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June 4, 2003

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W. - Suite TW-A325
Washington, D.C. 20554

Re: *Ex Parte Presentation*
Rules and Regulations Implementing the Telephone
Consumer Protection Act of 1991, CG Docket No. 02-278

Dear Ms. Dortch:

Attached for inclusion in the record of the above-referenced proceeding pursuant to 47 C.F.R. § 1.1206(b) is a letter to K. Dane Snowden, Chief of the FCC's Consumer and Governmental Affairs Bureau, from Lisa B. Smith, Director, Federal Advocacy, for MCI.

Sincerely,

Ruth Milkman

Attachment

cc: Margaret Egler
Erica McMahon
Richard Smith
Marcy Greene

Lisa B. Smith
Director
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MCI

June 4, 2003

K. Dane Snowden
Chief, Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Consequences of Inconsistent State Rules Regarding Interstate Telemarketing

Dear Mr. Snowden:

In enacting the Telephone Consumer Protection Act of 1991 (TCPA), Congress' goal was to establish a national policy that would apply to all interstate telemarketing. In addition to facilitating compliance, a uniform national policy for interstate calls minimizes consumer confusion and unnecessary costs. Congress clearly vested in the FCC the exclusive jurisdiction to promulgate rules governing interstate communications, and interstate telemarketing.[1] Despite this clear grant of authority, some states have attempted to assert authority over interstate calls in ways that are often inconsistent with the FCC's implementation of the TCPA. For example, by adopting more restrictive requirements, states may set *de facto* national standards, thus subverting Congress' goal of national rules established by the FCC for interstate calls. States may also adopt manifestly different standards that will result in their residents receiving disparate treatment, or they may implement requirements that are inconsistent with, or in addition to, those required by the FCC, leading to confusion for customers and companies, and needlessly increasing compliance costs for the industry. As discussed below, to the extent that the FCC does not clarify that its rules govern interstate calls, the practical effects of such state actions will be substantial.

As noted, more restrictive state rules may effectively override the FCC's expert judgment and set *de facto* national standards. For example, after weighing both the burdens to telemarketers and the benefits to consumers, the FTC adopted a maximum call abandonment rate of three percent for predictive dialers. Although a number of

1 *See* WorldCom Comments at 2 n.6 (Dec. 9, 2002); WorldCom Reply Comments at 27-30 (Jan. 31, 2003).

commenters asked the FTC to adopt an abandonment rate of zero percent, the FTC refused to do so, concluding that "a maximum abandonment rate of three percent strikes a reasonable balance between curbing a very abusive practice and preserving some of the substantial economic benefits that accrue from the use of predictive dialers."[2] The FCC will presumably perform a similar analysis in determining whether, and to what extent, it will regulate the use of predictive dialers. Yet, telemarketing companies generally use the same predictive dialer – programmed to comply with a single call abandonment rate – to reach customers nationwide. As a result, if one state were to adopt a stricter call abandonment rate than that adopted by the FCC, any carrier that desired to use predictive dialers for a regional or nationwide marketing campaign would be forced to seek to achieve that lower rate, or risk violating the state rule. Indeed, at least one state has considered adopting a substantially lower abandonment rate (1%) than established by the FTC.[3]

If the FCC does not affirmatively assert exclusive jurisdiction over interstate calls, inconsistent state rules would also result in interstate calls to residents of certain states being treated differently from interstate calls to consumers in the rest of the nation. For example, Congress clearly intended there to be an exception, in the regulation of telephone solicitations, for those customers with which a company has an "established business relationship." An established business relationship is defined as a prior or existing relationship based on a consumer's inquiry, application, purchase or transaction regarding the company's products or services.[4] However, Indiana's state do-not-call rules do not include an exception for established business relationships. By adopting a patently inconsistent rule, a state like Indiana would be able to trump the national rule for its residents. As a result, telecommunications companies would be barred from contacting – and thus attempting to "win back" – former customers in Indiana, despite the fact that the FCC has previously ruled that such conduct is pro-competitive.[5] As a result,

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2 *FTC Telemarketing Sales Rules, Final Rule*, 68 F.R. 4580, 4643 (Jan. 29, 2003).

3 Although California has thus far declined to adopt a stricter call abandonment rate, it has left "the door open to a possible further reduction later if warranted." *See Order Instituting Rulemaking on the Commission's Own Motion to Establish an Appropriate Error Rate for Connections Made by an Automatic Dialing Device Pursuant to Section 2875.5 of the Public Utilities Code*, Rulemaking No. 02-02-020, Opinion at 14 (March 13, 2003) (rejecting request that the existing rate of 3% be made permanent).

4 47 C.F.R. § 64.1200(f)(3)-(4).

5 *Consumer Proprietary Network Information and Other Customer Information,* Order on Reconsideration, 14 FCC Rcd 14409, ¶ 68 (1999) ("Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to 'out bid' each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs.").

consumers in Indiana would not be able to benefit from the lower prices and better terms that often result from winback activities.

Inconsistent rules will also create needless customer confusion as the rules are enforced. A prime example arises with regard to how long a customer's name will remain on a do-not-call list. Although MCI expects that consumers will remain on the FCC's do-not-call list for five years,[6] the duration for state lists varies from three years (New York) to indefinite (Indiana, Kentucky). Thus, if a Kentucky resident signed up for the state do-not-call list, that consumer would be on the list indefinitely. A next-door neighbor who signed up for the federal list, however, would be eligible for interstate telemarketing calls after five years. In addition, the customer who signed up for the state list would be subject to different protections than the neighbor who signed up for the federal list. This inconsistent treatment is particularly troubling given that consumers are unlikely to understand all of the consequences associated with their choice of lists.

Finally, inconsistent state rules create unnecessary confusion and litigation risk for companies. It is reasonable for a company to assume that if it complies with the FCC's rules, it is in compliance nationwide with respect to interstate telemarketing calls. An FCC order that does not assert that states may not regulate interstate calls is a recipe for company confusion and unnecessary litigation.

In sum, failure to clarify that the FCC has exclusive jurisdiction over interstate telemarketing calls will undercut Congress' goal of having a national policy. In addition to creating confusion, inconsistent state rules will effectively require telemarketers to assemble and regularly update state-specific lists, increasing their costs and, ultimately, the costs borne by consumers. Accordingly, MCI urges the Commission to make clear that state rules do not apply to interstate telemarketing calls.

Sincerely,

/s/ Lisa B. Smith

Lisa B. Smith

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6 MCI has urged that, if the FCC adopts a national list, it should use a five-year timeframe, which would be consistent with the FTC's requirement. *See Ex Parte* Letter from Lisa B. Smith, Director, Federal Advocacy, MCI, to K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, FCC, at 4 n.2 (June 2, 2003).