

January 3, 2003

Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **NOTICE OF PROPOSED RULE MAKING (NPRM) IN THE MATTER OF THE
TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

DOCKET #02-278

Reply Comments Submitted by Douglas M. McKenna

To the Commission and the Commissioners:

I have read many of the Comments submitted by various professional telemarketing organizations and/or their legal representatives, as well as those of numerous companies that rely on telemarketing (collectively “industry comments”). As someone with a degree in mathematics and who has studied probability and statistics, I have found that there are several glaring flaws pertaining to the “facts” and “studies” upon which the industry relies. The Commission needs to take these industry comments that rely on these purported facts with a mammoth grain of salt.

I also agree with the comments submitted by the Association of Attorneys General. I further urge the Commission to pay close attention to all comments submitted by Robert Biggerstaff of South Carolina, one of the foremost authorities on the TCPA and its nuanced legalities, and by Wayne Strang of California, an individual who has also spent considerable time reading and analyzing the industry’s comments in this matter. I incorporate by reference all of their comments and replies, whether already submitted or submitted after the above date, herein.

The IPI Study Is Fundamentally Flawed

The comments submitted by WorldCom, Inc. state, “[i]n fact, a recent survey of residents in states with government-sponsored DNC lists revealed that, of the respondents aware of their state’s DNC list, the majority of households chose not to register on the list.” (Comments of WorldCom, Inc., page 5). The study they cite, “Consumers, Citizens, Charity and Content: Attitudes Towards Teleservices” was released by the Information Policy Institute on June 4, 2002 under the authorship of a Dr. Michael Turner. WorldCom continues to cite this study elsewhere in

their comments (e.g. footnote 21, page 5; footnote 24, page 7, etc.).

I have read Dr. Turner's report in its entirety. A closer look at this survey's methodology, however, reveals some very significant flaws that render its conclusions absolutely void of any decisional value.

If I were to go into an airport and conduct a survey for the purpose of finding out the degree to which people were afraid of flying, and I found that a majority (say 80 percent) of those surveyed told me they were unafraid of flying, it would be completely intellectually dishonest and statistically bogus for me to then conclude that 80 percent of all Americans are therefore not afraid of flying. The reason such a survey would be of little worth is because it would never sample all those Americans who are so afraid of flying that they avoid the airport in the first place. This is what's called a "biased sample". It is the bane of all quality objective statistical research, and the friend of many politically or financially motivated persuaders who wish to play off of the innumeracy or partial knowledge of those whom they are trying to persuade.

The IPI survey in which WorldCom places so much faith suffers from the exact same problem as the hypothetical airport survey above, only in a much worse way. According to the methodology section printed at the very end of the IPI study, the survey was conducted by telephone, cold calling nearly 20,000 random telephone subscribers to ask about their attitudes towards telemarketers. This method in and of itself raises questions about the study's validity, since outbound telemarketers use basically the same technique, but let's ignore those questions for now. In fact, only 1,000 of those calls resulted in a fully answered set of survey questions, upon which all the conclusions rely. Yet, according to the methods used in this survey, 4,936 of the study's cold calls resulted in reaching an answering machine as opposed to a live person willing to talk to the cold-caller, and the survey discounted and completely ignored those answering machine owners. Additionally, *another* 4,925 subscribers refused outright to participate in the survey, and these were also ignored in the results.

As some individual commenters in this matter have stated, because of the onslaught of telemarketing abuses in the last decade, telephone subscribers have taken to using none other than answering machines to protect themselves from telemarketers (*see e.g.* the NPRM comments of Dale Carson of Parachute, Colorado, who states "My answering machine has become a defense mechanism instead of an assistance to me. [Because of so many telemarketing calls, the] answering machine has become a barrier between myself and the friends and family with whom I wish to communicate"). A recent letter to the editor, under the headline, "Telemarketer on the Line? I'm not in" confirms this same use of answering machines: after attempting to subscribe to an industry-sponsored DNC list, but balking because of a request for his social security number, a beleaguered consumer wrote, "I decided to revert to my normal way of dealing with the problem: just don't pick up the phone until someone I want to talk to starts leaving a message." (Alan Goldfarb, Sunday New York Times Op-Ed/Week in Review, December 22nd, 2002).

In other words, the IPI study ignored a much greater (by a factor of five!) population of people who are very likely to have affirmatively protected themselves against both telemarketers and cold-calling survey takers, and who are thus highly likely (a) to be unsatisfied with outbound telemarketing, (b) to have not purchased anything from an outbound telemarketer, and (c) to have

placed their number on their state's DNC list as opposed to an industry list. The IPI study is additionally wholly invalid in that it ignored the attitudes of yet another 4,925 people (again about 5 times as many as those who participated) who expressly refused to participate in the survey. It doesn't take a genius to understand that a person who refuses to participate in a cold-call telephone survey is quite likely to be a person who does not appreciate nor respond to outbound telemarketing calls. There is every reason to believe that those refusals are highly correlated to the subject matter of the survey, and as such *they cannot be discarded from the data*. In sum, Dr. Turner's uncontrolled study ignored an order of magnitude (10 times) as many people as those who participated, where the accurate inclusion of that ignored sample in the data would have undoubtedly affected, undermined and/or reversed the study's conclusions. As such, this purported study reaches meaningless conclusions, and in fact I would think its design would get one laughed out of the most elementary statistics courses. That the author has a Ph.D is thoroughly disquieting at best.

In short, it appears that this industry survey "cherry-picked" a set of respondents who were inclined towards the study's conclusions. This is perhaps not surprising in that only a few weeks prior to the IPI study's June 4th, 2002 release, Dr. Turner appeared in his capacity as the Direct Marketing Association's "Senior Director Strategic Information" at a DMA-sponsored conference on governmental affairs (see <http://www.the-dma.org/dmagovernment/index.shtml>). The FCC's own Commissioner Abernathy spoke directly after Dr. Turner at this conference.

As is usual when an industry is threatened by regulation, one must be cautious about the level of intellectual honesty employed to provide "evidence" of certain conditions or facts. Fortunately, one does not need a degree in statistics to understand that the IPI "study" suffers from fundamental sampling flaws in its methodology, nor does one need a degree in political science to understand that its author appears to have a serious conflict of interest in conducting that study.

I urge the FCC not to be fooled by these industry shenanigans. This IPI study is as intellectually bankrupt as WorldCom is financially bankrupt (perhaps there's a lesson there). As an educated citizen, I find it astonishing that significant policy questions might be based on anything other than truly objective evidence. The Commission should completely ignore these results and any arguments based upon them, whether from WorldCom or any other luminaries of the telemarketing industry.

Telephone Number Turnover Rate and DNC Expiration Times

It is patently obvious to anyone reading the industry comments that a national Do Not Call list is threatening to the telemarketing industry. Many state lists have been so successful that they have re-invigorated the notion among citizens that, in a relatively short amount of time at little cost, their governments can actually make daily life better for them. That 97 percent of the comments submitted in this matter are from residents of Indiana who feel threatened by a possible loss of their successful state DNC list certainly ought to re-inforce the point.

Given the rapid deployment of state DNC lists in the last few years, the industry knows the writing is on the wall (just in the last month, the FTC announced its national DNC registry, which Bush administration immediately praised). Consequently, the issue the industry has chosen to

focus on is not the existence of a DNC list, but rather the length of time a phone number should remain on the DNC list before a telemarketer can begin trespassing into people's homes and invading people's privacy again. Naturally, the industry will argue for the shortest possible time before they can call again. The Direct Marketing Association recommends five years. CitiGroup recommends three years. At least one industry comment has argued for a DNC expiration period as short as one year (*see* Comments of Comcast Cable Communications, page 12).

Underlying these arguments is a statistic the industry commenters use to support their contention that the expiration of a DNC request should be much less than the usual 10 years. That statistic concerns the turnover rate of telephone numbers in any given year, i.e. that X percent of telephone numbers change hands every year. The Direct Marketing Association (DMA) states that "approximately 16 percent of the U.S. population changes phone numbers every year" (DMA's comments, page 17). In Comcast Cable Communication's comments, the figure they use is 16 percent to 20 percent (citing the DMA and the FCC, *see* footnote 23, page 12). MBNA's comments also repeat the 20 percent figure (page 6).

This figure in and of itself may be reasonable with respect to just one year. What is unreasonable, however, is the unwarranted leap of logic into the chasm of fallacy that after five years 80 percent or more of the population has therefore changed phone numbers. The DMA does not come out and directly say this, but Comcast Cable Communications does: "Telephone numbers change for at least sixteen to twenty percent of the population each year, meaning that within five years, almost all of the numbers on a do-not-call list would belong to different subscribers..." (Comments of Comcast Cable Communications, page 12). This conclusion flies in the face of both simple analysis and basic everyday experience.

The hidden and unwarranted assumption in their argument – that in only five years 80 percent of the population has changed telephone numbers – is that each and every year, a completely distinct 16 percent of the population changes phone numbers. In other words, the industry is saying that in the second year, a *wholly different* 16 percent of phone numbers have changed, and in the third year, another wholly different 16 percent, etc. But this does not account for the year-to-year overlap in that 16 percent of the population that is mobile and changing numbers. To illustrate, in the extreme limiting case, the same 16 percent of phone numbers could change hands every year, leaving the remaining 84 percent of all phone numbers never changing hands at all. What the calculation lacks and requires is some estimate of how many people or phone numbers in that 16 percent are also accounted for in each subsequent year's 16 percent.

For example, in my own case, between the time I left my parents' home to go to college (i.e. when I became a telephone subscriber) and the time I became a homeowner myself, I changed my address approximately once per year. I lived in four different states during that time, and my phone number changed every one to two years. But once I settled down and bought a home, I stayed put for 10 years with the same phone number, moved once, and have stayed put another 9 years. I will very likely remain stayed put with the same phone number for another 5 to 10 years before moving one more time (and even then, I intend to keep the same phone number if I remain in the same city).

The older one gets, the less mobile one becomes in American society. Young people who

have not put down roots and who live in apartments (including dorms) are responsible for some (and I would argue, significant) portion of that same 16 percent of churned phone numbers each year after year. That 16 percent is like a standing wave in the river of aging people, with new young adults entering from upstream, and ex-young adults leaving downstream. Certainly there are itinerant homeowners who change numbers frequently, just as there are also non-itinerant apartment dwellers who keep the same phone number for decades; but, in general, homeowners are much less mobile.

It takes only a few minutes using an internet search engine to find answers to the question, “What is the average length of time a homeowner remains in their home?” While there are many factors that cause wide variation (e.g. whether a neighborhood is near an airport, or has decent school opportunities, etc.), a study by the respected Chicago Title Corporation concluded that homeowner turnover rates circa 1997 ranged in different states from every 6.2 years in Arizona (the fastest) to 18.3 years in New York (the slowest), with an average length of home ownership of 10.2 years for the country (*see* <http://news.inman.com/inmanstories.asp?ID=11469>). In short, my personal experience related above is absolutely typical.

The same study found that 5.8 million homes were sold, out of about 68 million total in the country. Thus, the annual turnover rate of homes in 1997 was just 8.6 percent. There is every reason to believe that the length of time homeowners subscribe to their phone numbers is highly correlated to the length of time they own their homes. And assuming that it is a completely different 8.6 percent of homes being sold each year (which I argue above is not a warranted assumption due to year-to-year overlap, but which would be in line with the telemarketing industry’s style of reasoning), a 10 year wait for a DNC request to expire is thus entirely reasonable for the majority of the US population.

Portability

The explosion in cell phone usage in the last decade has led to a significant and growing proportion of Americans who have foregone residential land line subscribership altogether in favor of their cell phones. For instance, there have been recent stories in the media on the deleterious effect that college student cell phone usage has had on the cash cow many universities have historically enjoyed from the leasing of dorm telephones to their students.

Even worse for the industry’s reliance on a purported 16 percent turnover rate, is that with coming portability of cell phone numbers, many people will be able to remain mobile, changing addresses, but without changing their phone numbers at all. This should lead to an even lower telephone turnover rate in the coming years.

DialAmerica’s Comments

DialAmerica’s comments make the statement, “If the FTC’s estimate of 60 million consumers signing up for the national do-not-call list ... is anywhere close to accurate, the universe of marketable names will be drastically reduced.” (page 15). This is nothing but hysterical fear-mongering for the simple reason that the vast majority of those people who are going to put their names on the DNC list are precisely those people who would not have responded to any outbound

telemarketers' interruptions. Therefore, there will be little change in absolute numbers of Dial America's "universe of marketable names," just a change in density.

Why Dial America or any outbound telemarketer wouldn't want to concentrate their efforts on precisely that (soon-to-be-denser) universe of people who haven't put their names on a national DNC list is bewildering. The industry regularly and completely rationally states that they only want to expend their efforts on consumers who are likely to respond to their sales entreaties. It would seem that now's their chance.

It is also instructive to note that the FTC's "estimate of 60 million" DNC requests coincides in number quite closely with the number of homes in the United States as reported in the above-mentioned Chicago Title Corp study (68 million).

Outbound vs. Inbound Telemarketing

Numerous industry comments avoid making the distinction between sales, employment, and general economic activity due to outbound telemarketing vs. that of inbound telemarketing calls. I urge the Commission to not be fooled by the industry tactic of lumping these two statistics together to give the false and exaggerated picture of the importance of outbound telemarketing, which is responsible for the vast majority of abuses that the TCPA and DNC lists address.

Established Business Relationship for Unsolicited Faxes

Several commenters, including DirecTV and William B. Hayes of Denver, Colorado, have argued that the Commission should continue to exempt from TCPA violations unsolicited fax ads sent by a business with whom the recipient has an existing or established business relationship ("EBR"). This EBR exemption, however, has been and will continue to be properly rejected by the courts as contrary to Congressional intent.

There is nothing in the TCPA that prevents a business from faxing an ad to another business with whom the sender has an EBR, as long as the sender gets prior express permission. If it's important to both parties to have timely advertising transmitted by fax, then when their EBR is first established, the sender simply asks the recipient whether it's acceptable to the recipient for the sender to reach out electronically to borrow the recipient's printing machinery and use it to print out advertisements for the sender's goods or services using the recipient's valuable resources. If the recipient says "Yes", the sender can fax away for some agreed-upon period of time. If the recipient says "No thanks", the sender cannot. Problem solved.

Acquiring permission before borrowing or using (much less consuming or destroying) another's property is one of the foundational principles of our society. Without permission and the ability to withhold it, there can be no private property. What DirecTV and others are really arguing for is the ability to avoid the costs of asking permission to consume, convert, deface, or destroy a person's property, whether it be fax paper or computer memory or whatever the media is. Astoundingly, these commenters are essentially asking the Commission to allow them to "opt-out" of civil society so that they can save money at other people's expense without asking.

As the comments of nearly all 50 state Attorneys General argue in this proceeding, as well as those of several other individuals well-versed in the law and the canons of statutory construction, there can be no EBR exemption for unsolicited faxes. The TCPA's language simply does not allow for such an exemption. This does not preclude any business with whom I have a relationship from faxing ads to me. They just have to ask first, at their own cost, if it's okay to do so.

As an example of the problem, consider what has happened to my business in the last couple of weeks. My business had recently signed up to exhibit in a trade show. In spite of the fact that during the establishing of a temporary business relationship with the trade show operators I expressly labeled my facsimile number (which the sign-up process required me to provide) as not to receive any advertising, the operators of that trade show ignored my entreaties and have begun shifting the costs of marketing their services to my business by transmitting multi-page fax ads for services that no one in my business has any need of or interest in, just as I feared.

As eventually always happens, these unsolicited ads caused my business fax machine to become prematurely empty, which rendered *wholly useless* the equipment my small business crucially depends on for its revenue. When a customer of mine a short time later attempted to fax a purchase order for over \$3000 worth of my company's product, my empty fax machine was not able to capture this transaction for a significant period of time until a non-automated employee (me) was able to restock the machine with paper. Thus, these few unsolicited ads directly interfered with my business operations, harmed valuable goodwill with one of my larger customers, and threatened my ability to accomplish a sale of goods whose value was *four orders of magnitude* greater than the nominal value of the raw resources consumed by the initial unsolicited fax ads. That my company fax machine would have become empty anyway at a much later date is immaterial; I can plan for that eventuality by using the mechanism of permission w/r/t my legitimate customers, whereas I cannot, and should not have to, plan for a fax machine emptied by unsolicited fax ads, whether sent by strangers or by persons with whom I have some form of business relationship.

Should I complain against these trade show companies in court, their attorneys will no doubt argue the EBR exemption, and they will eventually lose because there is no statutory basis for the FCC's overreaching exemption. The FCC needs to rescind the language for this alleged exemption, as it is causing a waste of judicial resources.

Loss of strict vicarious liability would enable enormous junk fax abuse

DirecTV and other commenters urge the Commission to rescind the FCC's proper clarification that liability of advertisers under the TCPA's junk fax provisions is strictly vicarious.

DirecTV is unhappy, it would seem, with being on the receiving end of at least one class action lawsuit complaining of one or more fax marketing campaigns that have graced the fax machines of nearly everyone I know in the last two years with ads touting its products. My business has received several of these infuriating ads, prominently displaying DirecTV's logo and trademarks, and displaying fine print expressly saying "© 2001 DIRECTV, Inc.," "a unit of Hughes Electronics Corp."

Persons in various industries are expected to be, and in fact have an obligation to be, familiar with the laws and regulations governing their business activities. Whether one is a restaurant owner abiding by health regulations, or a marketer conducting an ad campaign, every person is expected to know the laws governing their activity. When one discovers an agent doing something illegal in one's name, particularly an action from which one is benefitting even indirectly, if one does not immediately take affirmative steps to control or repudiate that actor's actions, then one must still be held liable. This is basic agency law.

A business should not be able to benefit from an illegal marketing campaign at the same time as avoiding the liabilities of having that campaign performed in its name. I have no sympathy for DirecTV and its ilk, nor should the Commission.

Conclusion

"There are truths, half-truths, and statistics" goes an inverted variation of Disraeli's famous aphorism. It is my belief that the telemarketing industry is showing its true colors in their comments by blatantly relying on misleading or manufactured "facts" about telemarketing, especially those that are the result of non-independent industry surveys.

I continue to urge the Commission to use its rulemaking powers to protect telephone subscribers from the often illegal, always disruptive predations of an industry that has taken advantage of the open nature of the telephone network and its subscribers. The industry pleas to allow them to continue to use predictive dialing machines is nothing short of sociopathic (my business could be so much more productive too were I allowed to break the law or violate others' rights to make more money). The costs of acquiring prior express permission, whether to consume someone's fax paper or to bother someone in their own home with an automated machine, cannot and must not be avoided. The industry has had a decade to incorporate these costs into its business model, but they have self-evidently failed. The industry's continued avoidance of these permissional costs deserves a response: citizens through their government banding together to implement a large-scale withholding of that permission, in the form of a national Do Not Call list.

Junk faxers and the outbound telemarketing industry and those that rely on them should literally have no business behaving the way they do in a civil society.

Thank you.

Sincerely,

/s/ _____
Douglas M. McKenna, President
Mathemaesthetics, Inc.