

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

WORLDCOM COMMENTS

Karen Reidy
WorldCom, Inc.
1133 19th Street, NW
Washington, DC 20036
(202) 736-6489

May 5, 2003

SUMMARY

In this proceeding, the Commission must act in a way that best achieves Congressional policy, as expressed in not only in the Do-Not-Call Implementation Act (DNC Act), but also in the Communications Act of 1934, as amended (Act), specifically the Telephone Consumer Protection Act of 1991 (TCPA) (Section 227 of the Act) and the local competition provisions of the Act. As discussed in these comments, the DNC Act's direction that the FCC "maximize consistency" with the Federal Trade Commission (FTC) rules does not require that the FCC adopt rules that are identical to those adopted by the FTC. Indeed, if the FCC concludes that it should adopt new rules, it is most likely that the Commission can best implement Congressional policy mandates by adopting rules that are different in certain respects from the FTC's rules.

First, in order to further the local competition goals of the Communications Act, WorldCom (d/b/a MCI) has proposed that all local telecommunications carriers be deemed to have an established business relationship with consumers. Second, FCC rules governing abandonment rates and reporting requirements with respect to predictive dialers should vary in certain respects from the FTC rules, in order to achieve public policy objectives and consistency with the TCPA. Third, in order to comply with the TCPA, the FCC would need to implement the national database in a manner that differs in some respects from the FTC's implementation plans. Finally, because the DNC Act does not reference the FTC's Caller ID rules, the FCC has even greater flexibility to deviate from the FTC framework. The FCC should therefore adhere to its previously-adopted policies with respect to the transmission of the calling party number.

TABLE OF CONTENTS

I. INTRODUCTION	1
II. DISCUSSION	2
A. The Commission Must Still Determine Whether or Not to Adopt Any Additional Regulations Pursuant to the TCPA.....	3
B. The FCC Should Ensure that the Do Not Call Rules Do Not Stifle Competition for Local Telecommunications Services.....	5
C. The FCC’s Rules for Predictive Dialers Can and Should Vary From The FTC’s Rules	7
D. If It Adopts a National Database, the FCC Should Tailor Implementation to Achieve the Objectives of the TCPA.....	10
E. The FCC Should Adhere to its Precedent Pertaining to Caller ID.....	13
III. CONCLUSION.....	14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

WORLDCOM COMMENTS

WorldCom, Inc. (d/b/a MCI, hereinafter “MCI”) respectfully submits these comments in response to the Commission’s Further Notice of Proposed Rulemaking (*Further Notice*), in the above-referenced dockets, released on March 25, 2003.¹

I. INTRODUCTION

On September 18, 2002, the Commission initiated a rulemaking proceeding to consider whether to revise its rules implementing the Telephone Consumer Protection Act of 1991 (TCPA),² including whether the Commission should revisit the option of establishing a national do-not-call list and whether it should adopt rules restricting the use of predictive dialers.³ On December 18, 2002, the Federal Trade Commission (FTC)

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Further Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 03-62 (rel. Mar. 25, 2003)(*Further Notice*).

² 47 U.S.C. Section 227.

³ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Docket No. 02-278 and CC Docket No. 92-90, FCC 02-250 (rel. Sept. 18, 2002)(*Notice*).

released an order that, among other things, established a national do-not-call registry and adopted rules pertaining to abandoned calls that effectively govern the use of predictive dialers.⁴ On March 11, 2003 the Do-Not-Call Implementation Act (Do-Not-Call Act or DNC Act)⁵ was signed into law. The Do-Not-Call Act requires the Commission to issue, within 180 days of enactment, a final rule pursuant to the rulemaking the Commission began in September 2002 and, in doing so, to “consult and coordinate” with the FTC to “maximize consistency” with the rules promulgated by the FTC that pertain to the national do-not-call list and the regulation of predictive dialers.⁶ The Commission, in its *Further Notice*, seeks comment on how the Commission should consider amending its rules given the statutory directive, as well as how to harmonize the Do-Not-Call Act’s requirements with those of the TCPA.⁷

II. DISCUSSION

In this proceeding, the FCC must act in a way that best achieves Congressional policy, as expressed in not only in the DNC Act, but also in the Communications Act of 1934, as amended, specifically the TCPA (Section 227) and the local competition provisions of the Act. As discussed below, the DNC Act’s direction that the FCC “maximize consistency” with the FTC rules does not require that the FCC adopt rules that are identical to those adopted by the FTC. Indeed, if the FCC concludes that it should adopt new rules, it is most likely that the Commission can best implement Congressional

⁴ 16 CFR Part 310.4(b).

⁵ Do-Not-Call Implementation Act, Pub. L. No. 108, 117 Stat. 557 (2003).

⁶ Do-Not-Call Act, Section 3.

⁷ *Further Notice*, para. 6.

policy mandates by adopting rules that are different in certain respects from the FTC's rules. First, in order to further the local competition goals of the Communications Act, MCI has proposed that all local telecommunications carriers be deemed to have an established business relationship with consumers. Second, FCC rules governing abandonment rates and reporting requirements with respect to predictive dialers should vary in certain respects from the FTC rules, in order to achieve public policy objectives and consistency with the TCPA. Third, in order to comply with the TCPA, the FCC would need to implement the national database in a manner that differs in some respects from the FTC's implementation plans. Finally, because the DNC Act does not reference the FTC's Caller ID rules, the FCC has even greater flexibility to deviate from the FTC framework. The FCC should therefore adhere to its previously-adopted policies with respect to the transmission of the calling party number.

A. The Commission Must Still Determine Whether or Not to Adopt Any Additional Regulations Pursuant to the TCPA.

The Do-Not-Call Act does not require the Commission to adopt a national do-not-call list or rules regulating the use of predictive dialers.⁸ The Congressional Report accompanying the Do-Not-Call Act specifically states that “[i]n enacting section 3, it is not the intent of the Committee to dictate the outcome of the FCC’s pending rulemaking proceeding.”⁹ If Congress’s intent had been a mandatory requirement that the Commission adopt a national do-not-call list and regulate the use of predictive dialers,

⁸Additionally, the Commission can and should modify its rules regarding company-specific lists to only require an entity to retain a name and number on the company-specific list for 5 years, as well as allow an entity to cross-reference LEC data to verify a number has not been reassign.

Congress would have specifically imposed that requirement. Instead, Congress required the Commission to issue final rules “pursuant to the rulemaking proceeding that it began on September 18, 2002.”¹⁰ This rulemaking proceeding was initiated *to determine whether or not* the Commission should adopt a national do-not-call regime or regulate the use of predictive dialers.¹¹

Moreover, as Congress acknowledges, the FCC is bound by the TCPA.¹² The TCPA specifically requires the Commission to “develop proposed regulations to implement the methods and procedures that *the Commission determines* are most effective and efficient [to protect residential telephone subscribers’ privacy rights.]”¹³ The Commission, in order to fulfill its duty under the TCPA, must make this determination and issue, or decline to issue, rules accordingly.

Congress’s primary purpose in maximizing consistency is “to prevent situations in which legitimate users of telephone marketing are subject to conflicting regulatory requirements.”¹⁴ Such a situation exists if it is impossible for an entity to be concurrently in compliance with all of its regulatory obligations. Since the FCC’s TCPA jurisdiction overlaps the FTC’s jurisdiction, certain entities must abide by the rules of both agencies. If these rules were in conflict with each other it would be impossible for the entities subject to the jurisdiction of both agencies to meet their overall federal regulatory requirements. The Commission does not have to adopt the FTC regulations to

⁹ H.R. Rep. No. 8, 108th Cong., 1st Sess. 9 (2003)(H. R. Rep.).

¹⁰ Do-Not-Call Act, Section 3.

¹¹ *See, Notice*, paras. 1, 11, 26 and 49. Additionally, this rulemaking also sought to address the effect of a national do-not-call list on the telecommunications industry. *See Notice*, para. 20

¹² H. R. Rep. at 4.

¹³ 47 U.S.C. Section 227(c)(1)(E)(*emphasis added*).

avoid such a conflict. In fact, by declining to adopt a national do-not-call regime and regulations pertaining to predictive dialers, the Commission avoids any potential conflict.

B. The FCC Should Ensure that the Do Not Call Rules Do Not Stifle Competition for Local Telecommunications Services

If the FCC adopts new rules, it must do so in a way that fulfills Congressional directives in the Communications Act, as well as the DNC Act.¹⁵ In 1996, five years after passage of the TCPA, Congress enacted far-reaching legislation designed to introduce local competition. The FCC has spent seven years implementing the 1996 Act, and consumers are just beginning to see the fruits of that labor, as they begin to have a choice of local service providers.

The best way for the FCC to meet the Congressional policies established in the Communications Act as well as the DNC Act is to maximize the opportunities for consumers to choose their local carriers, by ensuring that all local telecommunications service providers can market their services to all customers, including those on the national list. Were the FCC to simply adopt the FTC's established business relationship rule, incumbent local exchange carriers (LECs) – but not competitive LECs - would be able to call the vast majority of all residential customers, because virtually all residential

¹⁴ H.R. Rep. at 3 & 9.

¹⁵ Courts have recognized the principle that an agency, in effectuating the policies of one statute, cannot ignore the "...policies embodied in other legislation enacted at different times and with different problems in view." Mclean Trucking Co. v. United States, 321 U.S. 67, 80 (1944). The agency must carefully analyze the possible effects of its actions on other statutory policies and, to the extent possible, minimize its disruption of those policies. See Yukon-Kuskokwim Health. Corp. v. N.L.R.B., 234 F.3d 714, 718 (2000). Accordingly, in implementing the Do-Not-Call Act, the FCC should act in a manner

customers currently subscribe to local services provided by the incumbent LEC, or have done so within the last eighteen months.¹⁶ The best way to promote local competition is to allow competitive carriers to have the same access to consumers enjoyed by the incumbent LECs as a result of the incumbent LECs' historical monopoly position. This is also consistent with a goal of the DNC Act "to protect consumers in a manner that is fair and balanced to industry participants."¹⁷

In its reply comments of January 31, 2003, MCI proposed a definition of established business relationship (EBR) that would achieve this goal of providing customers with a choice of local carriers. Specifically, where consumers desiring an essential service such as local telecommunications have been forced to obtain that service from a government-sanctioned monopoly, once competition for that service is introduced, consumers should be deemed to have an established business relationship with all providers of that service -- incumbents and new entrants alike -- until competition in the market is sufficiently developed.¹⁸

MCI's proposed EBR definition is consistent with the Do-Not-Call Act. In fact, the DNC Act is not applicable to the definition of EBR since the DNC Act specifically refers to 16 CFR 310.4(b), and this section of the FTC rules does not include the definition for "established business relationship." Nonetheless, even if the FCC seeks to maximize consistency with this aspect of the FTC's rules, no conflict would emerge if the FCC adopted a different definition, because common carriers are not subject to the FTC's

consistent not only with the FTC's rules, but with the FCC's own statutory mandates aimed at promoting competition for telecommunications services.

¹⁶ See 16 CFR Part 310.2(n).

¹⁷ H.R. Rep. at 5.

¹⁸ WorldCom Reply Comments, pp. 4-7.

jurisdiction. The FCC cannot be bound by a regulation of an agency that neither had the requisite expertise or authority to address the unique circumstances surrounding local telecommunications services.

The FTC is not charged with implementing local competition, and does not regulate telecommunications service providers. Therefore, the FTC did not consider the how best to fulfill the mandates of the Telemarketing Act¹⁹ congruent with the mandates of the Communications Act. Moreover, because the FTC lacks jurisdiction over common carriers, the FTC did not have the benefit of hearing arguments concerning the impact of the FTC's proposed rules on local exchange competition. As described above, the FCC has the flexibility to adopt rules that are different than those adopted by the FTC. In order to facilitate the continued development of local competition, the FCC should adopt rules that allow competitive carriers to call residential customers who can be called by incumbent local exchange carriers.

C. The FCC's Rules for Predictive Dialers Can and Should Vary From the FTC's Rules

As discussed above, the DNC Act contemplates that the FCC's rules may be different from those adopted by the FTC. With respect to the rules affecting predictive dialers, while MCI maintains that no FCC action is necessary, if the FCC adopts rules, MCI continues to believe that the FCC should adopt rules that are different from those

¹⁹ The Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. 6101-6108, was the basis for the FTC's Telemarketing Sales Rule (16 CFR Part 310).

adopted by the FTC with regard to the rate and definition of abandoned calls, record retention, and recorded messages.²⁰

In its previous pleadings, MCI has described rules for predictive dialers that would best serve the public interest by striking a balance between increased productivity from the use of predictive dialers with the level of abandoned calls experienced by consumers.²¹ Although MCI maintains that no rule is necessary, we contend that requiring that no more than 5% of calls be abandoned (compared to the 3% required by the FTC) is the best means of achieving this balance.

In addition, assuming the FCC adopts rules on retention of call records for the purpose of determining compliance with a maximum abandonment rate, the FCC should develop reporting requirements that are effective without being unnecessarily burdensome. For example, as MCI has previously described in its comments, carriers should have the flexibility to calculate the rate over a six-month period.²²

Furthermore, the Congressional Report accompanying the Do-Not-Call Act raises the concern that there are certain aspects of the FTC's rule on abandoned calls that the FCC cannot adopt because they conflict with the TCPA, specifically referring to the FTC's recorded message requirement.²³ The FTC's safe harbor for abandoned calls includes a requirement that the telemarketer play a recorded message, providing the name and a telephone number of the seller on whose behalf the call was made, whenever a sales representative is not available to speak with the called party within two seconds of

²⁰ The FCC's rules should be no more restrictive than the FTC's rules.

²¹ WorldCom Comments, pp. 41-45; WorldCom Reply Comments, pp. 18-22.

²² WorldCom Reply Comments, pp. 18-19.

²³ H.R. Rep. at 4.

the called party's complete greeting.²⁴ Given Congress's expressed view that this provision is inconsistent with the TCPA, the FCC should refrain from adopting a similar requirement.

Finally, if the Commission adopts rules with regard to predictive dialers, the Commission must allow time for all companies to be fully compliant. As the FTC recognized, in extending the compliance date for its abandoned call rule, a failure to allow for a nine-month time period for full compliance with the regulations governing the use of predictive dialers (namely, the maximum abandonment rate, record retention and recorded message) would "...constitute an undue burden on some telemarketers and sellers, who may need to reprogram or purchase software for their equipment, or replace their current equipment."²⁵ Entities subject solely to the FCC's rules are entitled to the same time period for compliance as provided the entities subject to the FTC's rules, as these entities will be forced to perform similar system upgrades.²⁶ Companies need the specifics of any FCC rules, and indeed the decision as to whether the FCC will adopt rules in this area, before they reasonably can be expected to initiate the steps necessary for compliance. Consequently, if the FCC adopts rules that govern the use of predictive dialers, those rules should not be effective until nine months from the date such rules are issued. This does not conflict with the mandate of the DNC Act. The DNC Act requires the Commission to issue final rules by September 7, 2003. It does not require a specific

²⁴ 16 CFR. Part 310.4(b)(4)(iii).

²⁵ 68 FR 14659-60 (Mar. 26, 2003) and 68 FR 16414-15 (Apr. 4, 2003).

²⁶ See *WorldCom Ex Parte Notice*, CG Docket No. 02-278 (Mar. 14, 2003)["[I]n order to demonstrate compliance with a specific ABA, companies would need to create and test new software functionally in order to generate data to track ABA as it may be defined. Companies would also need to create a database to capture, sort, and store the data

effective date for those rules. Moreover, as discussed above, providing a nine-month time period for implementation is consistent with the FTC's actions.

D. If It Adopts a National Database, the FCC Should Tailor Implementation to Achieve the Objectives of the TCPA

The Do-Not-Call Act does not alter the fact that the FCC is bound by the TCPA in its implementation of a national do-not-call database. As MCI stated in its opening and reply comments, the Commission may not lawfully require entities subject to its jurisdiction to participate in a nationwide do-not-call database that includes non-residential callers. The FTC's database, as currently designed, is not limited to "residential subscribers" and therefore is beyond what this Commission is authorized to adopt.²⁷

Moreover, if the Commission adopts a national do-not-call database it must, in accordance with the TCPA, ensure that states can access the portion of the national database that relates to that state.²⁸ The access provided must accommodate proper enforcement of the relevant regulations. While the states may have the authority to enforce state laws with respect to intrastate calls to subscribers on both the state and federal lists, regulations adopted pursuant to the TCPA can only be enforced with respect to calls to subscribers that are in the federal database, not calls to those subscribers who only registered on the state list. Therefore, the states' access to the FCC database must be provided in a manner that enables a state, and telemarketers accessing the state's list, to

mention above in order to be able to determine ABA levels as may be required. This type of development and testing could take nine to twelve months to complete."}]

²⁷ See WorldCom Comments, pp. 33-34; WorldCom Reply Comments, p. 9.

distinguish those subscribers who only registered on that state's list from those included on the state list via the federal list.

In addition, states must be required to update their lists as the national database is updated. That is, as a telephone number is added or removed from the national database, the number must simultaneously be added or removed from the state list. An entity should not be subject to state enforcement action for calling a number that is on the state list by virtue of its inclusion in the national database if that number is no longer in the national database. Similarly, an entity may opt to only purchase the state list that, pursuant to the TCPA, should incorporate subscribers of that state from the national database. Yet, if the state list is not properly maintained and some of the numbers in national database were not yet added to the state list, that entity could unintentionally be violating federal law.

While the FTC Order discusses possible coordination with the state lists, it appears that the FTC has not yet developed a system that would support the access required by the TCPA. The FCC, which is bound by the TCPA, must ensure that the mechanics of this access are determined and operational prior to its rule taking effect. One possible solution is for the Commission to create the national do-not-call database as the sole database, with states only being permitted to use, as the state list, their respective portions of the national database.

Furthermore, pursuant to the TCPA, the Commission is required to specify the details of implementation, such as how subscriber numbers will be added to the

²⁸ 47 U.S.C Section 227(c)(3)(J); *see also*, 47 U.S.C Section 227(e)(2).

database.²⁹ In fulfilling its obligations the Commission should not merely defer to the FTC's decisions on these matters, when a different approach would better serve the public interest. For example, in specifying the sign-up mechanism the FCC should ensure that, aside from periodic purges such as those for disconnects and reassignments, only an individual representing the household is able to register or remove a number. The FTC is planning two means of registration, telephone registration from the telephone number being registered and Internet sign-up. The requirement that telephone registration be from the number being registered is intended to prevent third-party sign-up. While not completely fool proof, with the additional requirement of the name and identifying information of the party enlisting the number, telephone registration does appear to be a practical approach to verifying legitimate sign-up.³⁰

The Commission, however, should not permit Internet sign-ups. The FTC intends to establish a website for registration via the Internet, through which consumers will be able to enter the number they wish to register. The only protection against third party sign-ups is an email confirmation and/or requirement for entry of certain address information. Telephone numbers and associated addresses are listed in telephone books and easily obtainable by persons other than the subscriber, thus requiring address information to accompany the request provides no assurance that it is in fact a member of the household placing a telephone number in the registry. In addition, since there is no mechanism to associate an email address to a particular telephone number, this mechanism likewise provides no assurance. Because the entry on the do-not-call list is a

²⁹ 47 U.S.C. Section 227(c)(3).

³⁰ As the Commission knows, when household disputes arise, it is important to be able to trace the sign-up to particular person with the accompanying verifiable information.

restriction on the information a household will receive the Commission must be sure that only a household can register itself on the list and consequently, should not allow Internet sign-up.

Given the importance of proper implementation, if it adopts a national do-not-call regime, the Commission should consider seeking further comment on the implementation and operational aspects of the database. While the Commission is required to issue final rules adopting, or declining to adopt, a national do-not-call database by September 7, 2003, any Commission rule adopting such a database should not take effect until such time as the Commission has satisfactorily resolved the implementation and operational issues associated with such a database, so as to avoid consumer and industry confusion.

E. The FCC Should Adhere to its Precedent Pertaining to Caller ID.

As noted above, the DNC Act does not reference the FTC's caller ID rule.³¹ Accordingly, the FCC should refrain from adopting a rule requiring telemarketers to transmit caller identification information. Such a rule would be inconsistent with the policy established in Commission precedent concerning caller ID services. The Commission's rules regarding caller ID services were designed to protect the calling party's privacy. The Commission has previously found that "the *calling* public has an interest in exercising a measure of control over the dissemination of telephone numbers that must be reflected in federal policies governing caller ID service."³² Consequently,

³¹ See 16 CFR 310.4(a)(7).

³² *In the Matter of Rules and Policies Regarding Calling Number Identification Service – Caller ID*, Report and Order and Future Notice of Proposed Rulemaking, CC Docket No. 91-281, 9 FCC Rcd. 1764, 1769, para. 34 (rel. Mar. 29, 1994)(*emphasis added*).

the Commission prohibits local exchange carriers that lack caller ID blocking and unblocking capabilities from passing calling party number (CPN).³³ It would be discriminatory for the Commission to require one type of calling party to send CPN, at significant expense, while having rules that ensure the right of all other callers to decide whether or not this information is sent to the called party. As MCI discussed in its previous comments, such a rule would also create an expectation on the part of consumers – that a telemarketer’s caller ID information will be displayed on their Caller ID boxes – that will not always be fulfilled, through no fault of the telemarketer.³⁴

III. CONCLUSION

The Commission, in issuing rules pursuant to this rulemaking, must seek to implement the Congressional policies established in the DNC Act, as well as the Communications Act. FCC rules that vary from the FTC rules are permitted, and may be necessary to achieve these statutory objectives.

Respectfully submitted,

WORLDCOM, Inc.

/s/ Karen Reidy
1133 19th Street, NW
Washington, DC 20036
(202) 736-6489

May 5, 2003

Its Attorney

³³ *In the Matter of Rules and Policies Regarding Calling Number Identification Service – Caller ID*, Third Report and Order, Memorandum Opinion and Order on Further Reconsideration, and Memorandum Opinion and Order on Reconsideration, CC Docket No. 91-281, para. 15 (rel. Mar. 25, 1997).

³⁴ WorldCom Reply Comments, pp. 25-26.