

Before the  
Federal Communications Commission  
Washington, DC 20554

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

To: Commission

**COMMENTS OF CINGULAR WIRELESS LLC**

Cingular Wireless LLC (“Cingular”) hereby submits these comments in response to the Commission’s *Further Notice* in this proceeding.<sup>1</sup> As discussed below, Cingular supports a limited safe harbor under the Telephone Consumer Protection Act (“TCPA”)<sup>2</sup> for any automatic and prerecorded calls made to a wireless number, including calls made to numbers recently ported to wireless phones, assuming certain threshold conditions are met. Cingular also supports requiring telemarketers to access the national Do-Not-Call list and update their records every 31 days, consistent with the rules recently adopted by the Federal Trade Commission (“FTC”).

**DISCUSSION**

As a general matter, the TCPA prohibits auto-dialed and prerecorded calls to wireless phones, unless the subscriber is not charged for the call or has provided express consent through

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<sup>1</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 *Further Notice of Proposed Rulemaking*, FCC 04-52 (rel. Mar. 19, 2004), *summarized*, 69 Fed. Reg. 16873 (Mar. 31, 2004) (“*Further Notice*”).

<sup>2</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 (“TCPA”).

a provided contact number.<sup>3</sup> The *Further Notice* seeks comment on whether, given the implementation of intermodal local number portability, there should be a limited safe harbor for automatic and prerecorded calls to numbers recently ported to wireless phones.<sup>4</sup> This is in part a response to a petition filed by the Direct Marketing Association (DMA) and the Newspaper Association of America, which asked the Commission to adopt a safe harbor for calls made to any wireless number regardless of whether the number was recently ported to wireless service.<sup>5</sup>

Cingular agrees with DMA that a limited safe harbor should apply to any automatic and prerecorded calls made to a wireless number if the calling party adheres to procedures similar to those applicable to the Do-Not-Call safe harbor. Those procedures include: (i) use of a wireless suppression or other comparable service to remove wireless numbers from marketing lists, and

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<sup>3</sup> See 47 U.S.C. § 227(b)(1); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Report and Order*, 18 F.C.C.R. 14014, ¶ 165 & nn.603 (2003) (“*2003 Report and Order*”). For example, the Commission has reaffirmed that “calls made by cellular carriers to their subscribers, for which subscribers are not charged in any way for the call . . . are not prohibited under the TCPA.” *Id.* at n.610; see *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, *Report and Order*, 7 F.C.C.R. 8752, ¶ 45 (1992) (“*1992 Report and Order*”) (“[W]e conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged.”); see also *id.* at ¶ 31 (“[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached.”).

<sup>4</sup> *Further Notice* at ¶ 46.

<sup>5</sup> *Id.* at ¶ 45 (citing Direct Marketing Association and Newspaper Association of America, Petition for Declaratory Ruling in CG Docket No. 02-278 (filed Jan. 29, 2004) (“DMA Petition”).

(ii) updating those marketing lists every 31 days.<sup>6</sup> Consistent with the Do-Not-Call safe harbor, such a safe harbor for any automatic and prerecorded calls made to a wireless number would help ensure that a calling party which “has made a good faith effort” to comply with the prohibition will not be held liable for erroneous calls.<sup>7</sup>

A limited safe harbor is needed to account for recently ported and pooled numbers, as well as inadvertent errors. While DMA has been working with Neustar to provide a “wireless suppression service” which would include ported numbers, marketers will not be able to update their call lists instantaneously even with such a service, necessitating a safe harbor. Moreover, pooling also affects ownership of numbers. If a wireline carrier has obtained a “contaminated” block of numbers from a wireless carrier, it will be shown as the code holder for the block even though some of the specific numbers may remain wireless.<sup>8</sup> The Number Portability Administration Center would have to be accessed to ensure the remaining wireless numbers are not treated as part of the wireline block. Absent real-time access to this data, a safe harbor is required. Finally, inadvertent calls may be made to wireless numbers just as errors may be made to numbers on the national Do-Not-Call registry.<sup>9</sup>

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<sup>6</sup> See DMA Petition at 2, 6; 69 Fed. Reg. 16368 (Mar. 29, 2004) (amending the FTC rules to require sellers and telemarketers to use a version of the national Do-Not-Call registry obtained from the FTC no more than 31 days prior to the date any call is made).

<sup>7</sup> See *2003 Report and Order*, 18 F.C.C.R. at 14040.

<sup>8</sup> Under the Commission’s number pooling rules, carriers are required to donate thousands-blocks that are not an initial block and are contaminated by 10% or less, *i.e.*, 10% or less of the numbers have been released. See 47 C.F.R. § 52.20(c). Thus, if a thousands-block is held by a wireless carrier but 10% or less of the numbers have been issued to wireless subscribers, and that block is donated to a wireline carrier, the 10% or less of the previously assigned numbers remain wireless.

<sup>9</sup> See DMA Petition at 4.

The Commission seeks comment on the appropriate safe harbor period.<sup>10</sup> The existence of ported and pooled transactions requires that providers have a reasonable time period to access such information and then update marketing lists to suppress calls to wireless numbers. Thirty-one days is a necessary and reasonable amount of time for marketers to obtain data on recently designated wireless numbers and to scrub their call lists of those numbers.<sup>11</sup> This time frame would also mirror the Do-Not-Call rules, which require telemarketers to scrub their call lists every 31 days to eliminate consumers who have indicated a desire not to be called and provides a further means of protection against unwanted calls to wireless numbers. Any shorter time period would be unduly burdensome and costly with very little benefit.

A sunset date for the safe harbor provision is not warranted.<sup>12</sup> Given the ongoing nature of porting and pooling transactions and the potential for inadvertent error, companies who use a suppression service and make good faith efforts to comply by updating their records every 31 days should be able to avail themselves of the safe harbor on a continuing basis.

Finally, with respect to the national Do-Not-Call list, the *Further Notice* asks whether the FCC should require telemarketers to access the list and update their do-not-call records every 30 days, rather than every 3 months as is now required.<sup>13</sup> Cingular supports a 31-day time period, which would make the FCC's rules consistent with the rules recently adopted by the FTC.<sup>14</sup> Consistent rules and time periods will simplify the process of educating and informing consumers and avoid confusion by telemarketers and consumers alike.

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<sup>10</sup> *Further Notice* at ¶ 49.

<sup>11</sup> *See id.*

<sup>12</sup> *Further Notice* at ¶ 49.

<sup>13</sup> *See Further Notice* at ¶¶ 52-53.

<sup>14</sup> *See supra* note 6.

**CONCLUSION**

Accordingly, Cingular respectfully requests that the Commission adopt the rules and polices expressed herein.

Respectfully submitted,

**CINGULAR WIRELESS LLC**

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