

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

authenticated."

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 regularions was an option for the Commission in 1991. In fact such a prohibition is mandated by the TCPA.⁶⁰ Still, as the Commission previously determined, a NDNC database poses the risk of unscrupulous telemarketers misusing consumer information contained in the database."

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." 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

⁵⁹ *Id.*

⁶⁰ 47 U.S.C. 227(c)(3)(K).

⁶¹ *TCPA Order*, para. 15.

⁶² 47 U.S.C. § 227(c)(1)(B).

⁶³ *In the Matter of the Telephone Consumer Protection Act*, Notice of Proposed Rulemaking, 7 FCC Red. 2736, para. 29 (Apr. 10, 1992). The Commission affirmed its tentative conclusion, *TCPA Order*, para. 14 n. 24.

WorldCom Inc. Comments
CG Docket No. 02-278
December 9, 2002

**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 interest in protecting consumer privacy and because it is not narrowly tailored to meet that interest.

In *Central Hudson*, the Supreme Court established a four-part test for analyzing the constitutionality of a content-based commercial speech regulation: *First*, to warrant any First Amendment protection, the regulated speech must concern lawful activities and not be misleading.⁶⁵ *Second*, for the regulation to be upheld, the asserted government interest in restricting the speech must be substantial. *Third*, the government must show that its speech restriction directly and materially advances the asserted government interest. *Fourth*, the government must narrowly tailor its restriction to the asserted interest, so that there is a reasonable fit between the two.⁶⁶ "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."⁶⁷ The third and fourth prongs form the heart of the *Central*

⁶⁴ See Notice, para. 50.

⁶⁵ See 447 U.S. at 566; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

⁶⁶ See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

⁶⁷ *Central Hudson*, 447 U.S. at 564.

WorldCom Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

Hudson analysis.

The first step of *Central Hudson* requires little discussion. The telemarketing calls that are subject to the Commission's proposed national do-not-call regime seek to offer truthful, non-misleading information about a lawful commercial transaction. (To the extent the calls are fraudulent, they can be regulated without First Amendment objection under federal and state fraud provisions.)

Even assuming that the Commission's asserted interest in residential privacy is considered substantial under the second part of the *Central Hudson* test,⁶⁸ the Commission has not met its burden of satisfying parts three and four of the *Central Hudson* analysis - whether the regulation directly and materially advances the government's privacy interest, and whether it is narrowly tailored to further the government's asserted goals."

A. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD DISCRIMINATE BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The Commission states that it is revisiting the question of whether to adopt a national do-not-call database due to "[p]ersistent consumer complaints regarding

⁶⁸ See *Notice*, para. 1. Although freedom from unwanted solicitations may rise to the level of a substantial state interest when the solicitations are "pressed with such frequency or vehemence as to constitute a substantial harassment of the recipient," *Edenfield v. Fane*, 507 U.S. 761, 769 (1993), "the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1234-35 (10th Cir. 1999). "When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest. . . . It must specify the particular notion of privacy and interest served." *Id.* at 1234-35. The need for the government to make this showing is particularly strong given that we live in an open society in which information is exchanged freely. *Id.* at 1235. The Commission has asserted that it has received numerous consumer complaints about unwanted telephone solicitations. See *Notice*, n. 177. It has not, however, demonstrated that such solicitations are so vexatious or intimidating that their prevention constitutes a substantial state interest.

⁶⁹ See *Discovery Network*, 507 U.S. at 416, 417 n.13; *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

unwanted telephone solicitations."⁷⁰ The Commission's principal concern is the need to protect "consumer privacy."⁷¹ The proposed database, however, would not protect consumers from all unwanted telephone solicitations because its application is limited to certain commercial calls.⁷² Although the national do-not-call database purports to regulate all "telephone solicitations,"⁷³ the TCPA's definition of "telephone solicitation" excludes calls from nonprofit organizations: "a telephone call or message for the purpose of encouraging the purchase or rental of, or investment *in*, property, goods, or services but such term does not include a call or message . . . to any person with whom the caller has an established business relationship, or . . . by a tax exempt nonprofit organization."⁷⁴ The exemption for nonprofit organizations "applies to religious and political organizations that have likewise received tax exempt **status** from the U.S. government" and "extends to telephone solicitations made by telemarketers on behalf of tax-exempt nonprofit organizations.""

The national do-not-call database would therefore be fatally underinclusive. It would regulate some commercial calls, but would exempt all noncommercial calls, including solicitations by telemarketers on behalf of nonprofit organizations. The disparate treatment of commercial and noncommercial calls does not withstand First Amendment scrutiny. The Constitution demands a "reasonable fit" between a speech-restrictive regulation and the government's asserted goal." such that the challenged

⁷⁰ Notice, para. 49.
⁷¹ *Id.* para. 1.
⁷² See *id.* para. 56 ("The Commission has concluded, however, that its regulations under the TCPA apply only to commercial calls.")
⁷³ See *id.* paras. 1, 50.
⁷⁴ 47 U.S.C. § 227(a)(3).
⁷⁵ Notice paras. 33, 56.
⁷⁶ See *Discovery Network*, 507 U.S. at 417 n.13.

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

regulation advances the government's interest "in a direct and material way."⁷⁷ A fundamental mismatch between the government regulation and its purported goal calls into question the sincerity of the government's proffered justification and raises the specter that the government simply prefers some speakers to others.

Indeed, the Supreme Court struck down a regulation that drew a comparable distinction between commercial and noncommercial speech. In *Discovery Network*, a city ordinance banned commercial newsracks but permitted noncommercial newsracks on sidewalks. The Court acknowledged that the city's concerns about the safety and aesthetics of its sidewalks were legitimate, but concluded that those concerns applied equally to commercial and noncommercial newsracks: "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault."⁷⁸ As the Court noted, the banned commercial newsracks were "no greater an eyesore" than the noncommercial newsracks permitted to remain on the city's sidewalks.⁷⁹ In the absence of a distinction between the commercial and noncommercial newsracks that related to the city's interests, the Court refused to recognize the city's "bare assertion that the 'low value' of commercial speech" justified the categorical ban on commercial speech.⁸⁰ The Court explained that the city placed "too much importance on the distinction between commercial and noncommercial speech," and that "the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate

⁷⁷ *Edenfeld v. Fane*, 507 U.S. at 767.

⁷⁸ *Discovery Network*, 507 U.S. at 426.

⁷⁹ *Id.* at 425.

⁸⁰ *Id.* at 428.

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

interests."⁸¹

The Court's analysis applies with equal force to the Commission's proposed national do-not-call database. The distinction between commercial and noncommercial telephone calls in the proposed do-not-call database is entirely unrelated to the Commission's core concern of protecting consumer privacy. Like the newsracks in *Discovery Network*, all telephone solicitations, regardless of whether they are commercial or noncommercial, "are equally at fault" for intruding upon consumer privacy." The alleged intrusion in the home is the same whether the unwanted solicitation comes from a telemarketer seeking a contribution to a charity or from a company offering services. Nothing suggests that the Commission believes that the prohibited calls are more invasive of privacy than the non-prohibited calls, and nowhere in the *Notice* does the Commission even purport to justify the regime's distinction between commercial and noncommercial calls on this basis. Nor could it, for the alleged intrusion in the home is the same whether the unwanted solicitation comes from a telemarketer seeking a donation to a charity, a company introducing new services, or a landscaping company offering a special deal for mowing a lawn.

The court reached the same conclusion in *Lysaght v. New Jersey*, 837 F. Supp. 646 (D.N.J. 1993), in which a federal district court enjoined enforcement of a New Jersey ban (absent the called party's consent) on automated commercial calls. Applying intermediate scrutiny and relying heavily on *Discovery Network*, the court held that the government's interest in preserving the privacy of the home, while valid, was not

⁸¹ *Id.* at 424 (emphasis in original).

⁸² *Id.* at 426.

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

funliered by banning only commercial calls because both coinmercial and noncommercial calls "equally disrupt residential privacy"⁸³; nor was it funliered by prohibiting only prerecorded calls, because such calls threaten the privacy of the home just as much as live calls.⁸⁴ The absence of an) evidence that the calls subject to the do-not-call list are any more invasive of privacy than noncommercial calls is dispositive of tlie First Amendment analysis.

Moreover, the fact that the national do-not-call database would provide a blanket exemption for all noncommercial calls directly "undermine[s] and counteract[s]" the government's interest in protecting consumer privacy from telephone solicitations.⁸⁵ Because consumers would continue to receive noncommercial calls, including calls from telemarketers on behalf of nonprofit organizations, there is "little chance" that the national do-not-call database "can directly and materially advance its aim."⁸⁶

The Seventh Circuit's opinion in *Pearson v. Edgar*, 153 F.2d 397 (7th Cir. 1998), is directly on point. That case involved an Illinois statute that made it unlawful for a real estate agent to solicit a sale or listing of propeny from any owner who had indicated a desire not to sell the property. Relying heavily on *Discovery Network*, the Seventh

⁸³ 837 F. Supp. at 651.

⁸⁴ *Id.* at 653. See also *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1369-70 (9th Cir. 1997) (striking down ordinance regulating only for-profit vendors along boardwalk because there was no evidence that they "are any more cumbersome upon fair competition or free traffic flow that those with nonprofit status"); *Anabell's Ice Cream Corp. v. Town of Gloucester*, 925 F. Supp. 920, 928-29 (D.R.I. 1996) (striking down on *Discovery Network* grounds ordinance prohibiting use of outdoor loudspeakers by merchants but not by nonmerchants).

⁸⁵ See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (striking down ban on disclosure of alcohol content on beer labels where same information was allowed on labels of wines and spirits); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 189-90 (1999) ("*GNOBA*") (striking down statute prohibiting advertising of private casino gambling, but allowing advertising of state and Indian tribe gambling, given that "any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling").

⁸⁶ 514 U.S. at 489; see also *Central Hudson*, 447 U.S. at 564 ("[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

Circuit held that the no-solicitation list at issue was impermissibly underinclusive and thus violated the First Amendment." The Court held, for example, that because "the distinction between real estate solicitation and other types of solicitation is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy," the speech restriction did not "reasonably fit" the reason for the restriction.⁸⁸ Similarly, in the absence of evidence that the real estate solicitations at issue were particularly invasive, "a mechanism whereby homeowners can reject real estate solicitations but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'"⁸⁹ Finally, in light of the Supreme Court's commercial speech cases, the Seventh Circuit disclaimed the ability to "place the interest in residential privacy above the interest in logical distinctions in speech restrictions."⁹⁰

B. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD VIOLATE THE FIRST AMENDMENT BECAUSE IT IS MORE EXTENSIVE THAN NECESSARY TO SERVE THE GOVERNMENT'S INTEREST IN CONSUMER PRIVACY.

A restriction on commercial speech may not be "more extensive than necessary to serve the interests that support it." The government must show that its interests cannot be protected by a more limited regulation of speech," and bears the burden of demonstrating that a regulation has been narrowly tailored to the asserted government

⁸⁷ 153 F.3d at 402-05.

⁸⁸ *Id.* at 404.

⁸⁹ *Id.* at 404 (quoting *Edenfield*, 507 U.S. at 767).

⁹⁰ *Id.* at 404. See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁹¹ *GNOBA*, 527 U.S. at 188.

⁹² *Central Hudson*, 447 U.S. at 570.

⁹³ *GNOBA*, at 183, 188.

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

interest.⁹³ The Supreme Court has "made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."⁹⁴ Accordingly, the Court has not hesitated to strike down regulations of commercial speech that were more extensive than necessary to serve the government's asserted interests."⁹⁵

The Commission could implement alternative regimes to protect consumer privacy that would restrict less speech. For example, company-specific do-not-call lists, which protect consumer privacy by requiring telemarketers to place a consumer on the company's list if the consumer asks not to receive further solicitations, strike a better balance between consumer privacy and the First Amendment rights of telemarketers. Company-specific lists allow a customer access to information from a variety of sources - including information that the consumer may not have anticipated would interest him - while providing the consumer with an easy mechanism to protect his privacy from unwanted calls. Although the company-specific lists impose a slightly greater burden on the consumer to the extent that the consumer must respond once to each caller (as opposed to responding once by placing his name on the national list), this burden is outweighed by the benefit to the consumer and telemarketer alike of the free exchange of

⁹³ *GNOBA*, at 183, 188.

⁹⁴ *Thompson v. Western States Med. Cir.*, 122 S.Ct. 1497, 1506 (2002).

⁹⁵ See, e.g., *Rubin*, 514 U.S. at 490-91 (holding law prohibiting display of alcohol content on beer labels unconstitutional in part because of availability of less restrictive means of advancing government's interests); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (striking down prohibition on advertising the price of alcoholic beverages in part because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance"); *Central Hudson*, 447 U.S. at 570-71 (striking down regulation banning advertising by a utility where "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interest").

⁹⁶ See, e.g., *Central Hudson*, 447 U.S. at 561-62 ("Commercial expression not only serves the economic

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

idea.")

Unlike the national do-not-call database, the company-specific lists are narrowly tailored to serve consumer privacy. The national do-not-call database regime paints with too broad a brush. If a consumer receives a telephone solicitation from a local landscaping company and responds by asking to be included on the national do-not-call list, not only will that landscaping company suffer the consequences, but so will every other company that would otherwise call that consumer. In this way, all commercial callers are penalized for the conduct of a single actor, and the First Amendment rights of a wide range of callers are restricted. Such a broad sweep suggests that the Commission has not "carefully calculate[d] the costs and benefits associated with the burden on speech imposed by the regulations."⁹⁷ The company-specific lists, by contrast, protect the free speech rights of a company that wishes to disseminate information to a consumer until the consumer makes clear that he does not want to receive information from the company. At the same time, the company-specific lists adequately protect a consumer's privacy because after receiving just one potentially unwanted telephone call, the consumer can prevent all future calls from that company by simply requesting his name be added to the company-specific list.

Other alternatives to the national do-not-call database, such as the use of caller identification devices and services that block calls from unlisted telephone numbers would likewise adequately protect consumer privacy while at the same time preserve the free speech rights of callers.

interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.").

⁹⁷ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (internal quotation and citation omitted).

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

C. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD VIOLATE THE FIRST AMENDMENT TO THE EXTENT IT WOULD MAKE CONTENT-BASED DISTINCTIONS AMONG TYPES OF COMMERCIAL SPEECH.

Finally, to the extent that the Commission's telemarketing rules draw content based distinctions among types of commercial speech, they are subject to strict scrutiny rather than a *Central Hudson* analysis and are unconstitutional.

"Content-based regulations are presumptively invalid."⁹⁸ Indeed "[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁹⁹

In *R.A.V.*, the Supreme Court addressed content-based restrictions within categories of "proscribable speech," such as [lie commercial speech at issue here.]" The Court noted that "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."¹⁰¹ When the content-based distinctions are *unrelated* to the reason the speech is generally proscribable, however, the Court's oft-noted concerns of the dangers of content-based discrimination remain at the fore.

For example, although a state may choose to prohibit only that obscenity which is "the most patently offensive in its prurience," it may *not* prohibit only that obscenity which includes "offensive political messages."¹⁰² In the commercial speech context, that

⁹⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁹⁹ *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n.*, 447 U.S. 530, 536 (1980) (quoting *Police Department v. Mosley*, 408 U.S. 92, 95 (1972)).

¹⁰⁰ WorldCom believes that truthful, non-misleading commercial speech is entitled to full First Amendment protection. WorldCom recognizes, however, that although several Justices appear to have embraced that position, it is not yet received the support of a majority of the Court. See generally *Lorillard Tobacco Co.*, 533 U.S. at 554-55.

¹⁰¹ *R.A.V.*, 505 U.S. at 388.

¹⁰² *Id.*

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

means that **although** "a State may choose to regulate price advertising in otic industry but not in others because the risk ut fraud (one of the characteristics of commercial speech that justifies depriving it of full **First Amendment protection**) is in its view greater there."¹⁰² It State may nor **prohibit** "only that commercial advertising: thar depicts men in a **demeaning** fashion."¹⁰⁴

Courts' more permissive approach toward regulation of commercial speech has been justified **principally on the ground that commercial speech is both "more easily verifiable by its disseminator" and less likely to be "chilled by proper regulation."**¹⁰⁵ The regulation of commercial speech, therefore, "is limited to the peculiarly *commercial* harms that commercial speech can threaten - *i.e.*, the risk of deceptive or misleading advertising."¹⁰⁶ and the need to "preserv[e] a fair bargaining process."¹⁰⁷ To the extent thar the Commission seeks to draw distinctions among types of commercial speech that are "unrelated to the preservation of a fair bargaining process," the distinctions - "like all other coilrent-based regulation of speech - must be subjected to strict scrutiny."¹⁰⁸ and

¹⁰² *Id.* at 388-89 (internal citations omitted).

¹⁰⁴ *Id.* at 389; see also *Lorillard Tobacco Co.*, 533 U.S. at 576 (Thomas, J., concurring) ("[E]ven when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category."); *GNOBA*, 527 U.S. at 193-94 (Thomas, J., concurring) (noting that, even in the commercial speech context, "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment").

¹⁰⁵ *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24; see also *Lorillard Tobacco Co.*, 533 U.S. at 576 (Thomas, J., concurring).

¹⁰⁶ *Lorillard Tobacco Co.*, 533 U.S. at 576 (Thomas, J., concurring) (emphasis in original).

¹⁰⁷ *44 Liquormart Inc.*, 517 U.S. at 501 (Stevens, J., concurring, joined by Kennedy and Ginsburg, JJ.); see also *R.A.V.*, 505 U.S. at 388-89 (noting that "risk of fraud" is "one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection"); *Rubin v. Coors*, 514 U.S. at 493 (Stevens, J., concurring) (identifying the "rationales for treating commercial speech differently under the First Amendment" as "the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker").

¹⁰⁸ *Lorillard Tobacco Co.*, 533 U.S. at 577 (Thomas, J., concurring); see also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000); *R.A.V.*, 505 U.S. at 395.

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

cannot survive.

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(WASHINGTON_DC)_11601_1_11/8/02_10:32 AM **III. ADOPTING A NATIONAL DO-NOT CALL DATABASE IN TANDEM WITH THE FTC'S PROPOSAL TO ESTABLISH SUCH A DATABASE WOULD VIOLATE THE REQUIREMENTS OF THE TELEPHONE CONSUMER PROTECTION ACT.**

In January of this year, the FTC issued a Notice of Proposed Rulemaking announcing its decision to reexamine its telemarketing regulations, and requesting comment on a proposal to establish a national database of consumers who do not wish to receive telemarketing calls.¹¹⁰ The FTC issued subsequent notices to provide additional detail regarding its proposal, and to seek further comments on the implementation of the proposed scheme.¹¹¹ In September 2002, this Commission requested comments regarding, inter alia: the propriety of retaining a company-specific approach if the FTC adopts a national database;¹¹² the extent to which the FCC may act in conjunction with the FTC to develop a national database;¹¹³ the effect of a combination of efforts between the FCC and the FTC;¹¹⁴ the wisdom of extending the FTC standards to companies subject to the FCC's jurisdiction, and the role the FCC should play in administering the database if it does so;¹¹⁵ and any concerns that such collaboration would raise, such as an inconsistency between the requirements of the Telephone Consumer Protection Act and the FTC's proposed rules.¹¹⁵

¹⁰⁹ *Telemarketing Sales Rule*, 67 Fed. Reg. 4492 (FTC Jan. 30, 2002) ("FTC NPRM").

¹¹⁰ *See Privacy Act: System of Records*, 67 Fed. Reg. 8985 (FTC Feb. 27, 2002); *Telemarketing Sales Rule User Fees*, 67 Fed. Reg. 37362 (FTC May 29, 2002).

¹¹¹ *See Notice*, para., 16.

¹¹² *See id.*, para., 49.

¹¹³ *See id.*, para., 52.

¹¹⁴ *See id.*, para., 55.

¹¹⁵ *See id.*, paras. 56-57.

statutory concerns. Because the FTC's proposal conflicts with several aspects of the Telephone Consumer Protection Act ("TCPA"),¹¹⁶ a wholesale adoption of the FTC's proposed rules would be unlawful. Given that some of the conflicts are inherent to the FTC's proposed regime, these conflicts cannot be cured by adopting regulations that require only partial compliance with the FTC's rules. The FCC therefore lacks the authority to require carriers subject to its jurisdiction to adhere to the FTC's proposed do-not-call rules.

A. THE FCC CANNOT DELEGATE THE ESTABLISHMENT OF A NATIONAL DATABASE TO THE FTC BECAUSE § 227 REQUIRES THE COMMISSION TO CONSIDER CERTAIN ISSUES ITSELF.

It is a fundamental tenet of administrative law that the FCC lacks the authority to deviate from Congress's statutory commands.¹¹⁷ In this context, Congress adopted section 227 of the TCPA, which both establishes and constrains the FCC's power to adopt rules governing telephone solicitation. In part, section 227 imposes affirmative duties upon the FCC in the event that it determines that a national do-not-call list should be established. Specifically,

[T]he Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

¹¹⁶ 47 U.S.C. § 227.

¹¹⁷ See, e.g., *Lynn v. Payne*, 476 U.S. 926, 937 (1986); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984); *Alabama Power Co. v. United States EPA*, 40 F.3d 450, 454 (D.C. Cir. 1994).

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations:

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.¹¹⁸

These provisions expressly require the FCC to conduct an independent inquiry into the enumerated factors when adopting a national do-not-call list, and do not permit the FCC to delegate fulfillment of that duty to the FTC. Congress has determined that the FCC must consider those issues, and issuing regulations that require carriers subject to the FCC's jurisdiction to adhere to the FTC's rules would not be sufficient to meet those requirements -- even if the FTC itself had evaluated the same or similar factors. This is particularly true given that the FTC's proposed rules have not yet been established, and the Commission cannot, therefore, effectively evaluate the effect that adopting identical rules would have on telemarketers operating in different venues. Thus the Commission cannot require companies subject to its jurisdiction to adhere to FTC do-not-call regulations unless, at a minimum, it issues an NPRM specifically seeking comment on whether and how the FTC's final rules, once those rules are adopted, meet the requirements of section 227.

B. THE FCC CANNOT ADOPT THE FTC'S PROPOSED RULES BECAUSE THEY DO NOT MEET THE SUBSTANTIVE REQUIREMENTS OF SECTION 227.

¹¹⁸ 47 U.S.C. § 227(c)(4).

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

Even if the FCC were able to conduct the analysis **required** by §227(c)(4) at this time, it could not adopt the FTC's proposed rules because those rules conflict with several of the substantive **requirements** of section 227.

First, the FTC's proposed rules **cover entities** on the national do-not-call database that are **expressly** excluded by section 227. This Commission may establish a national database "to compile a list of telephone **numbers** of residential subscribers who object to receiving telephone solicitations, and to **make** that compiled list and parts thereof available for **purchase**."¹¹⁹ The FTC, in contrast, has proposed rules that are not limited to 'residential subscribers,' but instead sweep more broadly, including outbound **telemarketing** calls to any "person", who has indicated a desire to be included in the national database (or has **expressed a desire not** to receive calls from the specific telemarketer)¹²⁰ "Person" is defined as "any individual, group, unincorporated association, limited or **general partnership**, corporation, or other business entity."¹²¹ Thus, on their face the FTC's rules go well beyond those this Commission is authorized to **adopt**. And although the FTC's proposed rules do exempt some forms of **business-to-business telemarketing**,¹²² this **partial exemption** of calls does **not** remove all non-residential **subscribers** from those requirements. Thus, **adopting the** FTC's proposed rule would exceed the **restrictions** that section 327 **places upon** the FCC's authority **to regulate** telemarketing because it would require **companies** subject to the FCC's **jurisdiction** to

¹¹⁹ 47 U.S.C. § 227(c)(3) (emphasis added).

¹²⁰ *FTC NPRM*, 67 Fed. Reg. at 4543 (§310.4(b)(iii)).

¹²¹ *Id.* at 4541 (§ 310.2(u)).

¹²² *See* 67 Fed. Reg. at 4544 (§ 310.6(g)) (exempting "[t]elephone calls between a telemarketer and any business, except calls to induce a charitable contribution, and those involving the sale of Internet services, Web services, or the retail sale of nondurable office or cleaning supplies").

WorldCom Inc Comments
CG Docket No. 02-278
December 9, 2002

refrain from making telephonic solicitations to businesses and other non-residential telephone subscribers.

The Commission cannot reconcile this conflict between the FTC's proposed rules and section 227 by simply directing the companies subject to its jurisdiction to refrain from calling only the residential subscribers whose names appear in the FTC database, because there would be no practical means of making such a distinction. The NPA-NXXs assigned to a phone number do not themselves indicate whether a telephone number is that of a residential subscriber or a business. Nor has the FTC proposed to include such data with the numbers that are stored in its database.¹²³ Indeed the FTC has not even explained how potential telemarketers could identify business subscribers in order to comply with its own limited exception for business-to-business calls. Accordingly, so long as the FTC's proposed rules continue to include both residential and non-residential callers in the do-not-call database, the FCC may not lawfully require entities subject to its jurisdiction to use that database.

Adopting the FTC's proposed rules would also unlawfully inject the FCC into the regulation of companies' telephone solicitations to customers with whom the caller has an "established business relationship."¹²⁴ Congress has determined that calls to a person with whom the caller has such a relationship should not be considered "telephone solicitation,"¹²⁵ and therefore are not subject to the restrictions of the TCPA or its

¹²³ Although the FTC has not yet determined what information would be included in the database, it has only mentioned telephone numbers, the date and time the number was placed on the registry, telemarketing preferences, and other identifying information such as residential zip codes. See *Privacy Act: System of Records*, 67 Fed. Reg. at 8986.

¹²⁴ 47 U.S.C. §227(a)(3).

¹²⁵ See *id.*

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

implementing regulations place on such solicitations. The FTC, in contrast, has expressly declined to adopt such an exception to its do-not-call rules.¹²⁶ The FCC plainly lacks the authority to adopt this aspect of the FTC's proposed rule, and could only lawfully participate in the FTC's do-not-call database if it expressly authorized callers to make this category of calls.

The FTC's proposed rules are also inconsistent with the specific requirements that Congress enumerated in section 227(c)(3). As the Commission recognized in its NPRM,¹²⁷ that provision establishes twelve criteria that must be met by any regulations the Commission adopts to establish a national do-not-call database. The FTC's proposed rule fails to meet several of those criteria, and therefore cannot be adopted by the FCC.

For example, the FTC's proposed rules violate section 227(c)(3)(K), which requires any Commission rule adopting a national do-not-call list to "prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law. . . ."¹²⁸ Businesses' and telemarketers' use of the database to comply with the FTC's regulations would violate this section because use of the database for compliance with the requirements of another federal agency's rules do not arise under § 227. Because the same would be true of any national database created pursuant to a separate federal statutory and/or regulatory regime, there is no lawful means for the FCC to share a national database with the FTC. Moreover, the FTC has since proposed to use the national database that it establishes for "certain 'routine uses' that are generally

¹²⁶ See *FTC NPRM*, 67 Fed. Reg. at 4532 (reaffirming previous rejection of proposed exception for "telephone calls made to any person with whom the caller has a prior or established business or personal relationship").

¹²⁷ See *Notice*, para., 53.

¹²⁸ 47 U.S.C. § 227(c)(3)(K).

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

applicable to other FTC records system. . . [such as] in law enforcement investigations or proceedings conducted by the Commission or by other agencies or authorities (e.g., to determine whether a telemarketer is complying with the do-not-call provision of the FTC's Telemarketing Sales Rule), as well as other regulatory or compliance matters or proceedings."¹²⁹ Such uses present an equally glaring conflict with the requirements of § 227(c)(3)(K).

The FTC's NPRM also fails to satisfy other requirements of § 227(c)(3), but full analysis is premature since the FTC's rules are not final. Nonetheless, the FCC should decline to act in conjunction with the FTC to establish a single do-not-call database. Not only does the current NPRM fail to meet the procedural requirements of section 727, irreconcilable differences exist between the FTC's proposed rules and the Congressional commands found in section 227.

IV. A NATIONAL DO-NOT-CALL REGIME POSES AN UNDUE BURDEN ON COMMON CARRIERS

The TCPA states that "[i]f the Commission determines to require [a national do not-call] database, such regulation shall . . . require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations."¹³⁰ The Commission seeks comment on the codification of this provision.¹³¹ The requirement to provide such

¹²⁹ *Privacy Act; System of Records*, 67 Fed. Reg. at 8986

¹³⁰ 47 U.S.C. 227(c)(3)(B).

¹³¹ *Notice*, para. 54.

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

notification has the potential for being exceedingly costly to carriers. These costs will ultimately be borne by telephone subscribers and must be considered in the Commission's evaluation of whether the costs of NDNC outweigh the benefits. If the Commission were to adopt a NDNC database and implement this provision, in order to reduce the costs the Commission should only require carriers to provide a one-time notification to current subscribers. Notification to future subscribers will be unnecessary because their previous carrier would already have notified those subscribers.

The TCPA also states that "[i]f the Commission determines to require [a national do-not-call database, such regulation shall...require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder."¹³² Carriers are not usually aware of a subscriber's intended use of its service. Such notification could be infeasible or extremely costly. The practicality of this provision should be a factor in the Commission's decision as to whether or not to adopt NDNC pursuant to the TCPA. The Commission should also seek comment on the implementation of this provision.

THE COMMISSION SHOULD RETAIN, BUT SLIGHTLY MODIFY, ITS CURRENT TCPA RULES

The Commission seeks comment on the effectiveness, or need for modification, of its current rules implementing the TCPA. As noted previously, WorldCom supports the comments being filed today by DMA with regard to these issues.¹³³ WorldCom hereby

¹³² 47 U.S.C. 227 (e)(3)(L).

¹³³ As addressed in the introduction, WorldCom generally supports DMA's comments with regard to predictive dialers, with the exception of the DMA's proposed standard on the abandonment rate. Specifically, WorldCom does not agree that a standard below 5% is reasonable, nor should the Commission limit the time period, at least not to a per month or a per day standard, for measuring the standard. See

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

provides additional comments on the effectiveness of company-specific lists, the benefits of predictive dialers, and suggestions and concerns regarding the proposed regulations on the use of predictive dialers.

WorldCom also explains why the industry is unable at this time 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.

I. COMPANY-SPECIFIC LISTS ARE THE MOST APPROPRIATE MEANS OF PROTECTING CONSUMERS FROM UNWANTED TELEPHONE SOLICITATIONS.

Company-specific do-not-call lists offer consumers an effective mechanism to stop unwanted telephone solicitations and offer significant advantages over NDNC to both consumers and telemarketers. Company-specific do-not-call regulations allow consumers to learn of new service offerings or price reductions they may not have anticipated, while protecting them from undesired repeat calls from a company. A message cannot truly be deemed unwanted until it is received and rejected at least once. Although consumers may say they object to telephone solicitations in general, consumers' actions speak louder than words. The fact that one half of households surveyed purchased a product or service over the phone in the last year demonstrates that consumers respond favorably and benefit from telephone solicitations."¹⁴

Company-specific do-not-call lists also allow consumers to pick and choose the

¹⁴ *supra*, n.6 and *infra*, pp. 43-45.

¹⁴ *Supra*, n. 24.

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

companies from which they wish to receive telephonic solicitations. The fact that consumers appreciate the ability to pick and choose the entities that contact them is demonstrated by a recent survey. The majority of respondents said that they rarely, never, or from "time to time" requested individual organizations not to call them at home.¹³⁵

A company has a strong incentive, in addition to regulatory compliance, not to telemarket a consumer that has specifically stated that she did not want to receive telephone solicitations from it. For one, it preserves resources for solicitations to those individuals that are more apt to respond favorably to the solicitation. Second, companies are also aware that ignoring a consumer's request could foreclose future business opportunities with that consumer.¹³⁶

As such, MCI takes great measures to ensure that consumers who specifically express a desire not to be called by MCI are not called by MCI. In addition to making verbal requests during a sales call, consumers can place their names and numbers on MCI's do-not-call list by emailing MCI's Customer Service or by calling Customer Service via a toll free number.¹³⁷ MCI sales representatives honor those requests using a simple systematic process. MCI also provides thorough, annual training to its telemarketers on compliance with do-not-call regulations and company policies and maintains a written policy as required by the TCPA.¹³⁸

¹³⁵ IPI Report, p. 4.

¹³⁶ See Graves, para. 8-9.

¹³⁷ *Id.* Additionally, the Commission seeks comment on whether companies should be required to provide some means of confirmation so consumers may verify that their requests have been processed. *Notice*, para. 17. First, the record does not demonstrate that company-specific do-not-call requests are being ignored. Second, there would be substantial costs associated with such a requirement. Third, such a requirement would likely cause annoyance to consumers who requested no further contact from the company by any vehicle.

¹³⁸ See Graves, para. 8.

WorldCom Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

Company-specific lists also are **better** for consumers than NDNC because fulfillment of requests to be placed on such lists is faster than with NDNC. Experience in the states demonstrates that it can be months between when the consumer signs-up for the state do-not-call list and the required compliance by companies. Company-specific requests can be honored far more quickly. Do-not-call requests made directly to MCI are implemented in at most two weeks, and often within twenty-four hours."¹³⁹

With regard to the Commission's regulations concerning company-specific do-not-call lists, **WorldCom** would, however, like to take the opportunity to strongly urge the Commission to revisit its rules regarding how **long** a listing must be retained on the company's do-not-call list. The tremendous **turnover** in telephone numbers means the lists **become** quickly outdated."¹⁴⁰ Consequently, consumers who never requested to be placed on a **particular** company's do-not-call list **are being** denied a potentially valuable contact by that company. Moreover, **telecommunications markets** are evolving and expanding rapidly. Companies are continuously offering new and innovative products and services never dreamed of by consumers. Ten years is therefore far too long a time to deny a consumer information on a company's progress on new offerings.

WorldCom suggests the required retention period should be no more than five years. Marketers should also be permitted to cross-reference numbers with the Postal Service's National Change of Address (NCOA) system and other data sources to verify that a number has not been **reassigned**

II. THE REGULATION OF PREDICTIVE DIALERS IS NOT NEEDED AT THIS TIME, BUT IF REGULATED, IT SHOULD BE IN A MANNER THAT DOES NOT, IN EFFECT, BAN THE USE OR ELIMINATE THE

¹³⁹ *id.* para. 11

¹⁴⁰ *Supra* p. 17, n. 53

WorldCom, Inc. Comments
CG Docket No. 02-278
December 9, 2002

BENEFIT OF PREDICTIVE DIALERS.

A predictive dialer is customer premise equipment that is attached to the Automatic Call Distributor (ACD)¹⁴¹ and used to initiate the dialing of pre-determined telephone numbers in a manner that makes efficient use of the sales associates' time. The dialer equipment typically includes software, known as answering machine detection (AMD), which detects when a call is received by an answering machine rather than a "live" person."¹⁴² MCI uses predictive dialers in all of its telemarketing call centers located in various states.¹⁴³

Predictive dialers are a critical marketing tool because 86% to 89% of all outbound dialing does **not** reach an actual person. Instead, the vast majority of calls are not answered, the line is busy, it reaches a voice messaging service, or an answering machine picks up the call."¹⁴⁴ Predictive dialers enable callers to conserve resources and to target its personnel to calls where a person has actually been reached. The AMD component of predictive dialers itself has a substantial **positive** impact on productivity since over one-third of outbound calls are picked up by answering machines."¹⁴⁵

Additionally, predictive dialers reduce the risk of human error in dialing. In particular, predictive dialers assist companies in ensuring that the telephone numbers on its company-specific do-not-call list, or other prohibited numbers, are not dialed. Before loading the numbers into the equipment, MCI runs the numbers against its suppression

¹⁴¹ ACD is the telephony switching system that routes the calls to the available representatives

¹⁴² See Exhibit B, Declaration of Randy Hicks on behalf of WorldCom, Inc.

¹⁴³ Hicks, para. 4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

WorldCom, Inc. Comments
 CG Docket No. 02-278
 December 9, 2002

files, which includes **company-specific** do not call numbers and other numbers that should not to be called. If a number is **not** to be called, it will not be loaded into the system and **therefore** will **not** be called.¹⁴⁶ **Further**, dialers provide a method of controlling the quality and accuracy of the calls being **made**. The system tracks which **telemarketer** handled which call, allowing for **future** coaching and **training**. This is **exceedingly important** in maintaining regulatory compliance for a **company** that employs thousands of telemarketers. The **dramatic** reduction in costs and enhanced **regulatory** compliance capabilities **resulting from** the use of predictive dialers are highly beneficial to **consumers, telemarketers, and regulators**.

Cognizant of the benefits of predictive **dialers**, the Commission is concerned with the **harm** to consumers as a result of the potential for abandon calls and "dead air" posed by this **technology**.¹⁴⁷ An "**abandoned call**" is a call that is disconnected by the **equipment** after a "live" person has answered the call because no calling party agent is available to handle the call.¹⁴⁸ "Dead Air" is the few seconds of silence a called party may experience as the call is being **transferred** to the calling party's agent."¹⁴⁹ The Commission seeks **recommendations** on what **approaches** it might consider to minimize any harm caused by the use of predictive dialers.¹⁵⁰ Specifically, the Commission seeks comment on whether requiring a **maximum setting** for the abandonment rate on predictive dialers or requiring

¹⁴⁶ *Id.*, para. 3.
¹⁴⁷ *Notice*, paras. 26-7.
¹⁴⁸ Hicks, para. 7. *See also*, *Notice*, para. 27.
¹⁴⁹ *See Notice*, para. 27.
¹⁵⁰ There is no material evidence of substantial consumer harm to justify regulation by the Commission. The Commission reports receiving 1,500 *inquiries* in a recent eighteen-month period and 16,000 hits to the Commission's consumer alert website on predictive dialers. *Notice*, para. 26. Inquiries regarding a new technology do not necessarily indicate that consumers are harmed by that technology, nor do hits to a particular Commission website. In fact, the information the Commission provides on its website may be effectively alleviating any consumer concern that may exist as a result of the use of predictive dialers.