

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF BELLSOUTH

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively “BellSouth”), submits the following comments in response to the Consumer and Governmental Affairs Bureau’s recent *Further Notice of Proposed Rulemaking* (“Notice”) in the above referenced proceeding.¹

The Bureau seeks comments on issues related to the implementation of the Do Not Call Directory Order (“DNC Order”).² Specifically, the *DNC Order* prohibits the use of an automatic telephone dialer to call any wireless telephone number. Additionally, the *Order* prohibits using an artificial or prerecorded message on any call to a wireless telephone number. In promulgating these rules, the Commission recognized that wireless local number portability (“WLNP”)³ soon

¹ *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) (“Notice”).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14014 (2003).

³ WLNP allows a customer to port a landline number to a wireless phone. Thus, while a number may appear to be a landline number and therefore subject to different requirements regarding autodialers and recorded messages, that appearance would be incorrect and the number would instead be considered a wireless number, and subject to the wireless regulations noted above, if it had been ported.

would be available but concluded that the industry could navigate this issue by use of tools available in the marketplace.

Based on concerns raised by various parties regarding the capability of these tools to allow entities to comply with the *DNC Order* obligations for wireless numbers, the *Notice* asks if certain safe harbor rules are appropriate for numbers that were recently ported from a wireline service to a wireless service provider. Specifically, the *Notice* asks if the “Commission should adopt a limited safe harbor during which a telemarketer will not be liable for violating the rule prohibiting autodialed and prerecorded message calls to wireless numbers once a number is ported from a wireline to wireless service.”⁴

BellSouth whole-heartedly supports the establishment a safe harbor time period. It is axiomatic that the Commission should not seek to punish entities where compliance with a rule is unreasonable and it is unreasonable for an entity to maintain real-time updated databases with all ported wireless numbers. BellSouth contends that a short time frame where an entity would not be liable for violating the rule prohibiting autodialers and prerecorded message calls on ported wireless numbers is a desideratum that causes very little harm to consumers and is consistent with Commission precedent. The Commission should, therefore, adopt a 30-day safe harbor period. Thirty days is needed to avoid numerous weekly updates and would coincide with the 30-day period that is currently part of the Commission’s safe harbor rules for calls made to a number listed on the national DNC registry.

First, a 30-day safe harbor would not be a detriment to consumers. At most, once a consumer ports a wireline service to a wireless number, the consumer could potentially receive a telemarketing call or a prerecorded message for 30 days after the switch of service. That is a

⁴ *Notice*, ¶ 49.

small nuisance compared to a telemarketer having to incur substantial costs to try to implement systems that would provide real-time updates for every number ported. With most wireless carriers moving to unlimited calling plans, or at least providing customers with large numbers of free minutes before charging for air time per minute, the majority of consumers that could potentially receive a call from an autodialer or a prerecorded message will not incur a fee for these calls. Even if a consumer did receive a charge, the consumer has the ability to quickly terminate the call by hanging up.

Comparatively, the cost for a telemarketer to ensure that wireless ported number updates are received on a real-time, or even a daily, basis would be significant. Moreover, even if the telemarketer incurred these costs, it is highly likely that a recently ported number could slip-through-the-cracks for a particular day⁵ and not make the telemarketer's updated list. Then the telemarketer would be subject to fines on top of the cost of implementing the required systems. Accordingly, fairness and equity dictate that a safe harbor period should be allowed.

Second, in the *DNC Order*, the Commission recognized that a telemarketer should not be liable for a violation for a call made to a residential consumer on the national DNC registry if the telemarketer had made a good faith effort to comply with the national DNC rules. One of those rules is that the telemarketer access the national DNC registry on a periodic basis to update its marketing lists – initially this was a quarterly basis but the Commission is considering changing it to a 30-day time frame. Thus, as an example, if a consumer places a residential number on the national DNC registry on May 1, a telemarketer will not be in violation of the DNC rules if the telemarketer calls the consumer on May 25, as long as the telemarketer has complied with all other safe harbor rules. The Commission implemented this time period as one of the safe harbor

⁵ Any number that could easily be omitted from updated databases on the day of porting would certainly make those databases within 30 days.

rules because it recognized that it would be unreasonable and unfair to require daily updates from the DNC registry.

The current situation is essentially the same. A safe harbor time frame for ported wireless numbers, therefore, is consistent with the Commission's rules in the *DNC Order*. Accordingly, the Commission should adopt a 30-day safe harbor period. Furthermore, this safe harbor should not sunset. The reasons for discussed above for implementing the safe harbor will continue on an ongoing basis.

Finally, BellSouth does not oppose the Commission's proposal to amend the safe harbor rules for the DNC registry to be consistent with the Federal Trade Commission's ("FTC's") rules.⁶ BellSouth believes that it would be better to operate under one set of identical rules as opposed to different rules by different regulatory agencies.⁷

⁶ The *Notice* proposes to use "a version of the national do-not-call registry obtained from the administrator of the registry no more than 30 days prior to the date any call is made." *Notice*, ¶ 53. The *Notice* indicates that 30 days should be used in order to be consistent with the FTC. The FTC, however, recently issued rules that will become effective on January 1, 2005 that require using a "version of the 'do-not call' registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made." 16 C.F.R. § 310.4(b)(3)(iv) (effective Jan. 1, 2005). BellSouth is indifferent as to whether 30 days or 31 days is the standard to be used but believes that the Commission and the FTC should be consistent. Accordingly, BellSouth contends that the Commission should revise the *Notice* to 31 days in order to mirror the new FTC rule.

⁷ This statement is not intended to make any conclusion about jurisdictional matters related to the different regulatory agencies.

Conclusion

BellSouth respectfully requests that the Commission amend its rules as recommended herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 15th day of April 2004 served the parties of record to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH** via Electronic Mail to the following parties:

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