

**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
DA 03-2832

MCI REPLY COMMENTS

Pursuant to the Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) on September 4, 2003,¹ WorldCom, Inc. d/b/a MCI (“MCI”) submits these reply comments with respect to the Petition for Temporary, Limited Waiver (the “Petition”) that MCI filed on August 27, 2003. In the Petition, MCI sought a 60-day waiver of the requirement that it comply with new Section 64.1200(a)(6) of the Commission’s rules, which becomes effective on October 1, 2003.² Only two parties – Dennis C. Brown (“Brown”) and AT&T Corp. (“AT&T”) – have filed comments opposing MCI’s Petition. As explained below, neither party has identified a sound reason for denying MCI’s request for a temporary, limited waiver.

I. DISCUSSION

As an initial matter, AT&T claims that the waiver requested by MCI is subject to “special scrutiny” or a higher standard than the “ordinary” waiver petition.³ In fact, the cases cited by AT&T do not support this claim. Rather, those cases set forth the same

¹ *Consumer & Governmental Affairs Bureau Seeks Comment on MCI Petition for Temporary, Limited Waiver of the Commission’s Call Abandonment Rules*, Public Notice, DA 03-2832 (Sept. 4, 2003).

² 47 C.F.R. § 64.1200(a)(6).

³ AT&T Comments, CG Docket No. 02-278, at 3 (Sept. 11, 2003) (“AT&T Comments”).

standard that MCI identified in its Petition: namely, that a waiver is appropriate if “special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.”⁴

AT&T and Brown are also incorrect in claiming that MCI failed to demonstrate that special circumstances have impeded its compliance with Section 64.1200(a)(6).⁵ In fact, MCI described its special circumstances at length in its Petition. In particular, MCI explained that, unlike many other companies that were subject to the Federal Trade Commission’s (“FTC’s”) jurisdiction, and therefore were on notice since December 2002 of the need to reprogram software and purchase any additional equipment necessary to comply with the FTC’s abandoned call rule, MCI is not subject to the FTC’s jurisdiction and thus is not required to comply with the FTC’s rules.⁶ Moreover, unlike many other companies, MCI does not rely extensively on outside vendors, over which the FTC has asserted

⁴ Compare the cases cited by AT&T at n.9 of its comments – *Truth in Billing and Billing Format*, Order, 15 FCC Rcd 7549, ¶ 8 (2000); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, First Order on Reconsideration, 15 FCC Rcd 8158, ¶ 45 (2000) – with the case quoted by MCI on page 2, n.7 of its Petition – *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (all using the same quoted language). In addition, Brown’s claims regarding the unauthorized changes of a consumer’s telecommunications service provider are irrelevant to MCI’s waiver request. Brown Comments, CG Docket No. 02-278, at 4 (Sept. 5, 2003) (“Brown Comments”). Furthermore, MCI notes that it works diligently with the FCC and consumers to resolve any disputes over claims of such unauthorized changes.

⁵ Brown Comments at 2; AT&T Comments at 4-5. AT&T claims that, to the best of its knowledge, other telecommunications carriers that perform telemarketing using internal centers have not filed petitions for waiver of Section 64.1200(a)(6). AT&T Comments at 5. This claim, even if true, is irrelevant. As noted in MCI’s Petition, it is likely that only a small number of companies both: (i) rely primarily on internal call centers for telemarketing; and (ii) are not subject to the FTC’s call abandonment rules. MCI will not speculate as to the size of this group or whether any carriers other than MCI fit this description. However, the fact that MCI alone has filed such a petition only serves to reinforce the point that MCI faces unusual circumstances warranting a waiver.

⁶ Petition at 2-3.

jurisdiction, for its telemarketing.⁷ Consequently, MCI could not be certain what rules would apply to it until release of the FCC's Order on July 3, 2003.⁸ Finally, MCI demonstrated that the FCC's abandoned call rule presents a particularly complex problem for MCI 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 To accomplish both goals, MCI must change its existing method of tracking abandoned calls, which is incompatible with leaving a prerecorded message for such calls.¹⁰ In addition, MCI's current methodology for tracking abandoned calls is both manual and *ad hoc*, making it cumbersome and labor-intensive.¹¹ Establishing an automated system that complies with the FCC's new rules by both tracking the call abandonment rate and delivering a prerecorded message requires MCI to undertake a number of steps, including obtaining and integrating new hardware and software.¹²

Rather than address the special circumstances that plainly confront MCI, both Brown and AT&T claim that MCI failed to plan appropriately for the new requirements in Section 64.1200(a)(6) because MCI was on "notice" since last year that the Commission might

⁷ *Id.* at 3.

⁸ *Id.* at 3; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (rel. July 3, 2003) (FCC 03-153) ("Order").

⁹ Petition at 3-4.

¹⁰ As MCI noted in its Petition, the FCC did not previously require telemarketers to deliver prerecorded messages on abandoned calls. Indeed, until the Commission's recent Order, FCC and state regulations historically prohibited, with limited exceptions, the delivery of unsolicited prerecorded messages. Consequently, when MCI developed a means of tracking abandoned calls for purposes of complying with California's rules, it did so based on the "termination call progression event" that occurs after disconnection. MCI cannot continue to rely on this methodology, however, because the Commission's new rule requires that MCI deliver a prerecorded message before disconnecting. Petition at 3-4.

¹¹ *Id.* at 4.

¹² *Id.* at 4; Hicks Decl. ¶¶ 10-11.

adopt such requirements. AT&T argues that the FTC’s call abandonment rules, which were adopted in December 2002, “clearly presaged” requirements that “might” be adopted in the Commission’s rulemaking.¹³ Brown similarly claims that MCI was “on notice” since at least the release of the *TCPA NPRM*¹⁴ that the Commission “was considering” adoption of rules similar to those it ultimately adopted.¹⁵ Both AT&T and Brown apparently fail to understand that neither the Communications Act nor the Administrative Procedure Act requires a carrier to change its business operations based on speculations as to how the Commission eventually “might” vote, or the fact that the FCC is merely “considering” adopting a proposed rule as part of an ongoing rulemaking. MCI could not be expected to make the investments needed to change its systems until the FCC adopted a final rule after the conclusion of the required notice and comment period.¹⁶ The fact that the FTC – an agency that lacks jurisdiction over telecommunications common carriers – adopted a call

¹³ AT&T Comments at 4. AT&T’s argument is not only legally and factually unsound, it is also contradicted by AT&T’s own past behavior. Specifically, AT&T has previously sought (and been granted) a waiver affording it additional time to implement technical changes required by a new FCC rule, even though the FCC had tentatively concluded – almost two years prior to AT&T’s waiver request – that this new rule should be adopted. *See Billed Party Preference for InterLATA 0+ Calls*, Order, 13 FCC Rcd 12576, ¶¶ 16-18 (1998) (delaying effective date of a new “oral disclosure” rule requiring OSPs to disclose rates for calls before any charges were made because AT&T needed more time to make technical changes to its systems); AT&T Petition for Waiver, CG Docket No. 92-77 (May 18, 1998) (requesting waiver of oral disclosure rule); *Billed Party Preference for InterLATA 0+ Calls*, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274, ¶¶ 34-35 (1996) (tentatively concluding FCC should adopt oral disclosure rule).

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459 (2002) (“*TCPA NPRM*”).

¹⁵ Brown Comments at 1-2.

¹⁶ A new rule only becomes effective after notice, opportunity for comment and reply, adoption by the Commission, and, normally, subsequent publication in the Federal Register. *See, e.g.*, 47 C.F.R. §§ 1.412, 1.415, 1.425, 1.427(a).

abandonment rule has no bearing on the timing of MCI's obligation to comply with the FCC's rules.

Moreover, the argument that MCI somehow had "notice" of the FCC's new rules prior to their adoption simply ignores the relevant facts. Although the *TCPA NPRM* sought comment on whether the Commission should require "a maximum setting on the number of abandoned calls or requir[e] telemarketers who use predictive dialers to also transmit caller ID information,"¹⁷ it did not raise the question of whether a prerecorded message should be required when abandoning a call. Likewise, the fact that the FCC was required by Congress to "maximize consistency"¹⁸ with the FTC's rules did not enable MCI to divine the call abandonment rules that the FCC might eventually adopt. Not only was the Do-Not-Call Implementation Act (which imposed the maximum-consistency requirement) signed into law six months after the release of the *TCPA NPRM*, and three months after adoption of the FTC's rules,¹⁹ but the House Report accompanying the Act raised the concern that there were certain aspects of the FTC's rule on abandoned calls that the FCC could not adopt because they conflicted with the TCPA, and specifically referred to the FTC's prerecorded message requirement for abandoned calls as an example of a possible conflict.²⁰ Given the uncertainty as to whether a prerecorded message would be required or even permitted under the FCC rules, and given the lack of a legal obligation that MCI take any action based on a guess about the specifics of any call abandonment rules to be adopted by the FCC, there is no

¹⁷ *TCPA NPRM* ¶ 26.

¹⁸ Do-Not-Call Implementation Act § 3 (quoted without citation in AT&T Comments at 4).

¹⁹ The Do-Not-Call Implementation Act was signed by President Bush on March 11, 2003. Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003). The *TCPA NPRM* was released on September 18, 2002.

²⁰ H.R. Rep. No. 108-8, at 4 (2003); *see also* MCI Comments, CG Docket No. 02-278, at 8 (May 5, 2003) (filed as WorldCom).

sound basis for finding that MCI was “on notice” as to what rules would apply to it until release of the FCC’s Order on July 3, 2003.

The other arguments raised by Brown and AT&T are, like those described above, wholly lacking in merit. Contrary to Brown’s claim,²¹ for instance, MCI has demonstrated that it has taken “positive steps” toward compliance with Section 64.1200(a)(6). As the Hicks Declaration makes clear, MCI has been working hard to comply with the new rule, and is actively working to design the new software it must develop, and identify the new hardware it must purchase.²² As the Hicks Declaration also makes clear, however, by October 1, MCI will not have the hardware and software in place to both track the call abandonment rate and deliver a prerecorded message in accord with new Section 64.1200(a)(6).²³

It is not surprising that MCI needs more than three months to comply with this rule. The FTC previously determined that three months would be insufficient and that telemarketers might need as long as nine months to comply with its call abandonment rule due to implementation issues similar to those now confronting MCI.²⁴ MCI is not asking for nine months; it is merely seeking 60 additional days (or a total of approximately five months). This request clearly is reasonable in light of the FTC’s findings and in light of the special circumstances described in MCI’s Petition.

Contrary to Brown’s claim, there are no reasonable alternatives to the temporary, limited waiver requested by MCI. As Congress and the FCC have recognized, telemarketing

²¹ Brown Comments at 2.

²² Hicks Decl. ¶ 12.

²³ *Id.* ¶¶ 10-12.

²⁴ See Petition at 4-5 (discussing *Telemarketing Sales Rule* (Federal Trade Commission, Stay of Compliance Date), 68 Fed. Reg. 16414, at 16414-15 (April 4, 2003)).

serves legitimate purposes,²⁵ and “many consumers value the savings and convenience [that telemarketing] provides.”²⁶ The “alternatives” proposed by Brown would not reasonably accommodate MCI’s ability to pursue legitimate telemarketing, but rather would eliminate or drastically curtail MCI’s ability to place telemarketing calls for some period of time, as well as result in other substantial harms. For instance, if MCI were to suspend its telemarketing activities, its business would suffer devastating consequences, including significant lost sales and the need either to lay off its telemarketing employees or pay them to sit idly. Manual dialing likewise would be highly inefficient and impractical from a business standpoint.²⁷ Moreover, manual dialing would introduce a “human error” component that likely would result in a significant number of misdialed and abandoned calls – thereby defeating the very goals the FCC’s new rules are designed to achieve.²⁸ Similarly, it is unrealistic for MCI to outsource its telemarketing activities to one or more unaffiliated vendors in time to comply with the FCC’s new rules. Indeed, MCI would be able to bring its internal telemarketing systems into compliance with the FCC’s new call abandonment rules before a transition to an outside vendor could be completed.²⁹ In contrast to these

²⁵ See Telephone Consumer Protection Act of 1991 (“TCPA”), § 2(9), reprinted in 7 FCC Rcd 2736 at 2744 (App. A); Order ¶¶ 3, 37.

²⁶ Order ¶ 3.

²⁷ Using manual dialing instead of predictive dialers would substantially reduce MCI’s productivity. See, e.g., *Telemarketing Sales Rule* (Federal Trade Commission, Final Amended Rule), 68 Fed. Reg. 4580, 4666-67 & n.1055 (Jan. 29, 2003) (citing source estimating that using manual dialing instead of a predictive dialer would result in a 75% reduction in the number of telemarketing calls per hour).

²⁸ See MCI Comments, CG Docket No. 02-278, at 41-42 (Dec. 9, 2002) (filed as WorldCom).

²⁹ Transitioning from the use of internal telemarketing call centers to an outside firm(s) would require numerous steps, including, but not limited to: finding an appropriate vendor (e.g., one that can comply with the third-party verification requirements of the FCC’s slamming rules); undertaking the Request for Proposal (“RFP”) process; and putting in place

draconian and impractical alternatives, the temporary, limited waiver requested by MCI would achieve the appropriate balance of interests mandated by Congress. As the TCPA makes clear, the FCC must strike a balance that “protects the privacy of individuals” but also “permits legitimate telemarketing practices.”³⁰

Contrary to AT&T’s claim,³¹ granting the requested waiver would not confer a competitive advantage on MCI or “severely injur[e]” consumers. During the requested waiver period, MCI will use its best efforts to comply with the three-percent requirement of Section 64.1200(a)(6).³² Because MCI’s call abandonment rate during the requested 60-day waiver period therefore will not be higher than that of other companies, the dire consequences alleged by AT&T will not materialize.³³

information-exchange protocols between MCI and the outside firm (*e.g.*, exchanging information regarding lead lists).

³⁰ TCPA, § 2(9).

³¹ AT&T Comments at 5-6.

³² Even though MCI plans to comply with the new three-percent abandonment requirement, MCI currently cannot keep records in a way that would demonstrate its compliance if it has to leave a prerecorded message for abandoned calls. If MCI does not have to leave a prerecorded message, it could maintain the records necessary to demonstrate its compliance with the three-percent requirement, but the manual, *ad hoc* data collection system that MCI currently uses to track abandoned calls would make it burdensome for MCI to compile such records during the requested waiver period. *See* Petition at 6.

³³ AT&T Comments at 5-6. Because MCI reaches a live person in fewer than one out of six attempts, and because MCI will abandon no more than three percent of all live calls, any advantage conferred on MCI during the waiver period would be no more than 0.5% (three percent of one-sixth) of all telemarketing calls. *See* MCI Comments at 41 (Dec. 9, 2002) (stating that 86% to 89% of all outbound dialing does not reach an actual person). The time “saved” by not leaving a brief message on this small fraction of calls would be *de minimis*, and because the waiver would be in place for only 60 days, it is difficult to see how there could be any discernible effect on competition.

II. CONCLUSION

As demonstrated above, neither of the parties commenting on MCI's Petition has identified a valid reason for denying the 60-day waiver requested in the Petition. By contrast, MCI has demonstrated that it faces special circumstance with respect to compliance with new Section 64.1200(a)(6), and that grant of the waiver would serve the public interest.

Accordingly, MCI requests that the Commission grant the temporary, limited waiver requested in its Petition.

Lisa B. Smith
Karen Reidy
MCI
1133 19th St., NW
Washington, DC 20036
(202) 736-6489
Karen.reidy@mci.com

Respectfully submitted,


Ruth Milkman
Ruth Milkman
Richard D. Mallen
Lawler, Metzger & Milkman, LLC
2001 K Street, NW
Suite 802
Washington, DC 20006
(202) 777-7700
rmallen@lmm-law.com

Counsel for MCI

September 18, 2003