

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**REPLY COMMENTS OF PRIVATE CITIZEN, INC.**

These reply comments are focused on an examination of WorldCom's December 9, 2002 comments made to the FCC concerning the TCPA NPRM.

On page 2 of WorldCom's comments, they recite a "Summary" of six points. This section of Private Citizen's reply will restate and respond to each such point.

- 1) [WorldCom claims] "the ultimate costs to consumers, in terms of increased prices and loss of information, outweighs the benefits of such a [do-not-call] list;"

*Increased prices:*

- WorldCom offers no documentation that prices would increase.
- WorldCom's argument telegraphs its understanding that residents are generally unwilling to receive sales solicitation calls at home, and thus would enroll in a NDNCL to avoid WorldCom-like calls.
- The vast majority of residents value their privacy above WorldCom's conjectural lower prices.<sup>1</sup>
- WorldCom's argument indicates its insistence on ignoring the basic thrust of the issue; that of the sanctity of the home and a resident's right therein to avoid those they seek to not associate with.

*Loss of information*

- WorldCom, and other outbound telephone solicitation entities, have innumerable avenues to present 'information' to residents. While residents have but one locale to enjoy their fundamental right to be left alone, free of the ringing summons' of peddlers; their homes.
- At times, 'information' supplied via telemarketing, is antithetical to the benefit of consumers. For instance, on March 7, 2002, the California Attorney General and PUC announced an \$8.5 million settlement with MCI WorldCom over

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<sup>1</sup> 68%, if given the option, would block phone-company calls that telemarket products or services. "Privacy Concerns and Consumer Choice", Harris-Westin Survey Reports: 1998

slamming, cramming and unfair business practices. The collateral News Release included the following statements of California's:

Attorney General: "This settlement represents a major victory for California consumers who are tired of getting ripped off by long-distance companies that try to gain residential and small-business customers by deceptive means."

PUC President: "Under this judgment, MCI will have to stop the deceptive practices that resulted in thousands of complaints from California consumers."<sup>2</sup>

- 'Information' must actually benefit the recipient in order to be of value. Sadly, when 'information' is inflicted upon residents by hucksters who electronically barge into our homes, summoning us from our private family activities for the sake of the unknown caller's self-interest, that 'information' is, to a great extent, worthless or worse.
- 2) [WorldCom claims] "a NDNC would have a devastating impact on the competitiveness of the telecommunications industry, particularly since it substantially favors incumbent providers;"
- To highlight WorldCom's genuine concern for competitiveness within the telecommunications industry, a June 6, 2000 FCC News Release reported that WorldCom entered into a Consent Decree which terminated a Commission investigation into unauthorized conversion (slamming) of consumers' preferred carriers by MCI WorldCom. In the agreement, MCI WorldCom agreed to take major actions to deter slamming and pay the U.S. Treasury \$3,500,000, the highest such slamming payment made to the U.S. Treasury as of that date. Thus, the FCC and slammed residents have been vibrantly aware of WorldCom's genuine concern regarding competition.<sup>3</sup>
- 3) [WorldCom claims] "there are no significant changes in relevant circumstances since the Commission first considered and declined to implement NDNC;"
- Perhaps Worldcom forgot the affidavit that Randy Hicks, WorldCom's Director of Automation and Network Operations, submitted to the California Public Utilities Commission (PUC) pursuant to its Rulemaking in May of 2002.<sup>4</sup>

In that affidavit, Hicks stated, "Thus, by avoiding the 86% to 89% of all outbound dialing that does not reach actual consumers, a sales representative can be seven to nine times more successful at reaching potential customers than she/he would be without the use of predictive dialers."

In 1991, before the ubiquitous use of predictive dialers, Congress found that 300,000 solicitors called more than 18,000,000 Americans every day.<sup>5</sup> Today, the Direct Marketing

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2 <http://caag.state.ca.us/newsalerts/2002/02-017.htm>

3 Action by the Commission, June 6, 2000, by Order FCC No. 00-205.

4 In Support of the Opening Comments of Worldcom, Inc. on Draft decision of Commissioner Brown R.02-02-020

5 P.L. 102-243 [S.1462] sec.2 Findings (3).

Association (DMA) claims that 4.1 million jobs are affected by the business to residential telephone solicitation industry.<sup>6</sup>

Let us assume that only one-third of the 4.1 million employed are actually making outbound calls to residents today (1.367 million / 5 times more than in 1991). Let us also assume that those 1.367 million telemarketers are just six-times (rather than WorldCom's claim of seven to nine times) more successful in reaching residents than their 1991 counterparts, due to the use of now-available and widely used predictive dialer technology.

By using the above figures given us by Congress, and substantially more conservative figures than given us by the DMA and Worldcom, we can calculate a conservative estimate of the number of daily solicitation calls made to residences.

300,000 solicitors made 18,000,000 calls per day in 1991 = 60 calls per day per telemarketer  
1,367,000 solicitors x 60 calls per day would be 82 million calls without predictive dialers  
82 million x 6 times higher productivity due to predictive dialers = 492 million calls a day  
492 million calls per day; today / 18 million calls per day in 1991 =  
An increase of 27 fold in telemarketing calls to residents today, over Congress' 1991 figure.

By further reducing our finding by a factor of 5 to assure an absolutely conservative result for the purpose of this reply, we posit that residential telemarketing has increased 500% since 1991. Yet Worldcom claims that "there are no significant changes in relevant circumstances" since 1991.

Worldcom may be using a peculiar type of accounting method to determine that a 500% increase in the number of telemarketing calls is an insignificant change. Nevertheless, residents across the nation consider it quite significant, and oppressive.

4) [WorldCom claims] "such a regime would pose unconstitutional restrictions on commercial free speech;"

- As Worldcom should be aware, otherwise lawful and non-misleading commercial free speech can be restricted, constitutionally, pursuant to the guidelines laid down by the United States Supreme Court in the Central Hudson case.<sup>7</sup> These guidelines require that:
  - (a) The government has a substantial state interest in regulating the speech.
- Well, the government does have such a substantial interest, in that residents who are unwilling to receive commercial solicitation calls, should not be burdened by them. This is the right to be let alone, and that right is to exist, it must exist at least in our homes, or it will not exist anywhere. Samuel D. Warren and Louis D. Brandeis, described in their famous 1890 article<sup>8</sup> the Right to Privacy as the "right to be left alone". They argued that this right extended the common law protection of the body, reflected in the torts of assault and

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<sup>6</sup> Comments of the Direct Marketing Association to the FCC, CG Docket No.02-278 at page 10

<sup>7</sup> See Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341 (1980)

<sup>8</sup> Samuel D. Warren and Louis D. Brandeis, The Right To Privacy, 4 Harvard Law Review 193 (1890)

battery, to recognition and protection of personality. William L. Prosser clarified this right to constitute four distinct privacy torts.<sup>9</sup> One of these is the right to be protected from intrusion. Prosser's classification prevails widely today and is acknowledged in the Restatement (Second) of Torts.

(b) The regulation directly and materially advances that interest.

- A do-not-call list, that will enable residents to avoid commercial solicitation 'cold' calls will directly and materially advance that interest of preserving a resident's right to be let alone at home by those they wish to avoid.

(c) The regulation is no more extensive than necessary to serve the interest.

- The creation of a do-not-call list will not prevent advertisers from utilizing the rainbow of alternative advertising vehicles available today, such as radio, TV, newspapers, periodicals, internet spam/pop-ups, flyers, mail, blimps, door-to-door, billboards, and a myriad of other means.

5) [WorldCom claims] "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);"

- There is some truth to WorldCom's claim of conflict with the TCPA, in that the FTC's proposal does not completely prohibit abandoned sales solicitation calls initiated by predictive dialers. At §310.4 (b)(4) the FTC's Telephone Sales Rule states:  
"A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:  
(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;"

Yet, FCC regulations promulgated under the TCPA (47 CFR §64.1200) require the following at:

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(iv) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller,

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<sup>9</sup> William Prosser, "Privacy," 48 California Law Journal 383-423 (1960)

the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted..

(f) As used in this section:

(3) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property,

goods, or services, which is transmitted to any person, but such term does not

include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

Therefore, when a predictive dialer initiates a call for purposes described in 47 CFR §64.1200(f)(3), a failure to comply with (e)(2)(iv) is a violation of the TCPA. Such is the case even when the predictive dialer abandons the call. Thus, the FTC 'safe harbor' described at §310.4(b)(4)(i) conflicts with the TCPA. Thus, WorldCom's suggestion in its comments to the FCC, that predictive dialers be allowed a 5% abandonment rate, is itself in conflict with the TCPA.

6) [WorldCom claims] "implementing NDNC would impose an undue burden on common carriers."

- Considering WorldCom's claim of burdensome costs to common carrier's in notifying residents of their rights pursuant to a national do-not-call list:

Regional Bell Operating Companies (RBOCs) have been charging residents to have their number de-listed from the white pages of telephone directories. For example, SBC Ameritech charges more than \$10 annually for this 'non-service'. Thus, using the common carriers' own pricing theory, it follows that including a DNC notice in the phone book will be less costly to the RBOC than not doing so.

- If, on the other hand, Worldcom finds it an undue burden for it to not solicit telephone numbers on a do-not-call list, all they have to do to accomplish this, is nothing - not call those numbers. If common carriers are unable to avoid calling folks who have indicated that they do not want to be called, perhaps the telemarketing industry anthem should be changed to, "We don't want to call those who don't want to be called, but do it anyway because it may generate revenue." Yet somehow, common carriers that make solicitation calls seem to easily stop soliciting those residents who have accepted their offer.

WorldCom's comments to the FCC liberally cite a survey conducted by the Information Policy Institute<sup>10</sup> (IPI survey) in an effort to bolster WorldCom's position that:

- "Telemarketing is beneficial to the individual consumer. Fifty percent of surveyed households purchased a product or service over the telephone in the past year."
- "Yet it is not clear that the majority of consumers demand this one-step [opt-out] method. In 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."
- "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."

An examination of the IPI survey reveals that its actual indications are contrary to the propaganda line WorldCom hopes the survey will support. First, the survey intended to determine attitudes towards outbound telephone marketing was conducted via an outbound telephone marketing research program.

- Of the 19,348 'eligible' numbers called:
  - 4,936 reached answering machines (which are commonly used to screen telemarketing calls).
  - 3,214 went unanswered (which often results when an unknown number appears on Caller ID).
  - 359 residents were called and disturbed uselessly due to their inability to understand English.
  - 234 residents were summoned to their phone but were incapable or too ill to participate.
  - 2,219 calls were unproductive for a variety of other reasons.
- Of the remaining 8,386 people "asked to participate":
  - 2,153 refused to have an appropriate individual at that number take the call.
  - 4,625 refused to participate in any way, though they were appropriate subjects for the IPI survey.
  - 230 calls were terminated during the survey by (evidently) the called party.
- There were 1,378 calls to individuals, co-operative and capable of participating. Of these:
  - 202 were disqualified due to age or occupation.
  - 1,176 completed the survey.

Now, let us attempt to discern what the above facts and figures truly indicate.

Of the 8,979 folks summoned to their phone, only 1,176 of them were appropriate, willing and capable of completing the survey, and actually completed it. That is a rate of 87% of those people called who were disturbed for no productive reason, other than someone else's intent to meet their own objective.

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<sup>10</sup> Michael A. Turner, Ph.D., Information Policy Institute, "Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices," Final Report

Of the 8,386 people asked to participate, 7,008 objected in a conspicuous fashion, to being bothered. That is an 'objection rate' of 84% in which people implied their opinion against telephone solicitations - regardless of what was being solicited; opinions, donations, sales or political support.

Thus it is reasonable to reduce all pro-telemarketing findings in the WorldCom cited survey results by 84% and increase all anti-telemarketing findings by 84%.

### **Conclusion**

I thank the Commission for its consideration of these reply comments.

Sincerely,

Robert Bulmash - President  
Private Citizen, Inc.