

May 30, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Rm. TWB-204
Washington, DC 20554

Re: Notice of Ex Parte Presentation in CG Docket Number 02-278

Dear Ms. Dortch:

On May 28, the undersigned, together with Ms. Donna Gillin, Director of Government Affairs of CMOR, and William Wilson, Executive Chairman-US of NOP Worldwide, and John A. Dimling, Chairman of Nielson Media Research (both of which are members of CMOR), met separately with (i) Brian Tramont, Chief Legal Adviser to the Chairman of the Commission, and representatives of the General Counsel's Office and subsequently with (ii) Commissioner Abernathy and her legal advisor, Matthew Brill. The purpose of the meetings was to discuss the pending rulemaking in the above-referenced docket as it relates to survey research calls transmitted to cell phones and other wireless services.

During these meetings, we first summarized CMOR's position, stated in its comments and reply comments. We pointed out that the statute expressly allows the Commission to exempt from the restrictions of the statute calls to a wireless number that are "not charged to the called party" and that the legislative history of the statute makes clear that the Commission was granted this power to permit it to recognize the legitimacy of and need for such an exemption for certain non-commercial calls such as survey research calls: such calls are tied to a public interest value and are inherently non-intrusive in nature. We stressed, as we did in our Comments, that survey research calls do not occur with great frequency (the average person receiving perhaps one to two total calls year), that survey research organizations generally do not purposefully seek to place calls to cellular lines, and that modern calling plans offered by wireless carriers include flat rate arrangements and arrangements which offer free, unlimited inbound minutes so that consumers receiving such calls on their wireless plans are not exposed to unexpected or cognizable cost.

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The industry representatives both pointed out that even if it were possible to entirely exclude wireless calls from randomly generated survey samples, such an exclusion would create sampling bias that could seriously impair the rigor of survey research results. They explained that these results are used to respond to public opinion about social issues, political candidates, and government policy, about products and advertising, about media and entertainment, and the like and that the accuracy of that data is therefore critical. Furthermore, that the resulting bias would be greater, as more cell users utilize their cellular lines as their primary telephone. In each of the meetings, it was stressed that, on the infrequent occasion when a survey research call is made to a wireless number, the consumer is asked whether he or she would prefer to continue the call on a land line number and, if so, the consumer is requested to supply the appropriate land line number for that purpose.

Given the lack of complaints that have been received by the Commission with respect to survey research calls, we urged that the exemption from the wireless calling restrictions CMOR seeks would serve the literal terms, spirit and fundamental purposes of that provision of the TCPA.

In each of the meetings, alternatives to a categorical exemption for non-commercial calls such as survey research calls were explored. In response to one such suggestion, CMOR stated that although it might be willing to consider whether an arrangement could be constructed so that the caller, rather than the called party, paid for such calls, there are technological, economic, and legal issues that would have to be resolved. In particular, we noted that wireless carriers do not typically capture ANI, especially under flat rate plans and plans that provide free unlimited inbound minutes. Formidable accounting problems might therefore arise. We noted that such an arrangement would not work unless all wireless carriers were willing to participate. We also pointed out that, even if an arrangement satisfying the literal terms of the statute were technologically, economically, and legally attainable, it cannot be accomplished within the confines of the current timetable for this docket.

It was observed that there are a number of other outstanding issues concerning wireless service that will be resolved in the relatively near term. We stated that the Commission should not by inaction on CMOR's request in this docket moot the issue CMOR has raised.

Accordingly, if the Commission elects not to adopt the exemption CMOR seeks in this docket, we urged that the Commission forebear from enforcement of the statute in cases of infrequent or inadvertent violation by survey research organizations. We noted that the Commission has categorically exempted certain types of research calls – those made on behalf of political organizations or non-profit organizations – from the reach of

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the TCPA including the provisions of the TCPA dealing with calls to wireless telephones. We further noted that an indeterminate number of survey research calls that are not categorically exempt would nonetheless comport with the literal terms of the statute, either because the called party has voluntarily supplied the wireless number (and therefore can be deemed to have given consent to use the number for this purpose) or because the call is one for which the called party is “not charged” under the terms of the plan. Since survey research organizations have no means of knowing whether a particular call is or is not subject to the statutory restriction in these circumstances, there are obvious difficulties of fair and appropriate enforcement of the statute. We urged that, at the minimum, the Commission exercise its discretionary powers to refrain from enforcement until a more complete record can be developed in either a separate docket or in connection with one of the wireless dockets now pending, a record which – we are convinced – will fully justify the exemption CMOR seeks.

Very truly yours,

Ian D. Volner

cc: Brian Tramont, Esq.
Matthew Brill, Esq.

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