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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

92-90

December 9, 2002

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FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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OFFICE OF THE SECRETARY

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

WORLDCOM COMMENTS

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December 9,2002

SUMMARY

WorldCom opposes the adoption of a national "do-not-call" (NDNC) list for the following reasons: 1) the ultimate costs to consumers, in terms of increased prices and loss of information, outweighs the benefits of such a list; 2) a NDNC would have a devastating impact on the competitiveness of the telecommunications industry, particularly since it substantially favors incumbent providers; 3) there are no significant changes in relevant circumstances since the Commission first considered and declined to implement NDNC; 4) such a regime would pose unconstitutional restrictions on commercial free speech; 5) adopting a national no call list in conjunction with the Federal Trade Commission's (FTC) proposal would violate the requirements of the Telephone Consumer Protection Act (TCPA); and 6) implementing NDNC would impose an undue burden on common carriers.

WorldCom generally supports the comments being filed today by The Direct Marketing Association (DMA), specifically "Part I – Comments Regarding the Current Rules." WorldCom, for the most part, opposes any modifications to the current regulations on telemarketing practices. WorldCom does, however, urge the Commission to revisit its rule requiring that company-specific "do-not-call" requests be honored for ten years from the time the request is made. WorldCom recommends a five-year period. Moreover, WorldCom does not see a need for the regulation of predictive dialers. However, if the Commission chooses to regulate the abandonment rate of predictive dialers the mandated rate should be no less than a 5% rate.

In evaluating the current and proposed rules governing telemarketing practices the Commission should consider the following material facts:

- Telemarketing benefits the economy. It generates hundreds of millions of dollars in sales a year. It is responsible for nearly one third of all direct sales.
- Telemarketing is beneficial to the individual consumer. Fifty percent of surveyed households purchased a product or service over the telephone in the past year. Telemarketing significantly contributes to the reduction in prices of competitive services such as telecommunications services. Telemarketing keeps consumers informed of new offerings.
- Telemarketing *is* critical to the competitiveness of service industries such as the telecommunications industry. The majority of all MCI sales - including its new competitive offering, The Neighborhood - are the result of telemarketing efforts.

Some of the regulations being considered in this proceeding could have devastating consequences. In particular:

- NDNC will have a detrimental impact on development of competition in the local telecommunications service market. MCI has found that its local market penetration is up to 60% higher in states without a state "do-not-call" list.
- NDNC will substantially favor incumbent telecommunications providers which have an established business relationship with nearly all of the consumers in-region. The TCPA exempts companies with an established business relationship from the effects of such a list. consequently making the incumbents virtually exempt from the effects of such a list.
- Regulation that directly or effectively bans or severely restricts the use of predictive dialers will substantially raise marketing costs. MCI tests found that

attempts to reduce the abandonment rate on predictive dialers from MCI's current 3-5% rate to a 1% rate reduced productivity by 50%.

The Commission also seeks comment on the availability of any technological tools that may allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or recognize wireless numbers that have been assigned from a pool of numbers that formerly were all wireline. It is WorldCom's view that the time is not ripe to assess, or address, the impact that number portability and number pooling may have on the capabilities of telemarketers to identify wireless numbers in order to comply with the TCPA.

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

WORLDCOM COMMENTS

WorldCom, Inc. (WorldCom) respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking (*Notice*), in the above-referenced dockets, released on September 18, 2002.[1]

In its ***Norice*** the Commission seeks comment on whether it should revisit the option of establishing a national do-not-call (NDNC) list.[2] WorldCom opposes the adoption of a NDNC list for the following reasons: 1) the ultimate costs to consumers, in terms of increased prices and loss of information, outweighs the benefits of such a list; 2) a NDNC would have a devastating impact on the competitiveness of the telecommunications industry. particularly since it substantially favors incumbent providers; ***3)*** there are no significant changes in relevant circumstances since the Commission first considered and declined to implement NDNC; 4) such a regime would pose unconstitutional restrictions on commercial free speech; *5)* adopting a national no call list in conjunction with the Federal Trade Commission's (FTC) proposal would

[1] *In the Matter of Rules and Regulations Implementing the* ***Telephone*** *Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Docket No. 02-278 and CC Docket No. 92-90, FCC 02-250 (rel. Sept. 18, 2002)(*Notice*).

violate the requirements of the Telephone Consumer Protection Act (TCPA);[3] and **6)** implementing NDNC would impose an undue burden on common carriers

The Commission also seeks comment on the effectiveness, and need for modification, of its current rules governing unwanted telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimiles.[4] The Commission also seeks comment on the effectiveness of company-specific do-not-call lists.' With regard to these issues, WorldCom supports the comments being filed today by The Direct Marketing Association (DMA), specifically "Part I – Comments Regarding the Current Rules."' WorldCom, for the most **part,** opposes any modifications to the current regulations on telemarketing practices,' and hereby provides additional comment on the effectiveness of company-specific lists, the benefits of predictive dialers, and our concern with the proposed regulations of predictive dialers.

Furthermore, the Commission seeks comment on any future developments that may affect telemarketing to wireless phone numbers. In particular, the Commission seeks comment on the availability of any technological tools that may allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or recognize wireless numbers that have been assigned from a pool of numbers

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[2] *Notice* paras. 1, 11 and 49.
[3] *See* 41 U.S.C. § 227.
[4] *Notice*, paras. 1 and 11
[5] *Id.*, paras. 1 and 14.
[6] WorldCom, however, **does** not support DMA's proposed standard for a maximum setting on the abandonment rate of predictive dialers, in particular the time period over which the rate should be measured. See *infra,* pp. 43-44. Additionally. the Commission seeks comment on the Attorneys General interpretation of state authority to regulate telemarketing calls originating outside of the state. *Notice*, para. 63. WorldCom supports the comments DMA is filing today on this matter. States do not have jurisdiction to apply state laws regarding telephone solicitations to interstate calls.
[7] **As** discuss in second half of these comments, WorldCom supports a reduction in the ten-year retention requirement on company-specific lists. *See infra.*, p. 40.

that formerly were all wireline.[8] It is WorldCom's view that the time is not ripe to assess, or address, the impact that number portability and number pooling may have on the capabilities of telemarketers to identify wireless numbers in order to comply with the TCPA

THE COMMISSION SHOULD NOT ADOPT A NATIONAL DO-NOT-CALL

In its *Notice* the Commission seeks comment on whether it should revisit the option of establishing NDNC list.[9] WorldCom opposes the adoption of a NDNC list for the reasons discussed below.

I. THE DISADVANTAGES OF A NATIONAL DO-NOT-CALL REGIME VASTLY OUTWEIGH ANY ADVANTAGES SUCH A SYSTEM OFFERS.

In determining whether to adopt NDNC, pursuant to the TCPA, the Commission must undertake a full and thorough evaluation, considering all advantages and disadvantages of such a regime.[10] The disadvantages are substantial. NDNC poses a negative impact on the economy and the competitiveness of the telecommunications market and still poses cost, accuracy and privacy concerns. The potential benefits of such a list are indeterminate, and there already exists a practical mechanism for consumers to prevent unwanted telephone solicitations

Telemarketing, under the Commission's current regulations, is a cost-effective tool for companies to introduce new products, services, and service providers into the

[8] *Notice*, para. 46.
[9] *Notice* paras. 1, 11 and 49.
[10] "The proceeding shall *compare and evaluate* alternative methods and procedures…**for** their effectiveness in protecting such privacy rights, and in terms of their cost *and other advantages and disadvantages*." 47 U.S.C. 227(c)(1)(A)(emphasis added).

marketplace. It provides consumers access to goods and services that are not generally sold in the retail market, such as telecommunications. **As** such, telemarketing is beneficial to companies and consumers alike. The benefit to consumers is evident by its success. In general, telemarketing generates *hundreds of billions* of dollars a year in sales.[11] It accounts for approximately one third of the direct sales in the United States.[12] Consequently, curbing this form of marketing could have a dramatic negative impact on the economy.

Moreover, telemarketing is critical for vigorous competition in the telecommunications industry. **As** discussed below[13] and in the attached exhibits, telemarketing provides new entrants a cost-effective means to inform consumers of their choices in local and long distance providers and services and instigates zealous price competition.[14] Additionally, due to the statutory exemption for companies with an existing business relationship, NDNC will provide incumbents a considerable competitive advantage. With the advent of local telecommunications competition, it is now more important than ever for the Commission to recognize the value of telemarketing and *to* refrain from imposing undue burdens or costly regulations on the practice.

Furthermore, in its initial evaluation of the costs and benefits of creating a NDNC database the Commission determined that the disadvantages outweighed any possible

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[11] *See Notice*, para. 7; *See also*, Comments of the Direct Marketing Association, Inc. and The U.S. Chamber of Commerce, Before the Federal Trade Commission, FTC File No. R41 1001, p.5 (filed Apr. 15, 2002)("DMA Joint Comments to the FTC").
[12] ***Norice,*** para. 7.
[13] *Infra.*, p. 6
[14] *See Rules and Regulations Implemeniing ihe Telephone* ***Consumer*** *Protection* ***Act*** *of 1991*, *CG* Docket No. 02-278, CC Docket No. 92-90, Separate Statement of Chairman Michael K. Powell (Sept. 12, 2002). ["We also seek to empower consumers directly by providing them information they can use to make educated decisions in a marketplace where the options can sometimes be daunting."]

advantages.[15] The Commission concluded that a national database would be costly, difficult to establish and maintain in a reasonably accurate form, and posed a risk of misuse of consumer information by unscrupulous entities.“ The Commission also determined that a government-sponsored no call database was contrary to the public interest.” **As** discussed below.[18] the record does not reflect that the Commission's previous concerns regarding cost, accuracy and privacy have been alleviated, or that a government-sponsored no call list would be in the public interest.

The Commission states in its ***Norice*** that it has received TCPA-related complaints and inquiries.'' The Commission, however, does not discuss how these complaints relate to a lack of NDNC, or how they would be remedied by such a regime. It appears the primary. if not the *only,* advantage NDNC offers over company-specific lists is that “it might provide consumers with a one-step method for preventing telemarketing calls.”[20] Yet it is not clear that the majority of consumers demand this one-step method. In fact, a recent survey of residents in states with government-sponsored DNC lists revealed that, ofthe respondents aware of their state's DNC list, the majority of households chose not to register on the list.[21]

Lack of material burden to consumers in having to repeat a do-not-call request on a case-by-case basis is also indicated by the fact that, in states that have initiated general no call lists, the inclusion of a nominal registration fee is enough to dissuade subscriber

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[15] ***In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act*** *of 1991,* CC Docket No. 92-90, Report and Order, FCC 92-443, para. 14 (rel. Oct. 16, 1992)(*TCPA Order*).
[16] *Id.*
[17] *id.,* para. 14, **n.** 24.
[18] ***Infra.***, p. 16.
[19] ***Norice,*** para. 49, n. 177.
[20] *Notice*, para. 49.
[21] Michael **A.** 'Turner, Ph.D., Information Policy Institute, “Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices,” Final Repon, **p.** 30 (Jun. 4, 2002)(“IPI Report”),

enrollment.**Although the Commission is precluded by statute from imposing a fee on consumers, such unwillingness to pay a nominal fee for list participation denotes a lack of considerable consumer benefit from such regimes. Clearly the convenience of a one-step method does not outweigh the substantial benefits telemarketing brings in the form of consumer information on new products and service offerings, price reductions, and more vigorous competition in general, let alone overcome the costs, accuracy and privacy concerns posed by a NDNC list.

As discussed in second half of these comments,[23] company-specific do-not-call lists are a viable mechanism for consumers to prevent unwanted telephone solicitations and offer significant advantages over NDNC to both consumers and telemarketers. The current company-specific system allows consumers to pick and choose which companies call them. It also affords companies an effective means to introduce customers to their products and services, which is critical in emerging markets, while protecting consumers from repeat calls if the consumer requests no further contact from a company. Consumers cannot always anticipate all ofthe products, services or price reductions they may learn of via telephone solicitations, but when they are provided an offer that interests them, consumers respond favorably to, and benefit from, that telephone solicitation. This is evident by the fact that. according to a recent survey, one-half of the households surveyed acquired at least one product or service over the telephone in the past year, with

[22] In Florida and Georgia, states that require yearly fees for registering a household on the DNC list, only 4-14% ***of*** the households ***aware*** of the state DNC list registered. IPI Report, pp. 30-3 I. ***See*** *also,* Comments and Recommendaiions of the Attorneys General of Alabama *PI al*, Before the Federal Trade Commission, FTC File No. R41 1001, p. 22. ("AG Comments to *the* FTC") ("To the extent that a state may currently require a small registration fee we are concerned that any additional fee will serve only to dissuade registration in the Commission's registry."] **See** *alto,* T. Randolph Beard, PH. D., "Telemarketing and Competition: An Economic Analysis of 'Do Not Call' Regulations," pp. 4-5, n. 3 (March 2002). ["Participation appears to be very low in those states ihat charge for the service."]

[23] *Infra.*, p. 38.

the vast majority reporting satisfaction with the experience.[24] In fact, even some of those that placed their number on a state do-not-call list purchased an item via telemarketing."

A. A NATIONAL DO-NOT-CALL REGIME WILL SEVERELY HINDER COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY, HARMING TELECOMMUNICATIONS CONSUMERS.

The telecommunications market has unique aspects that make telephone solicitations particularly suitable to telecommunications sales and consequently advantageous to telecommunications consumers. According to a recent survey, the main reason respondents provided for being unlikely to purchase over the phone was not privacy. rather it is an inability to see what they purchase.[26] This factor is not applicable to telecommunications services. As discussed below, in purchasing telecommunications services, direct contact to discuss the various options, features and plans is most crucial This may explain why telephone services are the second most commonly acquired product or service purchased over the phone.[27] Telephone solicitations are the primary mechanism for, and the means by which consumers are accustomed to, purchasing competitive telecommunications services. The majority of customers who switch service to MCI, a wholly owned subsidiary of WorldCom that sells residential telecommunications services, do so in response to telemarketing efforts.

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[24] IPI Report. pp. 4-5 and 17. Although the report, at least at one point, refers to "inbound telephone solicitations," the authors meaning is clarified by statements such as "organizations ...*telephoning into* households" and "any company ... that *has telephoned*..." *Id.* (emphasis added).
[25] *Id.*, p. 6. *See also, id.*, p. 16. ["[T]he acquisition of products or services as a result of telephone solicitations from a national company with whom the respondent did not otherwise do business is slightly reduced for households who are on (16%) ...a state do not NDC list."]
[26] IPI Report, p. 4.
[27] *Id.*, p. 3.

Moreover, as opposed to other products and services, the consumers' needs for which are unknown, every household that receives a telephone solicitation is necessarily a purchaser of telephone services. Thus, it is exceedingly more likely that the consumer will be interested in. and benefit from, the information provided during a telephone solicitation related to competitive telephone services

Furthermore, a significant change since Congress and the Commission first considered a NDNC is the advent of competition in the formerly monopolized local telephone markets and the allowance of the Regional Bell Operating Companies into the long distance market. This is the result of the Telecommunications Act of 1996, which Congress adopted subsequent to the TCPA, which tasked the Commission with promoting competition in all sectors of the telecommunications industry. The Commission cannot ignore the detrimental impact of a NDNC regime on competition in the telecommunications industry. As discussed below, NDNC will 1) inflict an extreme burden on new entrants of the still exceedingly monopolized local market; 2) diminish telecommunications price competition; and 3) grant incumbents an enormous marketing advantage over competitive providers due to the statutory exemption for companies with an existing business relationship.

Considering these unique circumstances and potentially devastating consequences, the Commission should refrain from imposing a NDNC regime on common carriers.

(1). A NATIONAL DO-NOT-CALL REGIME WILL BE DETRIMENTAL TO LOCAL MARKET ENTRY.

Local competition is finally emerging. Consumer demand for competition is evident by the 2.4 million local customers subscribed to MCI across forty states and the District of Columbia since it launched local service in New York four years ago.[28] Competition in the local market not only lowers prices, it allows for unique packaging of telecommunications services such as MCI's new, and notably popular, Neighborhood product. The Neighborhood is an innovative all-distance telecommunications product that combines a special feature package and unlimited local and long distance calling for one price.

Continued expansion of local competition, and the associated benefits to consumers, is dependent on consumer awareness of their choices. Transforming a monopoly market into a competitive one is a difficult endeavor. One key obstacle is that consumers are accustomed to the well-known incumbent provider and its services, and many may not even be aware of their new options. Therefore, carriers not only need to be able to technically provision service they must also be able to *effectively* market their new service offerings. As discussed in the attached declaration of Andrew Graves, Exhibit **A,** telemarketing is the most cost-effective way to introduce new products and services to the public, especially local and long distance telecommunications services that customers customize for their specific needs.[29] The dramatic impact of telemarketing on opening previously monopolized telecommunications markets was demonstrated with MCI's entry into the long distance market after the divestiture of AT&T, which is now being repeated with MCI's new integrated product, The Neighborhood. The majority of subscribers to The Neighborhood signed up through telemarketing. Incredibly, this sales

[28] *See* Exhibit A, Declaration of Andrew Graves, para. 3. Note. MCI had previously attempted to enter the local market in California.

channel enabled MCI to welcome over a half a million customers within just eight weeks of introducing the product.[30]

The cost and extent of NDNC could force companies to cease telemarketing altogether and, as a result, deprive all consumers of this familiar and cost-effective vehicle for obtaining information about competitive products and service offerings. Even if telemarketing were to survive the implementation of NDNC, many consumers electing to be included in the national database would be denied valuable information. It is important to recognize that consumers cannot anticipate all the offerings or information they will receive via telemarketing. For example, the vast majority of consumers do not know that they have a choice in their local service provider. A NDNC list would mean that some consumers will never learn that they have a choice in local service providers, stopping local competition before it ever gets started.''

MCl's experience with state do-not-call regimes demonstrates that these lists critically limit a carrier's ability to introduce residential consumers to its attractive competitive offers, thereby hindering the expansion of local competition and consumer choice. MCI performed a comparison of its local penetration in states that had state do-not-call lists that were applicable to MCI and states that did not have such a regime, using pairs of similarly sized states where MCI service was launched at the same time. The analysis showed that MCl's local market penetration is up to 60% higher in the states without a state do-not-call list.[32] It is a grave misfortune for the consumers in states

[29] Graves. paras. 4-5.
[30] *See* ***Id.,*** paras. 3-4.
[31] *Id.*, paras. 6-7.
[32] *Id.*

which have such lists that they are being denied or delayed access to valuable information on unanticipated yet potentially welcomed new and innovative products and services

(2). A NATIONAL DO-NOT-CALL REGIME WILL DIMISH THE BENEFITS OF "INFORMATIVE ADVERTISING" AND PRICE COMPETITION THAT TELEMARKETING OFFERS.

Telemarketing provides telecommunications consumers a substantial benefit by providing service and product information that is pertinent to a particular individual and by stimulating vigorous price competition. The Commission already concluded that consumers reap significant benefits when telecommunications marketing is personalized.[33] Moreover, it is virtually indisputable that consumers benefit from price competition

Attached hereto as Exhibit B is an economist's report on the negative impact of a national no call list on the telecommunications industry, which the **DMA** and Chamber of Commerce submitted with their joint comments to the Federal Trade Commission.[34] The report discusses the benefits of advertising to the competitive process in general and emphasizes the significance of telemarketing to competition in the telecommunications industry in particular. "[I]n some important cases, advertising increases competition, lowers prices, and benefits the public."[35] Specifically, the report distinguishes between "informative" advertising and '-persuasive" advertising. Persuasive advertising can be

[33] *See* Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Dockets 96-115, 96-149, and 00-257, FCC 02-214. para. 35 (Jul. 25, 2002)("CPNI Third Report and Order"). ["Customers are in a position to reap significant benefits in the form of more personalized service offerings...based on the CPNI that the carriers collect."] Direct contact with the customer, via telemarketing, assists the sales representative in determining the consumer's needs when CPNI is not available.
[34] *See supra.*, n. 20. T. Randolph Beard, PH. D., "Telemarketing and Competition: **An** Economic Analysis of 'Do Not Call' Regiilations" (March 2002).
[35] Beard, p. 6.

characterized as advertising that "seeks to alter preferences."[36] For example, the use of a celebrity may prompt a consumer's desire in a product or service. "Informative" advertising, on the other hand, informs consumers of important features of the product or service such as price. "In general, economist view price advertising as beneficial to consumers and oppose restrictions on it."[37]

Telemarketing, particularly in the telecommunications industry, clearly falls in the latter category Telemarketing calls advertising telecommunications services stress price reductions. free minutes, cash awards, new bundling arrangements, additional service offerings and other important information on features and functions that consumers need to make educated choices regarding their provider of telecommunications services.[38] Telemaketing allows consumers to ask questions and obtain the information needed to choose the service that fits their individual needs, and provides a simple means to subscribe to those services. Other forms of telecommunications advertising are directed at the public in general and therefore may not provide the information most pertinent to a particular user.

In addition to being a cost-effective means to provide consumers information on offerings and services, telemarketing enables carriers to target customers of rivals, which ultimately results in vigorous price competition like that experienced in the long distance telephone market. Since virtually everyone subscribes to a telephone service, a sales call to a non-customer is necessarily a solicitation to the customer of a rival. Since telemarketing is the most cost-effective means of "raiding" the customer base of a rival

[36] *Id.*
[37] *Id*
[38] Heard. p 7. Graves, para. 5

carrier."' it " . . . appears responsible for most customers switching between carriers in response to offered price reductions."[40] Moreover, in order to prevent the loss of a customer as a result of a telemarketing call by a rival, the customer's current carrier continuously monitors its current prices and offerings to ensure they remain attractive. "Thus, any policy that limits such calls will have the unintended consequence of raising the costs incurred by firms in making attractive offers to rival firms' customers. This cost increase. in turn, reduces the incentives firms have to 'guard' their initial customers by moderating prices."[41] Consequently, limitations on telemarketing calls are likely to result in increased telecommunication prices.

Consumers making decisions as to whether to get on a general do-not-call list may consider the direct cost to them, such as the fee for inclusion on the lists, but are unlikely to consider or to even be aware of the indirect costs, e.g., consequential price increases. Nevertheless. the Commission must factor in these inevitable price increases in its evaluation ofthe costs and benefits of a NDNC list. Consumers may get tired of telemarketing calls, but at the same time they love the low rates, free minutes, and all the other promotions.[42]

(3). A NATIONAL DO-NOT-CALL REGIME WILL DISRUPT THE COMPETITIVE BALANCE.

A NDNC will favor incumbent providers. This is because in the TCPA Congress excluded from regulation calls to persons with whom the company had an established business relationship.[43]

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[39] Beard, pp. 6-8.
[40] *Id.*, pp. 16-17. ***See** also,* ***Id.,*** p. 1
[41] *Id.*, **p.** 1.
[42] ***See.*** *id,* **p.** 12. *["[W]hile some people object to sales calls, virtually* ***everyone*** *objects to higher prices.*](emphasis in original). See *also*, Graves. para. 12.
[43] ***See*** 47 U.S.C.227(a)(3)(B) and 47 U.S.C. 227(3).

MCI is unique among the major telecommunications players, in that every one of its customers chose its services, largely as a result of MCI's telemarketing efforts. AT&T, on the other hand. still maintains a large portion of the residential long distance customers as a result of its previous incumbency. Most significantly, incumbent local exchange carriers (ILECs) maintain nearly 90% of the local customer base.[44] These carriers would virtually be exempt from the effects of NDNC within their incumbent region. **As** a result, NDNC would have virtually no impact on the ILECs' ability to telemarket new services, such as long distance services, in-region. AT&T will also have a significant advantage over other new entrants to the local market as a result of its large long distance customer-base. Meanwhile, a carrier with no history of incumbency, that consequently lacks the associated sizable customer-base, will be significantly more restricted in marketing their service offerings.

Thus. incumbents will have more flexibility in their marketing campaigns, in particular the ability to use the most cost-effective and personal marketing tool for competitive telecommunications sales, while new entrants will be force to use more costly and less effective mechanisms. This places new or smaller competitors at a substantial marketing disadvantage to incumbents that already have the lion's share of advantages

The Commission has proposed a definition of "established business relationship" that would limit that relationship to the customer's current services.[45] Depending on how narrow a definition of "service" the Commission is contemplating, this could mean that a

[44] "Local Telephone Competition: Status as *of* December 31, 2001," Industry **Analysis** and Technology Division Wireline Competition Bureau, Federal Communications Commission, **p. 1** and Table **1** (Jul. 2002).
[45] *Notice*, para. 20.

telecommunications provider would not be able to contact its long distance customers. who become national no call list participants, to discuss local service when those customers are not currently subscribed to local service. This proposed definition, which conflicts with the TCPA, would not adequately cure the advantage to the incumbent, and is not in the public interest

Companies must have flexibility in communicating with their customers not only about their current services. but also to discuss available alternative services or products they or their affiliates offer.[46] Informing customers about ***new*** service offerings is an important function of customer service that some consumers expect, especially from their telecommunications provider. Congress clearly recognized this need and accordingly specifically excluded "a call or message . . . to any person with whom the caller has an established business relationship..." from the definition of "telephone solicitation" in the TCPA.[47] **By** statute. NDNC would only be applicable to "telephone solicitations."[48] Thus, while the **TCPA** grants the Commission the authority to establish a NDNC list that restricts *who* a company without a established business relation is permitted to call, the

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[46] The potential for MCI to contact its customers by phone has not been viewed unfavorably. Jane Bryant Quinn, "Long Distance Relationship is Changing," Contra Costa Times, July 30, 2001[MCI says you'll get a separate notice of every change in writing, *hyphone* or by e-mail with your consent. *Good deal.*"] *reprinted in* Washington Post. p. H2 July 29,2001, **as** "FCC Bows Out of Long Distance Picture", Baltimore Sun, p. 3D. July 30,2001 as "New Day for Long Distance Users Afrer August 1, and San Francisco Chronicle, p. D1. July 21, 2001 as "Long distance carriers required to come clean with customers"(emphasis added); ***See*** *also*, Paul Davidson, "States may take on long-distance firms. At issue: How consumers find out about rate increases," USA TODAY (Jul. 27, 2001)["MCI is the only big carrier vowing to contact consumers directly in writing or *by* ***phone."*** (emphasis added.)]

[47] 47 U.S.C. § 227(a)(3).

[48] 47 *U.S.C.* § 227(c)(3). [The Coinmission is authorized to establish "...a single national database to compile a list of telephone numbers of residential subscribers who object to receiving *telephone solicitations...*"](emphasis added.)The Commission seeks comment on the interplay between sections 222 and 227. In particular, the Coinmission asks if a carrier must refrain from contacting a customer by phone, if that customer places her name on a national do-not-call list, even if she gave her carrier opt-out consent with regard to the carrier's use of her CPNI. *Notice*, para. 19. The customer's carrier of choice is exempt from the NDNC ban because of the existing business relationship, regardless of whether or not it received opt-out consent for use of CPNI by the customer.

Commission does not have the authority to restrict or proscribe what is discussed on a call permissible under the TCPA.

Moreover, even assuming *arguendo* the Commission could limit permissible calls to those that have some purpose related to the customer's current service, such a limitation does not make sense in a market where products are increasingly integrated, e.g. The Neighborhood. An enhanced version of a customer's current service is likely to include additional services. Furthermore, as the Commission found in its most recent CPNl decision. customers want to be advised of services that their telecommunications providers offer such as "innovative telecommunications offerings that may bundle desired telecommunications services and/or products, save the consumer money, and provide other consumer benefits."[49] The Commission should be encouraging carriers to provide their customers such information, not making it more burdensome or costly.

Accordingly, the Commission should continue with a company specific regime, which allows a consumer to restrict calls from a particular company regardless of an existing business relationship. rather than a national do not call list.

B. THE COMMISSION'S PREVIOUS CONCERNS WITH A NATIONAL DO-NOT-CALL REGIME HAVE NOT BEEN ADDRESSED.

When an agency changes its decision on a matter, the agency must not only provide a reasoned analysis for its new decision, it must specifically address the reason for the divergence from its prior decision.'"

[49] *CPNI Third Report and* Order, paras. 35-36.
[50] Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383,444 F.2d 841,852 (D.C. Cir. 1970), *cert. denied,* 403 **U.S.**923, 91 S.Ct. 2233, 29 L. **Ed.** 701 (1971); *accord* Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43, 77 L. **Ed.** 2d 443, 103 S. Ct. 2856 (1983). Fox TV Station. **Inc.** v. FCC, No. 00-1222 (D.C. Circuit February 19, 2002).

In determining the most appropriate means to protect consumers from telephone solicitations to which they object, the Commission, in accordance with the TCPA," compared and evaluated alternative methods and procedures in terms of their effectiveness, costs and other advantages and disadvantages. Upon careful consideration of the cost and benefits of creating a national do-not-call database, the Commission determined that the disadvantages of such a system outweigh any possible advantages. "A national database would be costly and difficult to establish and maintain in a reasonably accurate form."[52] The Commission also found that such a list posed a risk of making consumer information available to unscrupulous entities.[53]

First, the Commission's concerns with accuracy have not been resolved. Nearly one-fifth of all telephone numbers still change subscribers each year.[54] Given this high turnover in telephone numbers, mechanisms must be in place to ensure the number listed is still associated with the person that registered on the DNC list. Frequent updates and renewals, which would be costly, would be necessary to maintain an accurate list. Some form of verification would also be necessary to ensure that it is the subscriber who is placing a number in the database. The importance of accuracy in maintaining the list cannot be underestimated since inaccurate data potentially denies information to persons who did not elect to be place on the list. It could also result in telemarketing calls to those who would have an expectation of receiving no calls.

Second, there is no evidence that the cost of developing and maintaining the database has diminished since the Commission last evaluated this issue. As the comments of the

[51] *See* 47 U S C. 227(c)(1)(A).
[52] *TCPA* ***Order,*** para. 14.
[53] *Id.*, para. 15. The Commission was also concerned with the inability to protect telemarketer proprietary information. *Id*

Attorneys General to the FTC noted, "states that have established No Call database systems have done so at considerable expense."" The Attorneys General expressed concern that the FTC's initial five million dollar estimate would "not be adequate to create the database, much less to cover the costs of maintenance and enforcement, even assuming significant state assistance in that endeavor."[56] They also cautioned that state experience has demonstrated that charging modest fees to companies engaged in telemarketing for access to the "do not call" list could off-set, but is unlikely to fully cover, the ongoing costs of the database systems." As DMA pointed out in its comments to the FTC. it is unclear how the FTC arrived at its estimated costs.[58] Yet, even if the FTC accurately estimated the cost of collecting name and number in an automated manner, it is far more expensive to compile a list that is capable of being accurate and authenticated.[59]

Third, it is unclear that the Commission's previous concern with protecting consumers' private information has been addressed. Merely prohibiting companies from using the consumer information contained in the database for purposes other than compliance with the no call regulations was an option for the Commission in 1991. In fact such a prohibition is mandated by the TCPA.[60] Still, as the Commission previously

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[54] ***See*** **DMA** Joint Comments to the FTC, p. 12. ***See*** *also*, Notice, para. **5 1**; *See* ***also*** *TCPA* ***Order.*** para. 12.
[55] **AC** Comments to the FTC, p. 12. "States implementing No Call database systems have incurred significant expenditures in establishing computerized databases, the corresponding personnel and other equipment and location expenses. and in consumer education." *Id.*, p. 25.
[56] ***Id.,*** p. *25*
[57] *Id.* **p.** 22.
[in] DMA Joint Comments to the FTC, **p.** 13.
[59] *Id.*
[60] 47 U.S.C. 227(c)(3)(K)

determined, a NDNC database poses the risk of unscrupulous telemarketers misusing consumer information contained in the database.[61]

Finally, if the Commission were to adopt a NDNC list it would have to evaluate the categories of public and private entities that would have the capacity to establish and administer the database.[62] The Commission previously concluded "that any [NDNC] database would not be a government sponsored institution and would not receive federal funds or a federal contract for its establishment, operation, or maintenance."[63] Accordingly, the use of a FTC no call database would be contrary to the Commission's previous decision not to have a government sponsored NDNC database, and would raise other concerns as discussed in section III below. And considering the Commission has not presented an alternative do-not-call regime, the Commission must give another opportunity to comment on any new proposal

II. IMPLEMENTATION OF THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD IMPOSE UNCONSTITUTIONAL RESTRICTIONS ON FREE SPEECH.

The Commission has invited comments on whether a national do-not-call database would satisfy the standards articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447* U.S. *557* (1980).[64] The Commission's proposed national do-not-call database is fundamentally incompatible with the First Amendment and *Central Hudson* because its disparate treatment of commercial and noncommercial speech bears no relationship whatsoever to the government's asserted

[61] *TCPA Order,* para. 15
[62] 47 U.S.C. § 227(c)(1)(B).
[63] *In rhc Matter of the Telephone* ***Consumer*** *Protection Acr,* Notice of Proposed Rulemaking, 7 FCC Rcd. 2736. para. 29 (Apr. 10, 1992). The Commission affirmed its tentative conclusion. ***TCPA Order.*** para. 14, n. 24.
[64] See *Notice,* para. 50