identification information for abandoned calls.

⁴² See NPRM ¶ 22.

⁴³ The caller I.D. requirement would also help address the problem of abandoned calls from predictive dialers. AWS recognizes that this is not a perfect solution since sometimes the number sent with caller I.D. is the PBX number, but it would help in some cases.

⁴⁴ The Commission's rules require callers who are making telephone solicitations to identify themselves to the called party. 47 C.F.R. § 64.1200(e)(2)(iv). These rules do not apply to calls made to customers with whom the carrier has an "established business relationship." *Id.* at (f)(3)(ii).

Accordingly, if the Commission were to adopt the FTC's interpretation of the identification rules, it would likely prohibit the use of predictive dialers. This is not a result the Commission should want to achieve, since, as discussed above, and acknowledged in the NPRM,⁴⁵ predictive dialers are beneficial not only to the telemarketing industry, but also to consumers. In order to achieve its stated goal of balancing needs of consumers against the needs of telemarketers, the Commission should address the problems of abandoned calls through less restrictive and onerous means such as the imposition of caller I.D. requirements on telemarketers and the establishment of a national do-not-call list.

V. ARTIFICIAL OR PRERECORDED VOICE MESSAGES

The TCPA and the Commission rules prohibit telephone calls to residences using an artificial or prerecorded voice without prior express consent of the called party, unless the company has an established business relationship or the message does not constitute "unsolicited advertising."⁴⁶ AWS only uses prerecorded messages to contact its customers for internal operational reasons (*e.g.*, delinquent bills; notification of service-effecting changes). In addition, AWS leaves pre-recorded messages in customers' voice mail boxes. Customers benefit from receiving these messages; customers receive messages (*i.e.*, late bill payment) without the delay of mail, as a result customers have more time to respond. These calls are operational, and may in no fashion be construed as marketing calls. AWS' ability to continue these practices should not be restricted.

⁴⁵ See NPRM at ¶ 26 ("Cognizant of the benefits of predictive dialing to the telemarketing industry...")

⁴⁶ The Commission rules also allow autodialers to leave non-commercial prerecorded messages. However, the NPRM does not address these calls. See NPRM ¶ 30.

A. Established Business Relationship⁴⁷

For the reasons stated above, AWS believes that it is critical that companies be afforded substantial latitude to communicate with their customers. It is therefore important that the existing business relationship exemption be maintained.

AWS generally supports the current definition of established business relationship because it is sufficiently flexible to cover the range of different types of business relationships companies may establish. AWS believes it is better for the Commission to have a more general standard than to attempt to define precisely the specific types of communications or actions that form a business relationship. However, AWS would like to see the Commission make one alteration to the definition of established business relationship.⁴⁸

Specifically, AWS proposes that the Commission clarify a business relationship can be formed by means other than “voluntary two way communications.” For example, consumers who use a carrier’s service through roaming or otherwise, do not necessarily engage in a voluntary two way communication with the carrier. Nonetheless, those consumers clearly have an established business relationship with the carrier through the use of the carrier’s network and services. The legislative history seems to contemplate a broad range of means to establish a business relationship. It states:

In the Committee’s view, an ‘established business relationship’ also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. (Emphasis added).⁴⁹

⁴⁷ NPRM ¶¶ 34-36

⁴⁸ The definition of “established business relationship” is at 47 C.F.R. § 64.1200(f)(4).

⁴⁹ NPRM n.133.

Thus, AWS believes the Commission should delete in its definition of “established business relationship” the requirement of “voluntary two way communications.”

The NPRM seeks comment as to what a “reasonable period of time” is before the established business relationship ends once the contact between the carrier and customer ends. AWS agrees that a business relationship that is established through an ongoing provision of service should not terminate the moment the service is cancelled. The carrier needs to continue to contact the consumers, perhaps even via a prerecorded call, for a reasonable period of time after the relationship terminates. Roaming records – especially international call records – sometimes are not received for 3-4 months. Consequently, in some cases, the customers’ final bill may be sent months after the customer terminates service.

The NPRM also seeks comment on the interrelationship of the established business relationship and do-not-call lists. Although the questions are mentioned within the section on artificial or prerecorded voice messages, the Commission appears to be asking for comment more generally on the relationship between established business relationship and the do-not-call list.⁵⁰ AWS concurs with the Commission that a request to be placed on a do-not-call list terminates the business’ ability to call the customer for solicitation purposes, unless and until the customer expresses willingness to accept such communications. The NPRM seems to be confused, however, about the effect of a request to be placed on the do-not-call list and business relationships. In the NPRM, the Commission states: “The Commission explained that a customer’s request to be placed on the company’s do-not-call list *terminates the business*

⁵⁰ For example, carriers running promotions may request that consumers agree to be called for marketing purposes (on a one-time only basis) as part of the promotion. Carriers should be able to call those consumers who have expressly agreed to be called per the promotion even if they are on the do-not-call list.

relationship between the company and the customer for the purpose of any future solicitation.”⁵¹

AWS respectfully disagrees. At least in AWS’ case, the business relationship exists independently of any do-not-call requests or customer contact preferences and a request to be placed on the do-not-call list does not effect business relationship. Similarly, inclusion on the do-not-call list does not prevent the business from soliciting in other ways, *e.g.*, mail, text messaging or e-mail or from calling the customers (including using artificial or prerecorded messages) for non-commercial reasons or commercial reasons that do not include unsolicited advertisements.

B. Calls with Dual Purposes

In the NPRM the Commission notes that some artificial and pre-recorded messages have dual purposes. While ostensibly these messages do not include an “unsolicited advertisement,” the messages are left with the intent of generating future business. The NPRM seeks comment on whether its rules should prohibit artificial or prerecorded messages that include information about a product or service but do not immediately solicit a purchase.⁵²

The Commission should not adopt regulations that would discourage companies from making dual purpose calls; these calls can be extremely beneficial to customers. Moreover, it would be effectively impossible for the Commission to try to distinguish between permissible and impermissible calls based on the company’s intent. In the commercial world, all communications to consumers no matter how far removed from the sales process (*e.g.*, to inquire about customer satisfaction), necessarily have another purpose, *i.e.*, to maintain customer satisfaction so that the customer will buy the company’s products and services.

⁵¹ NPRM at ¶ 35.

⁵² NPRM at ¶ 31.

What is crucial is that before the purpose of the communication changes (*e.g.*, from information to solicitation) the customer is clearly informed that he/she is about to hear a sales pitch and nevertheless consents to entering into the second part of the call, *e.g.*, by pressing a designated key or dialing another phone number. Provided that the disclosure is clear and the customer consents, the customer's privacy is well protected. Accordingly, rather than defining all offers for free goods or services as solicitations or prohibiting dual purpose calls,⁵³ the Commission should clarify that consent by the called party is needed prior to the portion of any artificial and prerecorded voice call that transmits an unsolicited advertisement.⁵⁴

VI. TIME OF DAY RESTRICTIONS

The Commission should not modify its time of day restrictions. The existing rules that prohibit unsolicited sales calls before 8:00 am and after 9:00 pm local time at the called party's location, reasonably balance telemarketers' need to make calls with consumers' right not to be disturbed too early or too late. This time frame is the same as that which the FTC is examining in its rulemaking.

VII. WIRELESS TELEPHONE NUMBERS

The Commission seeks comment on the extent to which telemarketing to wireless consumers exists today, whether consumers receive solicitations on their wireless phones and the nature and frequency of such solicitations. The Commission also requests comment as to whether wireless telephone numbers should be considered "residential telephone numbers" and whether there should be different rules applicable to solicitations to wireless telephone numbers

⁵³ NPRM at ¶ 31.

⁵⁴ In this regard, the informational calls described by the Commission that include a phone number for more information, necessarily meet this criteria because the customer has to take an affirmative action – *i.e.*, calling the number before the sales solicitation is made.

than already applied under § 64.1200(e). The Commission also discusses anticipated developments that may affect telemarketing to wireless phone numbers, like porting and pooling, and asks whether telemarketers will have the technology to distinguish between wireless and wireline numbers.

Although AWS believes that at present little telemarketing is directed to wireless subscribers on their wireless phones, such activity likely will increase. For this reason AWS supports allowing wireless subscribers to register on a national do-not-call list. However, AWS does not believe that the Commission should treat wireless subscribers as “residential subscribers” for purposes of applying its restrictions on live telephone solicitations to telemarketing that targets wireless subscribers. Classification of wireless subscribers as residential subscribers would lead to confusion in other areas.

A. Consumers Rarely Receive Solicitations on Wireless Phones

To date, AWS has not received a significant number of complaints from its wireless customers about telemarketing calls to their wireless phones. AWS believes that to the extent that its subscribers receive solicitation calls, it is a rare occurrence.⁵⁵ This could be because wireless carriers generally have not provided telemarketers with the option of “no cost” calls to wireless phones.⁵⁶ The lack of telemarketing to wireless consumers also may be due to the fact wireless numbers are not published and wireless consumers generally have not widely distributed their wireless phone numbers, especially to businesses or other entities that compile lists. This is likely to change, however, as wireless consumers begin to rely more on their wireless phones and

⁵⁵ Recently AWS has received subscriber complaints of unauthorized sales calls on the subscribers’ wireless phones from telemarketers. It is unclear how these telemarketers dialed AWS subscribers, by accident or intentionally.

⁵⁶ See 47 C.F.R. § 64.1200(a)(1)(iii) (prohibiting autodialed calls to wireless phones if there is a charge or if the subscriber has not consented to the call).

as it becomes more difficult for telemarketers and others to distinguish between wireless and wireline phones.⁵⁷ For these reasons, AWS believes the public interest would be served by the Commission's expansion of certain of the telemarketing protections for wireless phones.

B. Wireless Telephone Numbers Are Not “Residential”; However, the Commission Must Allow Wireless Subscribers To Participate in the National Do-Not-Call Registry

Section 64.1200(e) of the Commission's rules imposes time-of-day and other restrictions on live telephone solicitations to “residential subscribers.”⁵⁸ In the NPRM, the Commission seeks comment on whether it should treat wireless subscribers as “residential subscribers” for purposes of applying these restrictions to live telephone solicitations that target wireless subscribers.⁵⁹ Similarly, the Commission observes that the TCPA authorizes it to consider adoption of a national do-not-call list for “residential subscribers.”⁶⁰ The Commission seeks comment on whether this authority would allow it to classify wireless subscribers as “residential subscribers” and to include them on a national do-not-call list.⁶¹ AWS believes that classification of wireless subscribers as residential subscribers in this context would be inappropriate and lead to confusion in other areas of regulation. However, as explained below, the Commission can and should include wireless subscribers on a national do-not-call list.

Although many wireless subscribers today view their wireless telephone as their primary phone, wireless service still differs from traditional residential wireline service in significant

⁵⁷ In this regard, in connection with tests AWS was performing in preparation for pooling, one of its employees who ported a number from a wireline phone received more than ten telemarketing calls in a single day.

⁵⁸ 47 C.F.R. § 64.1200(e).

⁵⁹ NPRM at ¶ 44.

⁶⁰ See 47 U.S.C. § 227(c)(3).

⁶¹ NPRM at ¶ 57.

ways. Although some wireless consumers are beginning to use their wireless phones in their homes, most subscribers rely primarily on wireless phones when they are on the move, away from home or office. In addition, subscribers often use wireless phones for mixed uses. For example, a wireless subscriber may use her wireless telephone as a business line during the day and use the same telephone for her personal, “residential” calling needs in the evening. Thus, classifying wireless service as residential service would result in the classification of a significant amount of business use as residential. In sum, wireless service is too dynamic, multi-faceted and characterized by mixed uses to be classified strictly as residential service.

Classification of wireless service as residential service in the context of the TCPA Rules also would lead to ambiguity and uncertainty in other areas of regulation. In many instances, regulatory programs or requirements apply by their terms to traditional residential service and their application to wireless service clearly is not intended or would be illogical and unworkable. For these reasons, AWS urges the Commission not to classify wireless subscribers as residential subscribers in applying its restrictions on live telephone solicitations set forth in Section 64.1200(e) of the TCPA Rules.

However, the reference in Section 227(c)(3) to “residential subscribers” does not prohibit the inclusion of wireless subscribers on a national do-not-call list. Although Section 227(c)(3) refers to “residential subscribers,” there is no apparent intent to exclude wireless subscribers from any national do-not-call list. Indeed, a key goal of the TCPA is to limit intrusive calls from telemarketers and to protect subscribers’ privacy.⁶² The inclusion of wireless subscribers on a national do-not-call list would be consistent with Congress’ intent. Indeed, some subscribers may consider placement of a telemarketing call to their wireless phone to be as intrusive as a call

⁶² See 47 U.S.C. § 227, Congressional Statement of Findings (appended thereto).

to their residential wireline phone. In addition, as wireless subscribers become able to port numbers from wireline to wireless phones and become more comfortable distributing their wireless number, their exposure to telemarketing calls will grow, making it even more important that wireless subscribers have the option of registering on a national do-not-call list. If the Commission establishes a national do-not-call list, it should recognize the equal privacy interests of wireless subscribers and allow them to register on the national list.

The fact that Section 227(c)(3) does not expressly reference the inclusion of wireless subscribers on a national do-not-call list does not preclude the Commission from allowing these subscribers to register on the list. The Commission may allow wireless subscribers to register on a national do-not-call list based upon its authority under Section 4(i) of the Communications Act. Section 4(i) empowers the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”⁶³ Section 4(i) is “akin to a ‘necessary and proper’ clause” which gives the Commission power to act in a manner that is “‘reasonably ancillary’ to other express provisions.”⁶⁴ Here, Section 227(c)(3) expressly authorizes the Commission to establish a national do-not-call list for residential subscribers. With nothing in the provision indicating an intent to prohibit the inclusion of wireless subscribers on the list, the Commission may exercise its Section 4(i) ancillary authority to permit the inclusion of wireless subscribers. As discussed above, extension of privacy protections to wireless carriers is within the clear intent of the TCPA and therefore inclusion of wireless carriers on a national do-not-call list would be consistent with and in furtherance of the Act and Section 227(c)(3).

⁶³ 47 U.S.C. § 154(i).

⁶⁴ *Motion Picture Association of America, Inc. v. Federal Communications Commission*, 309 F.3d 796, 806 (D.C. Cir. 2002) (citation omitted).

C. Distinguishing Between Wireless and Wireline Numbers in a Pooled/Ported Environment

As the Commission recognizes, when consumers are able to port numbers from wireline phones to wireless or when wireless carriers are assigned numbers from the pool, it becomes more complicated for telemarketers to distinguish between wireless and wireline numbers.⁶⁵ The NPRM seeks comment on the availability of technological tools that would permit telemarketers to distinguish between a wireline and wireless number in a pooled/ported environment. Specifically the NPRM seeks comments on whether telemarketers should be provided with access to the Number Portability Administration Center's ("NPAC") Interactive Voice Response ("IVR") system, access to which is currently limited to service providers, law enforcement and the public safety agencies. The Wireless Number Portability Operations ("WNPO") team, has examined this issue. The group has reviewed a range of options and it appears from an initial review that there are other options that may be more efficient for distinguishing wireless phones from wireline than providing telemarketers with access to NPAC IVR. For example Intrado markets a product called the Intrado National Repository Line Level ("NRLL") database. The NRLL database houses all wireline numbers. With the start of wireless number portability on November 24, 2003 telemarketers could query the NRLL database to determine whether a number is wireless or wireline. If the number is not found in the database the telemarketer could assume that it is a wireless number and tailor its telemarketing activity accordingly. AWS would urge the Commission to consider all options before it makes a decision on this issue.⁶⁶

⁶⁵ NPRM at ¶ 46.

⁶⁶ Because wireless carriers are not yet porting their numbers and because the problem of inadvertent telemarketing calls to wireless subscribers is anticipated to occur primarily in a porting environment, the Commission has approximately 11 months to make this decision.

In the meantime, it appears that there is a relatively easy, “low-tech” solution that will assist telemarketers in identifying pooled numbers held by wireless carriers. Telecordia has developed a stand alone product called the “Telemarketers Data Source” that permits telemarketers to distinguish wireless from wireline numbers. Although this product currently just provides information at the NXX level, reportedly it will be updated in the near future to include information at the NXX-X level. Although this is not a perfect solution (since this reference material would not show when wireline carriers held a contaminated thousand block that included wireless numbers) it would help in the short term.

VIII. ENFORCEMENT

A. Private Right of Action/Safe Harbor

In the NPRM, the Commission seeks comment on any needed clarifications regarding the TCPA provisions authorizing consumer suits for rule violations and establishing defenses to such claims. The Commission in part asks whether it should require non-common carrier telemarketers to respond to informal complaints filed at the Commission.⁶⁷ AWS believes that the Commission should require non-common carrier telemarketers to respond to informal complaints.

Consumers, regulated entities and regulators alike will benefit from consistency in the application of the Commission’s informal complaint procedures. The informal complaint process allows for efficient resolution of minor disputes while calling the Commission’s attention to patterns of misconduct that warrant closer scrutiny and investigation. The area of telephone solicitations, in which individual consumers may be dissuaded from pursuing a more

⁶⁷ NPRM at ¶ 47.

costly formal process by the often non-pecuniary nature of the harm, especially would benefit from application of the informal complaint procedures.

The Commission also seeks comment on other necessary clarifications regarding the enforcement provisions.⁶⁸ AWS respectfully requests the Commission to clarify and further develop the “safe harbor” provision set forth in Section 227(c)(5) of the TCPA.

Section 227(c)(5) provides that it shall be an affirmative defense to a TCPA claim that the entity has “established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of regulations prescribed under this subsection.”⁶⁹ These provisions make clear that an entity that implements policies and procedures regarding compliance with the TCPA, monitors performance under such a system and takes corrective action if necessary will not be liable for a violation.

AWS requests that the Commission clarify the scope of this safe harbor as it applies to a company’s potential vicarious liability for violations by independent telemarketers. In some instances, a company may authorize a third party, like a dealer, to market the company’s product or services on an autonomous basis. In these circumstances, the Commission should confirm that if such third party violates the TCPA provisions despite the authorizing company’s clearly-stated compliance policies, that company shall not be held liable for the violation.

In other instances, telemarketers seek to market a company’s products or services without having been retained by the company to do so and without the company’s authorization to do so.⁷⁰ The Commission should make clear that a company is not liable in such circumstances for

⁶⁸ *Id.*

⁶⁹ 47 U.S.C. § 227(e)(5).

⁷⁰ AWS does what it can to prevent unauthorized use of its tradename in marketing. For example, it strictly limits the ability of its independently owned and operated dealers to

TCPA violations committed by these telemarketers. In addition, the Commission should clarify the scope of a company's burden of proof in such instances. In some cases, a subscriber registered on a do-not-call list receives a telephone solicitation made by a telemarketer referencing a particular company even though that company has not authorized the call and has no knowledge of the solicitation. The subscriber then files a complaint referencing the company as the source of the solicitation. The Commission should provide that when the company attests that it did not authorize the solicitation and offers reasonable verification of that fact, the burden shifts to the governmental entity processing the complaint to prove the company's responsibility. The alternative of requiring the company to "prove the negative" is unreasonable and unduly burdens companies acting in good faith.

telemarket using the AWS name. Dealers are not permitted to telemarket AWS's services without prior written authorization. The extremely small percentage of dealers who are given permission to telemarket (less than 1%) are allowed to do so only under specific written authorization and a specific set of guidelines that require compliance with the Commission's telemarketing rules, AWS' policies and procedures, and state law.

