

**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

OPPOSITION OF MCI TO PETITIONS FOR RECONSIDERATION

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Pursuant to the Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) on September 8, 2003,¹ WorldCom, Inc. d/b/a MCI (“MCI”) hereby submits this Opposition to certain requests made in the petitions for reconsideration filed by Robert Biggerstaff (“Biggerstaff”), Dennis C. Brown (“Brown”), and Verizon Wireless in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

On July 3, 2003, the Commission released a Report and Order (the “*Order*”)² adopting various rules pursuant to the Telephone Consumer Protection Act of 1991 (the “TCPA”)³ and the Do-Not-Call Implementation Act.⁴ Brown, Verizon Wireless, and Biggerstaff have filed petitions asking the Commission to reconsider a number of these

¹ *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, Public Notice, Report No. 2627 (Sept. 8, 2003).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) (the “*Order*”).

³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

⁴ Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), *to be codified at* 15 U.S.C. § 6101.

rules.⁵ As described more fully below, MCI urges the Commission to reject certain of these requests. In particular, Brown claims that several rules adopted by the Commission are not reasonable. Brown's concerns regarding three aspects of the FCC's *Order* are without merit. Specifically, the Commission's decisions to: (1) allow telemarketers thirty days to process requests to add new telephone numbers to their company-specific lists; (2) decline to require telemarketers to include a toll free number as part of their Caller ID for "abandoned" calls; and (3) adopt a three-month safe harbor for accessing the national do-not-call registry were all reasonable and amply supported by the record in this proceeding.

The Commission also should reject Verizon Wireless's request to "clarify" that a telephone number that has been ported from a wireline to a wireless carrier should be treated as "assigned to" a wireless service. As explained below, the FCC's rules regarding "assignment" are already clear. Moreover, there is currently no practical way for telemarketers to determine whether a number that has been assigned to a wireline carrier has been ported from that carrier to a wireless carrier.

Finally, the Commission should deny several of Biggerstaff's requests, including his request that company-specific do-not-call requests made prior to the effective date of the new rules be subject to a different retention period than all other do-not-call requests. The Commission's decision to adopt a five-year retention period for such requests is appropriate based on the evidence in the record. The Commission's decision also

⁵ Petition for Reconsideration of Dennis C. Brown (Aug. 18, 2003) ("Brown Petition"); Petition for Reconsideration and/or Clarification of Verizon Wireless (Aug. 25, 2003) ("Verizon Wireless Petition"); Petition for Reconsideration of Robert Biggerstaff (Aug. 22, 2003) ("Biggerstaff Petition") (all filed in CG Docket No. 02-278).

minimizes customer confusion by ensuring that all do-not-call requests are subject to the same retention periods.

II. DISCUSSION

A. Brown's Claims Regarding the Unreasonableness of Some of the FCC's Rules Are Unfounded

Brown claims that several of the rules adopted by the Commission in this proceeding are unreasonable. Many of Brown's claims are without merit. Specifically, in each case discussed below, the Commission formulated a reasonable rule that is based on relevant record evidence, and that balances the legitimate interests of both consumers and telemarketers.

1. The FCC's Decision to Require Company-Specific Do-Not-Call Requests To Be Honored within Thirty Days Is Reasonable

In the *Order*, the Commission adopted a rule requiring telemarketers to honor a company-specific do-not-call request within thirty days from the date of such request.⁶ Brown claims that the Commission arrived at this decision "unreasonably and arbitrarily and capriciously" because the Commission "did not refer to anything in the record" to justify its choice of a thirty-day period.⁷ On reconsideration, Brown urges the Commission to reduce this period of time to 24 hours.⁸

The Commission should reject this request. Contrary to Brown's claim, the Commission's decision to impose a thirty-day deadline on telemarketers' duty to honor company-specific requests was based on a reasoned evaluation of the evidence in the

⁶ 47 C.F.R. § 64.1200(d)(3); *Order* ¶ 94.

⁷ Brown Petition at 5.

⁸ *Id.* at 6.

record.⁹ In weighing this evidence, the Commission took into consideration several facts placed in the record by commenters: the “largely automated” process of adding numbers to company-specific do-not-call lists;¹⁰ the “large databases” of do-not-call requests maintained by some entities;¹¹ and the “limitations on certain small businesses.”¹² Based on these facts – all of which are ignored by Brown – the Commission concluded that “a reasonable time to honor such requests must not exceed thirty days from the date such a request is made.”¹³ Brown has presented no evidence that calls into question this conclusion, and the Commission therefore should reject his petition to require telemarketers to process company-specific requests within 24 hours.¹⁴

2. The FCC Has Provided Sufficient Consumer Safeguards with Respect to Abandoned Calls

Section 64.1200(a)(6) requires telemarketers to leave a prerecorded message for any call that is abandoned. The rule specifies that this message must include a telephone

⁹ See, e.g., *Order* ¶ 94 & n.295 (citing comments indicating that thirty days was a reasonable period of time for telemarketers to process company-specific requests). In fact, the Commission specifically disagreed with commenters that had argued that periods longer than thirty days were necessary to process company-specific requests. *Order* ¶ 94 & n.293 (citing two examples in the record: Household Financial Services Comments at 3-4 (contending that it takes 90 days to process requests); Verizon Comments at 6 (45 days to process request)).

¹⁰ *Order* ¶ 94 & n.294.

¹¹ *Id.* ¶ 94.

¹² *Id.*

¹³ *Id.*

¹⁴ The *Order* already states that telemarketers that can process do-not-call requests in less than thirty days must do so. *Order* ¶ 94. MCI, for example, strives to update company-specific requests as rapidly as possible. However, it cannot ensure that all requests are processed within 24 hours. See MCI Comments at 40 (filed as WorldCom in CG Docket No. 02-278) (Dec. 9, 2002) (“MCI Comments”). Adding an unrealistic requirement that requests be processed within 24 hours provides no further benefit to consumers, but puts telemarketers in an untenable position by subjecting them to a rule with which they may be incapable of complying.

number that would permit the called party to make a do-not-call request, and that such number “may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.”¹⁵ Brown argues that the new rule “places an unreasonable burden on telephone consumers” because they must bear the expense of placing a call to request inclusion on a company-specific do-not-call list.¹⁶ To alleviate this alleged burden, Brown urges the Commission to require telemarketers that have abandoned a call to “provide a telephone number, and include that number, and no other, in its Caller ID, which the abandoned consumer may call at no toll charge to the consumer.”¹⁷

Brown’s argument is without merit. Section 64.1200(a)(6) already affords consumers ample protection by limiting the charges they will have to incur to no more than the cost of a local or long distance call.¹⁸ Moreover, the Commission expressly declined to require telemarketers to make available a toll-free number for consumers to use to register company-specific do-not-call requests.¹⁹ In making this decision, the Commission weighed the benefits to consumers of being able to call a toll-free number against the costs that such a requirement would impose on businesses. The Commission found that requiring telemarketers to make available a toll-free number “would be unduly costly to businesses,” and was particularly “concerned with the costs [that would be]

¹⁵ 47 C.F.R. § 64.1200(a)(6).

¹⁶ Brown Petition at 19-20.

¹⁷ *Id.* at 21.

¹⁸ 47 C.F.R. § 64.1200(a)(6).

¹⁹ *Order* ¶ 93.

imposed on small businesses.”²⁰ The Commission’s decision not to require telemarketers to provide a toll-free number as part of their Caller ID information was reasonable, and the Commission therefore should reject Brown’s request.

3. The FCC’s Decision to Adopt a Three-Month Safe Harbor for Accessing the National Do-Not-Call Registry Is Reasonable

In the *Order*, the FCC agreed with the Federal Trade Commission (“FTC”) “that a safe harbor should be established for telemarketers that have made a good faith effort to comply with the national do-not-call rules.”²¹ As part of this safe harbor, both the FTC and FCC adopted rules requiring sellers and telemarketers to employ a version of the national do-not-call registry obtained not more than three months before any call is made, and to maintain records documenting this process.²²

In his petition for reconsideration, Brown argues that the FCC acted “unreasonably” in adopting the three-month safe-harbor period, and urges the Commission to require telemarketers to access the national registry either “immediately prior to each call” or “at least once on any day that it makes a telemarketing call.”²³ The Commission should reject this request for at least two reasons. First, the FCC was required by Congress to “maximize consistency” with the FTC’s rules.²⁴ The FCC did precisely that in adopting the same three-month safe-harbor period that the FTC already

²⁰ *Id.*

²¹ *Id.* ¶ 38.

²² *Id.*; 47 C.F.R. § 64.1200(c)(2)(i)(D); FTC, “Telemarketing Sales Rule,” 68 Fed. Reg. 4580, 4646-47 (Final Amended Rule, Jan. 29, 2003) (“FTC Order”).

²³ Brown Petition at 11.

²⁴ Do-Not-Call Implementation Act § 3, Pub. L. No. 108-10, 117 Stat. 557 (2003).

had adopted. Brown fails to provide sufficient justification for the FCC to adopt a rule inconsistent with the FTC's rule.

Second, there are sound policy reasons supporting the FCC's decision to adopt a three-month safe-harbor period. The FTC, for instance, initially proposed adopting a 30-day safe-harbor period, but based on the evidence in the record ultimately decided to adopt a three-month requirement instead. In justifying this change, the FTC explained that industry commenters "were unanimous in their view that a 30-day requirement would be extremely burdensome."²⁵ Commenters pointed out that a 30-day requirement would be "virtually impossible" for sellers and telemarketers to meet without shutting down operations for a day to reconcile the names on the registry with their customer list, and would be "particularly burdensome for small businesses with few employees or those that do not use sophisticated technology."²⁶ Commenters also pointed out that quarterly updating is the standard adopted by the majority of states in implementing their do-not-call lists, and that after an initial period of volatility, when consumers sign up for the new registry, the number of names on the registry will stabilize, reducing the need for frequent updating.²⁷ Based on this evidence, the FTC concluded that "the costs of requiring monthly updating outweigh any additional benefits that might accrue to consumers from such a provision."²⁸

As the FTC Order makes clear, there is a trade-off between the brevity of a safe-harbor period and the burdens imposed as a result of a shorter period. Specifically, as the

²⁵ FTC Order, 68 Fed. Reg. at 4646.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 4647.

safe-harbor period is shortened, progressively higher costs are imposed on telemarketers and progressively lower marginal benefits accrue to consumers. In fact, telemarketers incur substantial costs each time they download the national list. Currently, the national list has over 50 million numbers, and can be downloaded only in its entirety, making each download a time-consuming process. Moreover, downloading is only the first step in ensuring compliance with the national list. MCI, for instance, will have to convert the downloaded national list into an “active suppress” file, which in turn must be loaded at each of MCI’s call centers. Many telemarketers will have to devote multiple employees to these tasks over the course of several days. These substantial labor costs will have to be incurred each time a telemarketer downloads the national list.²⁹ As the FTC found, such costs clearly outweigh the benefits under a 30-day requirement; this disparity would be even greater under a shorter requirement, such as Brown’s unrealistic proposal for immediate or daily updating. The FCC therefore should retain its three-month safe-harbor provision.

B. The FCC Should Apply Its Existing “Assignment” Rules to Numbers that Are Ported from Wireline to Wireless Carriers

Both the TCPA and the FCC’s rules prohibit making calls using autodialers and artificial or prerecorded voice messages “to any telephone number *assigned to* a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”³⁰ Verizon Wireless argues that the Commission’s rules need to be clarified because they do not specify whether a number that has been ported from a wireline to a wireless

²⁹ In the *Order*, the FCC incorrectly asserted that “telemarketers will have the capability to download the [national do-not-call] list at any time at no extra cost.” *Order* ¶ 38.

³⁰ 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii) (emphasis added).

carrier should be treated as “assigned to” a wireless service.³¹ The Commission’s rules on this matter are clear, however. To the extent that Verizon Wireless is asking for reconsideration of these rules, its petition should be rejected.

Contrary to Verizon Wireless’s assertions, there is no lack of clarity regarding the treatment of ported numbers. As Verizon Wireless itself points out, the Commission has already determined that numbers ported from one carrier to another are to be reported as “assigned” numbers only by the carrier that originally received the number from the North American Numbering Plan Administrator (“NANPA”).³² As a legal matter, therefore, it is clear that numbers ported from a wireline carrier to a wireless carrier remain “assigned” to the wireline carrier. Since such numbers are not “assigned” to wireless carriers, neither the TCPA nor the FCC’s rules prohibit telemarketers from using autodialed or prerecorded voice messages to call numbers ported from wireline to wireless carriers.

Verizon’s Wireless’s petition is also unsound as a practical matter. As MCI pointed out in its comments, it is unaware of any technological tools in place today that would allow telemarketers to recognize numbers that have been ported from wireline to wireless phones.³³ Remarkably, Verizon Wireless urges the FCC to prohibit

³¹ Verizon Wireless Petition at 2-4.

³² See Verizon Wireless Petition at 3; see also *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 7574, ¶ 18 (2000); 47 C.F.R. § 52.15(f)(2) (defining a “reporting carrier” as carrier that receives numbering resources from the NANPA) and § 52.15(f)(5) (requiring each “reporting carrier” to submit to the NANPA a utilization report that classifies the carrier’s current inventory of numbering resources into five categories, including “assigned” numbers).

³³ MCI Comments at 46. Although NeuStar has “propose[d] to provide a wireless number database service that would answer a query to determine if a telephone number belongs to a wireless customer[,]” this proposal has not been fully developed in the record. Letter from Kimberly Miller, NeuStar, to Magalie Salas, FCC, CG Docket No.

telemarketing calls to numbers ported from wireline to wireless carriers “[r]egardless of whether there are or will be technical ways for telemarketers to identify wireless numbers.”³⁴ It surely would be contrary to the public interest for the FCC to adopt a requirement when there is no established means of carrying out that requirement. Therefore, the Commission should deny Verizon Wireless’s request, and instead apply its existing “assignment” rules to numbers that are ported from wireline to wireless carriers.³⁵

C. The Commission Should Reject Several of Biggerstaff’s Requests

1. The FCC Should Confirm that All Do-Not-Call Requests Are Subject to the Same Five-Year Retention Period

The FCC’s rules require all do-not-call requests to be honored for five years from the time of the request.³⁶ In his petition for reconsideration, Biggerstaff claims that Section 64.1200(d)(6) is “in an undetermined state” because it does not specify whether the five-year period applies to company-specific do-not-call requests made prior to the

02-278, at 1 (June 4, 2003), *cited in Order* ¶ 170 n.621. In addition, there are technical and legal issues that must be resolved before NeuStar’s proposal can be implemented. MCI is concerned, for instance, that NeuStar’s status as both a vendor and user of Number Portability Administration Center (“NPAC”) data may create a conflict of interest, and that NeuStar has not explained how it will maintain consumer privacy with respect to the confidential and proprietary information that NeuStar plans to disseminate. NeuStar has also failed to explain what its proposal would cost telemarketers. Any proposal that requires a database “dip” before each call would likely prove to be cost-prohibitive.

³⁴ Verizon Wireless Petition at 3.

³⁵ As the foregoing discussion makes clear, there is neither a legal nor a practical basis for the Commission to grant Verizon Wireless’ petition for clarification. Regardless of how the FCC rules on Verizon Wireless’ petition, however, MCI urges the Commission to adopt a safe harbor that would protect callers that make every effort to avoid calls to wireless numbers. *See* Direct Marketing Association Petition for Reconsideration, CG Docket No. 02-278, at 10-11 (Aug. 25, 2003). As noted, telemarketers should not be held liable for violating rules where there is no possible means to comply with such rules.

³⁶ 47 C.F.R. §§ 64.1200(c)(2) & (d)(6). *See also Order* ¶ 92.

effective date of the rules.³⁷ Biggerstaff urges the Commission to hold that requests made prior to the effective date of the new rules “continue in force” for ten years from the date of the request.³⁸

This rule is not “in an undetermined state” as Biggerstaff claims. Moreover, the Commission should reject Biggerstaff’s proposal and retain the requirement that all company-specific requests are subject to the same five-year period, regardless of when the request was made.

The Commission’s decision to adopt a five-year retention period for company-specific do-not-call requests was predicated on several findings supporting its conclusion that a five-year period is more “reasonable” than a ten-year period, and maximizes the benefits for both consumers and telemarketers. For instance, the Commission concluded that, because telephone numbers change hands over time, adopting a period shorter than ten years would allow “[b]oth telemarketers and consumers [to] benefit from a list that more accurately reflects those consumers who have requested not to be called.”³⁹ The Commission also noted that both the FTC and several commenters had concluded that five years is a “more reasonable” period than a ten-year period.⁴⁰ Finally, the Commission explained that a five-year period strikes the most reasonable balance of the interests implicated by the company-specific record retention rule:

³⁷ Biggerstaff Petition at 22. Previously, company-specific do-not call requests had to be honored for ten years.

³⁸ *Id.* at 22-23. In the alternative, Biggerstaff urges the FCC to find that the prior requests should continue in force for ten years from the date of the request, or for five years from the effective date of the new rule, whichever is shorter. *Id.* at 23.

³⁹ *Order* ¶ 92. *See also id.* ¶ 31 (record shows that “the current ten-year retention period for company-specific requests is too long given changes in telephone numbers”).

⁴⁰ *Id.* ¶ 92.

We believe a five-year retention period reasonably balances any administrative burden imposed on consumers in requesting not to be called with the interests of telemarketers in contacting consumers. As noted, a shorter retention period increases the accuracy of the database while the national do-not-call option mitigates the burden on those consumers who may believe more frequent company-specific do-not-call requests are overly burdensome.⁴¹

If the FCC were to adopt Biggerstaff's proposal, it would upset the balance struck by the current rule and harm telemarketers by requiring them to wait a full decade to place calls to many numbers on their company-specific lists, even though such numbers very well may have changed hands at some point in the past ten years. Adopting two different retention periods would also introduce the potential for confusion among consumers.⁴² The FCC's existing rules minimize the prospect of such confusion by applying the same five-year retention period to all do-not-call requests. The Commission therefore should deny Biggerstaff's request.

⁴¹ *Id.*

⁴² In explaining the basis for the rules adopted in the *Order*, the Commission frequently considered the need to minimize consumer confusion. *See Order* ¶¶ 27, 49, 54, 76, 79, 83, 210.

2. Biggerstaff's Requests with Respect to Attorney's Fees and the Statute of Limitations Are Outside the Scope of this Proceeding

In his petition for reconsideration, Biggerstaff argues that the Commission should find that, pursuant to Section 206 of the Act,⁴³ plaintiffs that prevail in “civil TCPA actions brought against common carriers” may recover attorney’s fees.⁴⁴ Biggerstaff also argues that the Commission should find that the general federal statute of limitations, set forth in Section 1658 of Title 28 of the United States Code,⁴⁵ applies to civil actions brought under the TCPA.⁴⁶

Biggerstaff’s requests are beyond the scope of this proceeding.⁴⁷ Neither Section 206 nor Section 1658 is implicated by the FCC’s notices of proposed rulemaking in this docket,⁴⁸ or by any of the rules adopted in the *Order*.⁴⁹ The very wording of Section 206, moreover, makes clear that issues regarding the appropriateness and amount of attorney’s fees are to be determined not by the FCC but “by the court in every case of recovery.”⁵⁰

⁴³ 47 U.S.C. § 206.

⁴⁴ Biggerstaff Petition at 21.

⁴⁵ 28 U.S.C. § 1658.

⁴⁶ Biggerstaff Petition at 21-22.

⁴⁷ See 5 U.S.C. § 553.

⁴⁸ *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); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Further Notice of Proposed Rulemaking, 18 FCC Rcd 6071 (2003).

⁴⁹ In addition, neither request appears in any of the requests for clarification that the Commission expressly incorporated into the Do-Not-Call proceeding. See NPRM ¶ 67 n.224. Biggerstaff is thus incorrect in claiming that his request regarding Section 206 was raised in one of these filings. See Biggerstaff Petition at 21 & n.5.

⁵⁰ 47 U.S.C. § 206; see also *Metrocall, Inc. v. Southwestern Bell Telephone Co. and Pacific Bell Telephone Co.*, 16 FCC Rcd 18123, ¶ 18 (2001) (FCC has “repeatedly . . .

It is likewise clear that Section 1658 of Title 28 does not apply when another statute of limitations exists.⁵¹ Under the Act, complaints against common carriers such as MCI for violations of the TCPA are governed by Section 415.⁵² Accordingly, the Commission should reject Biggerstaff's requests regarding Sections 206 and 1658.

III. CONCLUSION

For the foregoing reasons, MCI urges the Commission to deny the petitions for reconsideration to the extent discussed herein.

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held that the Commission lacks authority under the Act to award attorneys' fees as damages.").

⁵¹ Section 1658 is a default federal statute of limitations that applies "[e]xcept as otherwise provided by law." 28 U.S.C. § 1658.

⁵² 47 U.S.C. § 415 ("All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after.").

CERTIFICATE OF SERVICE

I, Ruth E. Holder, do hereby certify that copies of the foregoing Opposition of MCI to Petitions for Reconsideration were sent via first class mail to the following on this 14th day of October 2003.

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A handwritten signature in black ink that reads "Ruth E. Holder". The signature is written in a cursive style with a horizontal line underneath the name.

Ruth E. Holder