

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

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

**PETITION FOR TEMPORARY, LIMITED WAIVER
OF SECTION 64.1200(a)(6) OF THE COMMISSION'S RULES**

On July 3, 2003, the Commission released new rules regarding telephone solicitations under the Telephone Consumer Protection Act of 1991.¹ Among other modifications, those rules (1) prohibit telemarketers from abandoning more than three percent of calls answered live by a person (the “three percent rule”), (2) require telemarketers to deliver a prerecorded identification message when abandoning a call (the “prerecorded message rule”), and (3) require a telemarketer to maintain records demonstrating compliance with the maximum permissible abandonment rate.² These requirements, which are set forth in Section 64.1200(a)(6) of the Commission’s rules,³ become effective October 1, 2003. Pursuant to Section 1.3 of the Commission’s rules,⁴ WorldCom, Inc. d/b/a MCI (“MCI”) hereby requests that the Commission grant it a 60-day waiver of the requirement that it comply with Section 64.1200(a)(6). In the alternative, MCI seeks a waiver of the requirement that it leave a prerecorded message. As explained below,

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) (FCC 03-153) (“Order”).

² See Order ¶¶ 150-152, 155.

³ 47 C.F.R. § 64.1200(a)(6).

⁴ 47 C.F.R. § 1.3.

grant of this request is warranted because MCI faces unique circumstances that likely will prevent MCI from obtaining and integrating the software and hardware necessary for compliance with Section 64.1200(a)(6) prior to the October 1 deadline.

I. THERE IS GOOD CAUSE FOR THE COMMISSION TO WAIVE SECTION 64.1200(a)(6)

Waiver of Commission rules is permitted upon a showing of “good cause.”⁵

Specifically, the Commission may waive its rules where the particular facts would make strict compliance inconsistent with the public interest, taking into account, *inter alia*, considerations of “hardship, equity, or more effective implementation of overall policy on an individual basis.”⁶ Waiver is particularly appropriate where “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”⁷

A waiver is appropriate here because MCI faces special circumstances with respect to compliance with the abandoned call rules. Although the Federal Trade Commission (“FTC”) adopted similar requirements regarding abandoned calls in December 2002, the FTC stated that those rules apply only to companies over which it has jurisdiction, including companies in the business of conducting telemarketing for unaffiliated companies.⁸ Those companies have thus been on notice since December 2002 of the potential need to reprogram software and purchase additional equipment in order to comply with the FTC’s

⁵ *Id.*

⁶ *Numbering Resource Optimization: Petition of California Public Utilities Commission for Waiver of the Federal Communications Commission’s Contamination Threshold Rule*, Order, CC Docket No. 99-200, FCC 03-196, ¶ 9 (rel. Aug. 11, 2003) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (“*WAIT Radio*”); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

⁷ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d at 1166 (referencing *WAIT Radio*).

⁸ See *Telemarketing Sales Rule* (Federal Trade Commission, Final Amended Rule), 68 Fed. Reg. 4580, 4587 (Jan. 29, 2003).

abandoned call rule. However, because MCI is a common carrier, it is not subject to the FTC's jurisdiction and thus is not required to comply with the FTC's rules. Moreover, unlike many other companies, MCI uses internal call centers for its telemarketing, rather than outsourcing telemarketing to unaffiliated companies. Consequently, MCI could not be certain what rules would apply to it until release of the FCC's Order on July 3, 2003.

Since the Commission adopted its Order on June 26, 2003, MCI has been working diligently to come into compliance by October 1 with the various new rules adopted in the Order. As explained in the attached Declaration of Randy Hicks, however, compliance with the abandoned call rule presents a particularly complex problem because of the requirement that MCI *both* track the call abandonment rate *and* deliver a prerecorded message if the called person is not connected within two seconds.⁹ MCI currently terminates or disconnects a call if there is no representative available within that period. FCC and state regulations historically prohibited, with limited exceptions, the delivery of an unsolicited prerecorded message, and, until the Commission's recent Order, did not require a prerecorded message on abandoned calls. Consequently, when MCI developed a means of tracking abandoned calls for purposes of California, which adopted record retention requirements prior to the FCC,¹⁰ it did so based on the "termination call progression event" that occurs after disconnection.¹¹ This method of tracking abandoned calls cannot, however, be used to comply with the Commission's new rule because of the additional requirement

⁹ Hicks Declaration ¶¶ 9-12.

¹⁰ 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*, Decision 03-03-038, 224 P.U.R.4th 343 (Cal. P.U.C., March 13, 2003).

¹¹ Hicks Declaration ¶ 8. Unlike the FCC, California does not require, and arguably prohibits, the leaving of a prerecorded message on abandoned calls.

that MCI deliver a prerecorded message.¹² The delivery of a prerecorded message cannot be accomplished if the call has already been disconnected after two seconds; as just noted, however, MCI currently tracks abandoned calls based on this disconnection. In addition, MCI currently tracks abandoned calls on a manual, *ad hoc* basis, which is cumbersome and labor-intensive.¹³

MCI accordingly must design and put in place new software that will allow it to calculate the percentage of abandoned calls based on indicia other than the “termination call progression event” that occurs after disconnection.¹⁴ MCI also must purchase, install, and integrate new equipment to deliver the prerecorded message.¹⁵ Finally, MCI will have to develop new software and purchase new hardware that will allow it to collect data into a single repository, formalize the data, and present this data in a report format.¹⁶ At this point, the software is still in the design stage, and the new hardware is currently being sized to accommodate the necessary data storage and message presentation.¹⁷ MCI is unable to state with confidence that it will be able to complete the steps necessary to comply with the FCC’s abandoned call rule by October 1, 2003.

MCI’s request is also consistent with the FTC’s determination that telemarketers might need as long as nine months to comply with the FTC’s call abandonment rule due to similar implementation issues.¹⁸ There, telemarketers presented evidence that compliance

¹² Hicks Declaration ¶ 9.

¹³ Hicks Declaration ¶ 8.

¹⁴ Hicks Declaration ¶¶ 9, 11.

¹⁵ Hicks Declaration ¶ 10.

¹⁶ Hicks Declaration ¶¶ 10-11.

¹⁷ Hicks Declaration ¶ 12.

¹⁸ Aware of this fact, MCI asked the FCC during the proceeding below to allow companies

with the three percent rule would require the purchase, installation, and testing of new hardware and software, and that the three months initially allotted for compliance was insufficient.¹⁹ The FTC agreed, finding that the three percent requirement “may constitute an undue burden on some telemarketers and sellers who need to reprogram or purchase software for their equipment, or replace their current equipment.”²⁰ Weighing this burden against the benefits of implementing the rule, the FTC decided to extend the compliance deadline for the abandoned call rule until October 1, 2003 – over nine months from the date the agency released the final amended rules in December 2002.²¹

Grant of MCI’s request will also serve the public interest. It is undisputed that new software and hardware are required for companies to comply with new Section 64.1200(a)(6). The FTC has already determined that it takes more than three months, and up to nine months, for companies to acquire or develop such hardware and software. As a result of the FTC’s extension of the effective date of its call abandonment rule, most companies, as a practical matter, have had nine months to make the necessary modifications. In contrast, MCI – because of the special circumstances described above – has had only

at least the same amount of time that the FTC had allowed telemarketers to implement its rules. *See, e.g.*, Sally McMahon, “Considerations for Do-Not-Call Proceeding,” at 7 (May 20, 2003), attached to *ex parte* letter from Gil Strobel, counsel for MCI, to Marlene Dortch, Secretary of FCC, CG Docket No. 02-278 (May 21, 2003).

¹⁹ *See, e.g.*, Letter from Douglas H. Green, counsel for The Direct Marketing Association, to Donald Clark, Secretary of FTC (Feb. 27, 2003).

²⁰ *Telemarketing Sales Rule* (Federal Trade Commission, Stay of Compliance Date), 68 Fed. Reg. 16414, at 16414-15 (April 4, 2003) (“FTC Stay Order”).

²¹ *See* FTC Stay Order at 16415. The FTC concluded that “[s]taying these provisions will provide ample time for all telemarketers who use predictive dialers to obtain, install, and test the necessary hardware or software, and should alleviate concerns that predictive dialer manufacturers might not have adequate supplies of the necessary products” by the March 31 deadline. Letter from Donald S. Clark, Secretary, FTC to Robert Corn-Revere, Ronald G. London and Paul A. Werner III, Counsel for the ATA (March 14, 2003) (available at <http://www.ftc.gov/os/2003/03/030314ataletter.htm>).

three months. Not surprisingly, and despite its devotion of substantial time and resources to this problem over the past two months, it appears that MCI will not be able to meet the FCC's October 1 deadline. Therefore, it would serve the public interest to grant MCI's request for a 60-day waiver of Section 64.1200(a)(6).

In the alternative, MCI requests that the FCC waive the prerecorded message requirement of Section 64.1200(a)(6). At this time, MCI believes that it will not be able to have the necessary software in place by October 1 that would allow it to comply with both the prerecorded message and the three percent requirements. MCI could, if pressed, comply with the three percent requirement by using its temporary, manual, data collection system, provided that MCI were relieved of the obligation to leave a prerecorded message. Compliance in this manner would be resource-intensive, and considerably more burdensome for MCI. Because the waiver requested is for such a limited period of time (60 days), it would be simpler and less burdensome for the Commission to waive Section 64.1200(a)(6) in its entirety. In the alternative, however, MCI requests a narrower waiver of the prerecorded message requirement contained in that section of the rules.

II. CONCLUSION

Although MCI is hopeful that it will be able to comply with the FCC's rules by October 1, it is not confident that it will be able to do so. Consequently, MCI requests that the FCC grant it a limited, temporary 60-day waiver of either Section 64.1200(a)(6) of the Commission's rules, or, in the alternative, requests waiver of the requirement to deliver a prerecorded message for abandoned calls. MCI will of course continue to use its best efforts to comply with the FCC's rules by October 1, and, in the event that MCI is able to do so on or before the October 1 deadline, it will withdraw its waiver request.

For the foregoing reasons, MCI requests that the Commission grant MCI the temporary, limited waiver discussed herein.

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DECLARATION OF RANDY HICKS ON BEHALF OF MCI

Based on my personal knowledge and on information learned in the course of my business duties, I, Randy Hicks, declare as follows:

1. My name is Randy Hicks. I am employed by WorldCom, Inc. d/b/a MCI (“MCI”) as the Director of Call Center and Network Operations in the Operations group of MCI. In that position, I am responsible for providing Call Center System Engineering, Voice and Data network design/support and Call Center Operations Support. I have participated in the development, testing and use of hardware and software for MCI’s telemarketing telephone services.
2. I have been asked to describe the basic hardware and software that MCI uses today for telemarketing, and to describe the modifications to such hardware and software that MCI must undertake in order to comply with the new Section 64.1200(a)(6) of the Commission’s rules, adopted in the Commission’s recent order in the Telephone Consumer Protection Act proceeding.¹
3. For its telemarketing activities, MCI uses three principal types of equipment for call processing: automatic call distributors (“ACDs”), predictive dialers, and lead

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) (FCC 03-153).

- management systems.
4. MCI's ACDs are vendor-provided devices that automatically dial telephone numbers and use answer detection software that is designed to determine call disposition. The answer detection software is designed by the manufacturer to detect sound energy within the range of human voice frequency and duration. If the call is determined to be "live," the ACD sends the call to a sales representative. If no representative is available, the ACD places the called party's circuit in queue to be served by the next available sales representative.
 5. MCI's predictive dialer engines are internally developed, software-driven systems that connect to the ACDs, and that are designed to initiate each ACD's dialing of predetermined telephone numbers. The predictive dialers are programmed with self-adjusting, adaptive algorithms that send telephone numbers contained in a database to the ACD at a certain rate.
 6. MCI's lead management system is a database system that stores the telephone numbers that are used by the predictive dialers to control the ACDs' call processing. The lead management system also records some pertinent information about the calls that have been processed. Records are stored electronically in a variety of places, including in the lead management system, in telemarketing host systems, and in other databases.
 7. Predictive dialers have the potential to reach more "live" called parties than the number of agents available to service the calls. MCI has programmed its ACDs to hold the call in queue for a predetermined time period. If there are no representatives available within that period, the ACD will terminate the call and

the called party will be disconnected. This is what is termed an abandoned call.

The abandonment rate is simply the number of abandoned calls divided by the total number of calls answered by a “live” person.

8. MCI has been tracking abandoned calls based on the “termination call progression event” that occurs after disconnection for calls to California residents.

Specifically, when the termination call progression event occurs, the ACD is programmed to pass on that information to the predictive dialer, which in turn is programmed to log the event with the telemarketing host system, in order to classify and record the call as an abandoned call. The data indicating the number of abandoned calls in California are not stored in any single database. Therefore, the process of gathering, manipulating, and presenting the data is manual and *ad hoc*. MCI is developing a more formalized process for the storage of nationwide data for the purposes of compliance with FCC regulations.

9. In addition to developing this more formalized reporting and storage process, MCI will not be able to use the method it has been using to track abandoned calls in California to comply with new Section 64.1200(a)(6) of the Commission’s rules. Unlike the California rule, the new FCC rule requires MCI to deliver a prerecorded message for each abandoned call – a task that requires changes to call processing logic and the ability to provide event data. As a result, MCI must modify both its hardware and software in a number of ways before it can simultaneously track the call abandonment rate and deliver a prerecorded message, as required by the new FCC rule.
10. Specifically, in order to comply with new Section 64.1200(a)(6), MCI must

purchase, install, and integrate new hardware into its ACDs that will deliver the prerecorded message. MCI also must purchase, install, and integrate hardware for the purpose of storing the necessary data regarding abandoned calls.

11. In addition, MCI must develop and put into place new software that will allow the ACD to (1) determine when two seconds have passed after contacting a live voice and send an event message to the predictive dialer, (2) send the called party a prerecorded message, and (3) “tell” the predictive dialer to interpret and communicate the event message to the telemarketing host system, conveying that a prerecorded message has been sent, and the call should be classified as an abandoned call. MCI must also develop and put into place new software that will allow it to collect data regarding abandoned calls into a single repository, formalize the data, and present this data in a report format.
12. As of this date, the new software that MCI must develop is still in the design stage. The new hardware is currently being sized to accommodate the necessary data storage and message presentation. Although the team has been working hard over the past two months to enable MCI to comply with the new rule, at this point in time, I lack confidence that MCI will be able to complete the steps necessary to comply with Section 64.1200(a)(6) by October 1, 2003.

Declaration

I declare under penalty of perjury that the foregoing is true and correct. Executed on
August 27, 2003.


Randy Hicks