LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

RUTH MILKMAN
PHONE (202) 777-7726

PHONE (202) 777-7700
FACSIMILE (202) 777-7763

June 12, 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*
In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278

Dear Ms. Dortch:

On June 11, 2003, Lisa Smith and Karen Reidy of MCI, along with Ian Gershengorn of Jenner and Block and Ruth Milkman of Lawler, Metzger & Milkman, counsel for MCI, met with Debra Weiner, and John Stanley of the FCC's Office of the General Counsel, to discuss the above-referenced proceeding. During the meeting, MCI discussed issues raised in its previous filings in this docket and also provided FCC staff with the attached documents.

Pursuant to the Commission's rules, this letter is being provided to you for inclusion in the public record of the above-referenced proceeding.

Sincerely,

Ruth Milkman

Ruth Milkman

Attachments

cc: John Stanley
Debra Weiner

MCI

June 11, 2003
CG Docket No. 02-278

Preemption of State Do-Not-Call Legislation and Regulation Regarding Interstate Calls

As set forth in more detail below, Congress made clear that the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"), preempts state do-not-call legislation with respect to interstate telemarketing calls. In light of this clear congressional intent, and in light of the numerous practical difficulties that would result from active state regulation in this area, MCI urges the Commission to make clear in its order that TCPA and the Commission's implementing regulations are intended to, and do in fact, preempt state do-not-call legislation regarding interstate calls.

In particular, this written *ex parte* responds to arguments made in the Reply Comments and Recommendations of the Attorney General of Indiana, submitted in this docket on May 19, 2003 ("Indiana Reply Comments").

I. The TCPA Prempts State Do-Not-Call Legislation With Respect to Interstate Calls

As MCI's previous filings in this proceeding demonstrate, the TCPA and the Commission's implementation of the TCPA preempt state do-not-call legislation and regulations to the extent they purport to regulate interstate calls. The TCPA explicitly exempts from preemption only "State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits . . . the making of telephone solicitations." 47 U.S.C. § 227(e) (emphasis added). If a State could impose more restrictive regulations on interstate calls, then the word "intrastate" in the TCPA's preemption provision would be superfluous. Supreme Court precedent, however, precludes such a result. *See, e.g., Duncan v. Walker*, 121 S. Ct. 2120, 2122 (2001) (noting the "Court's duty to give effect, where possible, to every word of a statute"); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (noting that "a legislature is presumed to have used no superfluous words").

The structure of the TCPA reinforces the reading of the TCPA that this Supreme Court case law requires. In the congressional findings accompanying the TCPA, for example, Congress explicitly noted the substantial benefits to the economy that telemarketing provides, *see* TCPA § 2(4) (noting that telemarketers accounted for more than $435 billion in sales in 1990), and stated that the interests of telemarketers and the interests of consumers "must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing." TCPA § 2(9). That Congress expressly sought to have the Commission balance the interests of consumers *and* telemarketers strongly suggests that Congress viewed Commission regulation as both a floor and a ceiling, and that state efforts to disrupt the balance struck by the Commission would be preempted. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) ("where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation").

Abundant legislative history further confirms that Congress expected the Commission to conclusively determine the appropriate level of do-not-call regulation for interstate calls. For example, Senator Pressler, a proponent of the legislation, stated that the "Federal Government should act now to provide *uniform legislation* to protect consumers while ensuring that the telemarketing industry continues to be a vigorous player in the U.S. economy." Senate Report, Additional Views of Mr. Pressler (emphasis added). Similarly, Representative Rinaldo emphasized that "preemption has the important benefit of ensuring that telemarketers are not subject to two layers of regulation." Cong. Rec. H10342 (Nov. 18, 1991).

Those comments are consistent with the legislative history, including comments by Senator Hollings, the TCPA's primary Senate sponsor, making clear the absence of state jurisdiction over interstate calls. *See, e.g.*, Report Accompanying S. 1410, at 3 (Oct. 8, 1991) (noting that "States do not have jurisdiction over interstate calls"); Cong. Rec. S16205 (Nov. 7, 1991) (statement of Senator Hollings) ("State law does not, and cannot, regulate interstate calls."); TCPA § 2(7) (explicit congressional finding that "telemarketers can evade [state] prohibitions through interstate operations").

Finally, preemption of state efforts to impose do-not-call regulation on interstate calls is consistent with the overall structure of the Communications Act of 1934, as amended ("Communications Act"). The Communications Act created the Commission for the very purpose of "regulating interstate . . . commerce by wire and radio" to create "a rapid, efficient, nationwide and world-wide wire and radio communication service." 47 U.S.C. § 151. Congress feared, however, that expansive state authority over interstate calls might interfere with the Commission's statutory responsibility under the Act to create an efficient interstate telephone system. Accordingly, Congress created in the Communications Act a dual jurisdictional structure that generally vested broad interstate authority in the Commission, and placed intrastate authority in the States. *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). By recognizing and endorsing this basic jurisdictional divide, the Communications Act, as amended by the TCPA, limits the problems and obstacles to effective nationwide service that would inevitably arise from state-by-state do-not-call regulation of interstate telemarketing calls.

Given this overwhelming evidence of congressional intent, it is no surprise that when confronted with this issue, the Commission's Network Services Division concluded that States lack jurisdiction to impose do-not-call legislation with respect to interstate telemarketing calls, noting in a 1998 response by the Chief of the Common Carrier Bureau's Network Services Division, to an inquiry from a Maryland state legislator, that the Communications Act, as amended by the TCPA, "precludes Maryland from regulating or restricting interstate commercial telemarketing calls." That conclusion was clearly correct, and the Commission should reach the same conclusion today.

II. The Arguments of the Indiana Attorney General Are Unpersuasive

In light of this overwhelming evidence of congressional intent to preempt state do-not-call legislation with respect to interstate calls, the Indiana Attorney General faces an uphill climb. The arguments in the Reply Comments do not come close to accomplishing the task.

The Indiana Reply Comments argue first that, when analyzing the preemptive scope of the TCPA and the Communications Act, the Commission should start with a presumption against preemption. Indiana Reply Comments at 17. But with respect to interstate calls, that argument is misguided. The Supreme Court has stated that "[a]n assumption of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). No one can dispute that there has been a "significant federal presence" with respect to the regulation of interstate calls. *See, e.g.*, *AT&T Corp. v. Ting*, 319 F.3d 1126, 1136 (9th Cir. 2003) ("[W]e do not apply the presumption against preemption in this case because of the long history of federal presence in regulating long-distance telecommunications.").

Moreover, the argument for the presumption against preemption is particularly weak with respect to the TCPA. As a general matter, Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), limits the ability of the Commission to regulate intrastate calls. However, Section 2(b) explicitly *exempts* § 227 from its scope, thus allowing the Commission to regulate even *intrastate* telemarketing calls. In light of the expansive delegation to the FCC to regulate even intrastate telemarketing calls, a presumption of non-preemption with respect to interstate calls is illogical.

Moving beyond any presumption, the Indiana Reply Comments suggest that the plain language of § 227 insulates all state prohibitions from preemption. But the AG's purported plain language argument fails because it fails to confront squarely Congress' inclusion of the word "intrastate." Under the interpretation advanced in the Indiana Reply Comments, the word "intrastate" is superfluous and, as noted above, the Supreme Court views with disfavor arguments that render statutory terms superfluous.

Moreover, with respect to the TCPA, such a casual disregard for the term "intrastate" cannot be reconciled with the history of the legislation. The telemarketing bill as initially introduced provided that nothing in the bill shall preempt any state law that imposes "more restrictive requirements or regulations." *See* H.R. 2921 (introduced July 18, 1989). When the bill was reintroduced, the critical language had been changed to provide that nothing in the bill shall preempt any state law that imposes "more restrictive *intrastate* requirements or regulations." *See* H.R. 1304 (introduced Mar. 6, 1991) (emphasis added). The limitation of non-preemption to "intrastate" calls was thus intentional. Moreover, as the legislative history quoted above makes clear, there was extensive discussion of preemption and state jurisdiction in the course of enacting the TCPA, and it is thus particularly unlikely that the word "intrastate" appeared as a result of accident or oversight.

The Indiana Reply Comments next argue that the limitation of non-preemption of "intrastate" calls does not extend to the "prohibition" of those calls. Under that interpretation, the FCC can preempt state statutes that impose more restrictive regulations of interstate calls, but cannot preempt state laws that prohibit such calls altogether. But such an interpretation makes no sense as a general matter, and is particularly illogical in light of the balance of interests Congress was seeking to achieve. The Indiana Reply Comments do not even attempt to explain why Congress would have passed such a statute.[1]

None of the other arguments set forth in the Indiana Reply Comments can resurrect the Attorney General's inadequate textual presentation. The Reply Comments emphasize, for example, the various provisions that allegedly confirm Congress' understanding that States would continue to have a role in do-not-call restrictions. *See, e.g.*, § 227(e)(2) (referencing a State's "regulation of telephone solicitations"); § 227(c)(3)(J) (referencing "administering or enforcing State law"); DNCIA, Pub. L. 108-10 (referencing state do-not-call registries). None of those statutes, however, mention state laws governing *interstate* calls. They are thus all consistent with MCI's position that the Commission is the exclusive regulator of interstate calls, and that non-preemption is limited only to state laws governing intrastate calls.

The Reply Comments also argue that state do-not-call statutes "threaten no interference with Congress' goal of providing efficient, reasonably priced national telecommunications service." Indiana Reply Comments at 11. But giving each State the power to decide who may make interstate calls, and under what circumstances, creates exactly the type of interference with the "unified national communications service," *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), that the Communications Act was designed to prevent.

The Indiana Reply Comments also dismiss the extensive legislative history discussed above. But even accepting that legislative history should be disregarded in the manner that the Reply Comments suggest – and MCI does not accept that view here – the Reply Comments ignore the fact that the congressional understanding of the absence of state jurisdiction was conveyed in *express findings* passed by Congress along with the TCPA. *See* TCPA § 2(7) (explicit congressional finding that "telemarketers can evade [state] prohibitions through interstate operations"). The Supreme Court routinely relies on such findings. *See, e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997). The Attorney General's effort to convince the Commission to ignore the abundant evidence of congressional intent is thus to no avail.

Nor do any of the cases cited in the Indiana Reply Comments require a contrary result. In *Louisiana Public Service Commission*, for example, Respondents argued that the FCA preempted state regulation of depreciation rates in connection with intrastate telephone service.

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[1] It is particularly odd for the Indiana Attorney General to draw a distinction between a state "restriction" and a state "prohibition," since the Indiana statute, which is not an absolute bar to telephone solicitations but is instead a limit on the circumstances under which such calls can be made, would appear to constitute a restriction rather than a prohibition. Moreover, any difficulty in classifying the Indiana statute demonstrates that the distinction proposed by the Attorney General is unworkable.

Respondents argued that the grant of authority to the Commission to regulate depreciation, in conjunction with the broad power of § 151, confirmed that FCC authority over depreciation was exclusive. The Court noted that it might be inclined to accept that argument, "were it not for the express jurisdictional limitations of FCC power contained in § 152(b)." 476 U.S. at 370. Here, of course, § 152(b) has no application, both because *interstate* calls are at issue, and because (as noted above) § 152(b) expressly exempts § 227 from its coverage. There is thus no obstacle to assigning § 227 and § 151 the broad preemptive scope that they are due.

Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995), similarly offers the Attorney General little assistance, for *Van Bergen* involved calls by a candidate for office in Minnesota to other Minnesota residents – that is, calls that were *intrastate*. The Eighth Circuit thus had no reason to discuss, and did not discuss, the significance of the § 227(e)'s limitation of non-preemption to intrastate calls.[2]

Finally, although the Indiana Reply Comments tout the Indiana statute as a model of state legislation that is worthy of preservation, that statute illustrates vividly the dangers of state regulation of interstate calls. The Indiana statute is filled with exceptions, including those for newspapers and insurance agents, *see* Ind. Code § 24-4.7-1-1, that show a greater concern for protecting favored local industries than for protecting any alleged privacy concerns. As MCI has previously argued, allowing such state regulation not only risks discrimination against national businesses, it also risks creating "confusion for customers and companies, and needlessly increasing compliance costs for the industry." Letter from Lisa B. Smith, MCI, to K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, CG Docket No. 02-278 (June 4, 2003).

III. Conclusion

The FCC should make clear in its eventual order that the Communications Act, as amended by the TCPA, and the Commission's implementing regulations are intended to, and do in fact, preempt state do-not-call legislation regarding interstate calls.

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[2] The Reply Comments also incorrectly suggest that the asserted state power to address fraudulent interstate telemarketing calls somehow gives States jurisdiction to enact do-not-call legislation with respect to such calls. But the TCPA governs only do-not-call legislation, and thus the preemption analysis for do-not-call legislation is substantially different than is preemption analysis for fraudulent interstate calls.

LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

RUTH MILKMAN
PHONE (202) 777-7726

PHONE (202) 777-7700
FACSIMILE (202) 777-7763

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
Federal Advocacy

1133 Nineteenth Street, NW
Washington, DC 20036
202 887-2992
Fax 202 736-6359

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

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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).

LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

RUTH MILKMAN
PHONE (202) 777-7726

PHONE (202) 777-7700
FACSIMILE (202) 777-7763

June 2, 2003

BY ELECTRONIC FILING

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445 Twelfth Street, S.W. - Suite TW-A325
Washington, D.C. 20554

Re: *Ex Parte Presentation*
Rules and Regulations Implementing the Telephone
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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
Michelle Carey
Bill Dever
Bryan Tramont
Lisa Zaina
Jessica Rosenworcel
Matthew Brill
Daniel Gonzalez
Scott Bergmann

Lisa B. Smith
Director
Federal Advocacy

1133 Nineteenth Street, NW
Washington, DC 20036
202 887-2992
Fax 202 736-6359

MCI

June 2, 2003

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

Re: Local Competition Issues in Do-Not-Call Proceeding

Dear Mr. Snowden:

In its written filings in this proceeding, MCI has urged the Commission to ensure that any new rules adopted in the *Do-Not-Call* proceeding do not undermine its ongoing efforts to promote competition for local telephone services, despite MCI's continued belief that the adoption of additional DNC rules is not necessary. MCI has identified rules under consideration pertaining to Do-Not-Call lists that potentially could create a substantial advantage for incumbent local exchange carriers (LECs) that would impair competition significantly. MCI has also requested that the Commission take the following actions in its forthcoming order: (1) clarify that the FCC has exclusive jurisdiction over interstate calls, including interstate telemarketing; and (2) adopt a timeframe of five years for the company-specific list.

The local telephone business is unlike any other business or industry in the country. Incumbent LECs were the sole providers of local telephone service for 100 years, and their monopoly was protected by the government. The passage of the Telecommunications Act of 1996 marked a sea change in the government's approach to local telephony; Congress directed the FCC and state commissions to open local telecommunications services to competition. The development of local competition today remains at a very early stage, as new entrants finally are beginning to attract residential customers, despite the relentless opposition of incumbent LECs.

Incumbent LECs, however, remain dominant, providing local service to well over 90% of residential customers. If new entrants are to have a realistic opportunity to attract customers from the incumbent LECs, they must be able to educate consumers and make them aware that there are alternatives to the incumbent's offerings. Telemarketing is a critical sales channel for new entrants. For example, 70% of MCI's residential local customers have been acquired through telemarketing. Some rules that have been proposed in connection with a national Do-Not-Call list, or company-specific lists, may appear on their face to be competitively neutral, but in fact would create a substantial disadvantage for new entrants, raising barriers to entry in local telephony and impeding the development of local competition.

The aspect of Do-Not-Call policy that potentially has the greatest impact on competition for local telecommunications services is the definition of "established business relationship." Under the FTC's rules, for example, companies are permitted to call consumers with whom they have an established business relationship, even if those consumers subscribe to a national Do-Not-Call list.[1] Although this rule may be competitively neutral for other industries, it would provide a tremendous advantage to one set of local telephone service providers – the incumbent LECs – solely because of their historic dominance of local telephone service and continued control of more than 90% of residential customers.

Preferred Approach

Established Business Relationship. MCI has asked the Commission to adopt a definition of the term "established business relationship" that permits competitive LECs the same access to market their services to consumers that incumbent LECs enjoy. For example, the FCC could revise its existing definition of established business relationship as follows:

> The term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by a request by the consumer to be placed on a company's Do-Not-Call list.
>
> (a) Local exchange carriers, other than incumbent local exchange carriers as defined in 47 U.S.C. Sec. 251(h), shall be deemed to have an established business relationship with all residential telephone subscribers other than those that have requested to be placed on the local exchange carrier's company-specific Do-Not-Call list. This provision shall cease to apply three years after the effective date of this rule, unless the Commission finds that the three-year period must be extended to ensure

1 *See* 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii).

the preservation or development of competition in the residential market for local telecommunications service.

Alternative Approach

If the Commission decided not to define established business relationship in a way that eliminated the unfair competitive advantage afforded to incumbent LECs, MCI urges the Commission to adopt a set of more limited proposals that are designed to reduce (but would not eliminate) the competitive disadvantage that would otherwise be created by the Do-Not-Call list rules. These proposals include: clarifying the FCC's existing established business relationship definition; extending the established business relationship to marketing partners; and providing a fresh look for customers that have been on a company-specific list for more than eighteen months.

Established Business Relationship. The FCC should clarify its existing definition of established business relationship to specify the requirements for terminating such a relationship. Specifically, the Commission should explain that in order to "terminate" a relationship with a company, a consumer must ask to be put on the company-specific list. In addition, the FCC should determine that the established business relationship of a company extends to a company that is a marketing partner, for purposes of telemarketing the joint offer. By way of example, MCI might have a partnership with a company whereby MCI makes a special program offer available to customers of that company. For purposes of marketing the joint MCI/partner offer to customers of the company, the Commission's rules should permit MCI to share the established business relationships of its partner, and, consequently, to call customers that are on the national list, as long as the customers are on neither MCI's company-specific list, nor the partner's company-specific list.

Fresh Look. The FTC and FCC rules will usher in a new regulatory paradigm for telemarketing, including a new set of consumer safeguards. The company-specific list has served for the past ten years as the primary means by which consumers have indicated that they did not wish to be contacted by particular telemarketers. If the FCC, like the FTC, established a national Do-Not-Call list, that national list would become the primary vehicle for consumers to indicate their preferences. Under this new regime, the company-specific list will play a different, and more limited, role in regulating telemarketers' activities.

The FCC's implementing rules also should take account of the fact that telemarketing is a part of a competitive marketplace. Monopoly telephone companies do not need to telemarket their products and services – customers call them because they are the only game in town. Incumbent LECs, therefore, likely have relatively short company-specific lists. Carriers that have been using telemarketing to compete in long distance and other markets for many years, by contrast, likely have compiled significant company-specific lists.

To reduce the risk of anti-competitive effects that these circumstances could create, the Commission should adopt a "fresh look" policy for customers who have been on a local exchange carrier's company-specific list for more than 18 months.[2] Eighteen months is a reasonable demarcation point in this case, because, as the history of Section 271 approvals suggests, incumbent LECs have only begun to open their local networks to competitive entry since the beginning of 2002. Consequently, consumers that asked to be added to a telecommunications company's company-specific list more than 18 months ago likely did so because they did not wish to receive calls concerning long distance plans. The Commission also has the option of refining this "fresh look" policy to permit local exchange carriers to call customers on company-specific lists only for the purpose of marketing local or all-distance products, and not for the purpose of marketing stand-alone long distance. In addition, the Commission could require that notice of the new rules applicable to company-specific lists be given as part of the notification of the existence of a national list required by the TCPA.[3] For example, local exchange carriers could be required to send written notice to consumers advising the consumers of the national Do-Not-Call list, the role of the company-specific list under the new regime, and the need for a consumer who was added to the existing company-specific list more than 18 months prior to the date of the notice to affirm the request within 60 days.

These proposals for clarifying and revising the FCC's rules governing company-specific and the national Do-Not-Call lists would reduce the risk that the likely disparity between the existing incumbent and competitive LEC lists in the future will hamper unfairly the efforts of competitive LECs to enter local markets.

FCC Jurisdiction

Once the FCC has established national policies with respect to Do-Not-Call lists, and associated requirements that are consistent with its local competition goals, states should not be permitted to apply different rules and requirements to interstate telemarketing calls. As MCI has shown in this and other submissions in this proceeding, rules governing telemarketing calls may have a substantial impact on the ability of competitive LECs to enter local markets. Moreover, as the Commission has previously recognized, uniform national rules are important for carriers that operate on a regional or

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[2] As MCI and other commenters have indicated, if the FCC, like the FTC, adopted a national Do-Not-Call list that specified that subscribers will be listed for five years, the Commission should also adopt a five-year period for company-specific lists, and allow a company to remove the names of consumers who have been on a company-specific list for five years or more. *See, e.g.*, WorldCom Comments at 40 (Dec. 9, 2002).

[3] 47 U.S.C. § 227(c)(3)(B).

nationwide basis.[4] As discussed in MCI's comments, Congress, in the Communications Act, has made it clear that the FCC has exclusive jurisdiction over interstate calls.[5] Hence, the Commission should ensure that its rules alone govern interstate telemarketing calls.

In sum, the interests of consumers are best served in this proceeding by ensuring that any Do-Not-Call rules are implemented in a way that is responsive not only to consumers' wishes regarding telemarketing calls, but also to their interest in finding out about new choices for local telephone service. Rules that appear on their face competitively neutral, but create significant additional advantages for incumbent local exchange carriers, will impede progress toward robust local competition, to the serious detriment of consumers.

Sincerely,

/s/ Lisa B. Smith

Lisa B. Smith

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4 *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 179 (1996).

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