

**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

MCI COMMENTS

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WorldCom, Inc. d/b/a MCI (“MCI”) submits the following Comments in response to Further Notice of Proposed Rulemaking (“*Further Notice*”) released by the Federal Communications Commission (“FCC” or “Commission”) on March 19, 2004.¹

I. INTRODUCTION AND SUMMARY

The Commission’s rules currently provide a safe harbor for telemarketers that meet certain standards, including “employing a version of the national do-not-call registry obtained . . . no more than three months prior to the date any call is made.”² In the *Further Notice*, the Commission proposed amending this safe harbor to require telemarketers to update their call lists, using the national do-not-call registry, on a monthly, rather than quarterly, basis.³ MCI recognizes that the FCC is required to maintain a level of consistency with the FTC’s rules, but, as MCI has argued in the past, the goal of consistency does not require the two agencies’ rules to

¹ *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, CG Dockets No. 04-53 & 02-278, FCC 04-52 (rel. March 19, 2004) (“*Further Notice*”).

² 47 C.F.R. § 64.1200(c)(2)(i)(D).

³ *Further Notice* ¶¶ 52-53. Since, as explained below, the data contained in the national list cannot be made operational immediately, the current rule actually requires companies such as MCI to update their call lists more frequently than each quarter.

be identical. Therefore, should the Commission conclude that it is appropriate to require telemarketers to obtain the national list on a monthly basis, MCI urges the Commission to adopt certain conditions to ensure that its new rule is fair and feasible. MCI also urges the Commission to adopt appropriate safe harbors regarding any prohibition on autodialed and prerecorded message calls to phone numbers that have been ported from wireline to wireless service.

II. THE FCC SHOULD ENSURE THAT ANY AMENDMENT TO THE SAFE HARBOR IS FAIR AND FEASIBLE

A. The FCC Should Allow Telemarketers a Reasonable Amount of Time to Download and Implement the National List

In response to the Consolidated Appropriations Act of 2004 (“Appropriations Act”),⁴ the Federal Trade Commission (“FTC”) recently amended its Telemarketing Sales Rule (“TSR”) to require telemarketers subject to the TSR to “employ[] a version of the ‘do-not-call’ registry obtained . . . no more than thirty-one (31) days prior to the date any call is made.”⁵ In the *Further Notice*, the Commission sought comment on whether to amend its do-not-call rules “to mirror” the FTC’s new safe harbor provision.⁶

As the Commission acknowledged, the Appropriations Act does not require the FCC to amend its do-not-call rules.⁷ In addition, although the Commission is required to “maximize consistency” with rules promulgated by the FTC,⁸ the Commission also has an obligation under

⁴ Consolidated Appropriations Act of 2004, Pub. L. 108-199, 188 Stat 3, Division B, Title V (“Appropriations Act”).

⁵ 16 C.F.R. § 310.4(b)(iv) (effective Jan. 1, 2005), adopted in “Federal Trade Commission Telemarketing Sales Rule,” 69 Fed. Reg. 16368 (March 29, 2004) (“*FTC Order*”).

⁶ *Further Notice* ¶ 52. In the *Further Notice*, the FCC proposed adopting a 30-day safe harbor period that would be identical to the 30-day interval initially proposed by the FTC. *Id.* ¶ 53. After the release of the *Further Notice*, however, the FTC released an order in which it adopted a 31-day interval. *FTC Order* at 16371.

⁷ See *Further Notice* ¶ 52.

⁸ *Further Notice* ¶ 52; Do-Not-Call Implementation Act, H.R. Rep. No. 108-8 at 9, § 3 (2003).

the Telephone Consumer Protection Act (“TCPA”) to make an independent evaluation of the reasonableness of any rule that would apply to entities under the FCC’s jurisdiction. “Congress recognized that because the FCC is bound by the TCPA, it would not be possible for the FCC to adopt rules that are identical to those of the FTC in every instance.”⁹ As explained below, imposing the FTC’s 31-day requirement on MCI and similarly situated companies would be unreasonably burdensome, and would require telemarketers to obtain the national list from the FTC more frequently than the “once a month” requirement that Congress mandated in the Appropriations Act for telemarketers subject to the FTC’s jurisdiction.¹⁰ Therefore, the FCC should require telemarketers to obtain the list once every 31 days, but the amended rule also should afford telemarketers the additional time they need to implement the list prior to making calls.

MCI proposes that the Commission allow two weeks for companies to download and implement the national list.¹¹ This two-week period would allow MCI, for example, the time it needs to accomplish a number of steps, including:

- downloading the national list, which currently includes over 58 million phone numbers;¹²

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, ¶ 15 (2003) (“*Do Not Call Order*”).

¹⁰ Although the Appropriations Act does not apply to the FCC, it is worth noting that the Appropriations Act directed the FTC to require telemarketers only “to obtain” (*i.e.*, to download) the national list “once a month” – not to implement the list on a monthly basis. Implementing the national list includes all the steps needed to reformat the data in the national list to make it compatible with the telemarketer’s internal systems, and then disseminate that data to individual telemarketing representatives in a form that ensures compliance with the FCC’s do-not-call rules.

¹¹ The following description has been simplified for the sake of clarity, and omits a number of engineering and technical details.

¹² See “FTC Amends Telemarketing Sales Rule Regarding Access to National Do Not Call Registry” (March 23, 2004) (58.4 million phone numbers currently on the national registry), located at <<http://www.ftc.gov/opa/2004/03/tsrdncscrub.htm>>. MCI’s systems are configured in a manner that makes it functionally easier and quicker for MCI to download the entire national

- preparing the list for loading into MCI’s Sales and Marketing System (“SaMS”) database, which requires the list to be in a particular format (a ten-byte EBCDIC fixed length flat file) that is different from the format of the national list;
- loading the data into SaMS – a complicated process that requires MCI to format the data and match it with MCI’s internal records (*e.g.*, to determine whether MCI has an established business relationship with a particular number), and then segregate the data into blocks of numbers that can be simultaneously loaded or “threaded” into SaMS;
- distributing and uploading the updated data to MCI’s call centers; and
- correcting routine problems, such as system downtime or other computer failures, as well as difficulties in transferring data from the national database.

In order to afford MCI and other telemarketers adequate time to accomplish such steps, the FCC should require telemarketers to obtain the list once every 31 days, and use a version of the list that has been obtained no more than 45 days prior to any call.

If the FCC were not to afford telemarketers adequate time to download and implement the national list, and instead were to amend its rule to require telemarketers to use a version of the national list obtained no more than 31 days prior to the date of any call, the FCC effectively would be requiring MCI to download the list every 17 days – about twice as often as the 31-day period would seem to require. Such a rule also would impose unnecessary burdens on MCI and other similarly situated companies, effectively requiring them to undertake all the steps described above twice each month. The costs associated with this labor-intensive, semi-monthly process would be substantial, and would undermine the FCC’s stated goal that its do-not-call rules balance the costs to telemarketers against the benefits to consumers.¹³

list, rather than merely downloading updates to that list. Downloading the entire list also helps MCI ensure the accuracy of its do-not-call data.

¹³ *See, e.g., Do Not Call Order* ¶ 29 (“we are mindful of the need to balance the privacy concerns of consumers with the interests of legitimate telemarketing practices”).

A number of states have recognized the need to allow telemarketers time to download and implement phone numbers that have been submitted to do-not-call registries. Wisconsin, for instance, affords telemarketers ten business days to download and implement the state do-not-call registry;¹⁴ Louisiana affords telemarketers nine to seventeen calendar days;¹⁵ and Tennessee affords telemarketers up to 60 calendar days.¹⁶

Finally, the FTC stated that telemarketers and sellers would have “more than nine (9) months to ready their systems and procedures” to comply with the amended safe harbor.¹⁷ The FCC also should provide telemarketers nine months after the date that any amended safe harbor is published in the Federal Register to comply with any new rule. At a minimum, any new FCC rule should take effect no earlier than January 1, 2005.

B. The FCC Should Ensure that the National List Is Accurate and that Telemarketers Have the Information Required to Address Consumer Complaints

The adoption of a shorter safe harbor intensifies the need for the Commission to take certain actions to ensure that the national list is as accurate as possible, and that telemarketers have access to information required to address consumer concerns, including copies of

¹⁴ See “Wisconsin No Call List: Frequently Asked Questions for Telemarketers,” located at <<https://nocall.wisconsin.gov/web/includes/help/telemarketerfaq.asp>> (each quarter, telemarketers will receive by email an updated list for use in the following quarter; the effective date of the updated do-not-call list “will never be less than 10 business days from the delivery date of the list”).

¹⁵ See “‘Do Not Call’ Listing for Louisiana Residential Telephonic Subscribers,” Louisiana PSC Docket No. R-27021-A, 2003 La. PUC Lexis 36 at *27-28 (July 10, 2003) (explaining that a telemarketer can download the do-not-call database on the first Monday subsequent to the fifteenth day of the month prior to the start of a quarter).

¹⁶ “Tennessee Do-Not-Call Program: Frequently Asked Questions For Telemarketers,” located at <<http://www2.state.tn.us/tra/telemarketerFAQ.htm>> (explaining that telemarketers will be sent monthly updates of the state do-not-call list, and will have “up to 60 days [after receiving each update] to revise any outdated solicitation lists”).

¹⁷ *FTC Order* at 16368.

complaints and dates of registration. As MCI has argued, the Commission's established business relationship exemption puts MCI and other competitors at a distinct disadvantage to the incumbent local exchange carriers ("LECs"). That disadvantage is exacerbated by what MCI believes are inadequacies in the scrubbing process by the national do-not-call registry administrator. To that end, MCI urges the FCC to take steps to minimize the damage that is caused by this and other problems.

Accuracy of National List. First, the FCC should ensure that AT&T Government Solutions ("AT&T") has undertaken appropriate measures to maintain the accuracy of the national list. Both telemarketers and consumers benefit from a national list that is as accurate as possible. To maintain such a list, AT&T must ensure not only that new numbers are added to the list, but also that old numbers – including telephone numbers that have been disconnected or reassigned – are removed or "scrubbed" from the list. Although AT&T has represented that it scrubs the data in the do-not-call database, MCI is not aware of any means that are currently in place to allow the FTC, the FCC, or any company to determine whether these processes follow best practices or are even adequate to keep the list accurate.

The FCC should ask AT&T to report on the procedures AT&T is using to update the national database. In addition, the FCC should conduct a public forum that would enable companies that use the database to discuss the process for updating the database and to suggest methods for ensuring that AT&T's practices are consistent with best practices in the industry. In its report, at a minimum, AT&T should respond to the following questions:

- When did AT&T start the scrubbing process?
- Are the data obtained on a daily or monthly basis? If monthly, at what point in the month does AT&T receive the disconnected and reassigned telephone numbers?

- How long does AT&T take to incorporate this data into the national list and make it available for telemarketers to download?
- Where does AT&T obtain its data for disconnected and reassigned telephone numbers? Is it directly from all incumbent LECs and competitive LECs?
- Does AT&T encounter any difficulty obtaining the data from some incumbent LECs or competitive LECs?
- Are there any technical issues affecting AT&T's ability to obtain and download the data?
- Are "NPA splits" included in AT&T's processes for updating the list?
- Does AT&T evaluate whether its updates to the national database are consistent with known facts? For instance, under the widely held assumption that at least 16% of phone numbers change every year,¹⁸ approximately 779,000 numbers should be removed from the national list each month.¹⁹ However, MCI estimates that less than 6% of that amount is actually being removed each month. In light of such data, AT&T should report whether it is currently checking to determine if the actual number of deletions is commensurate with the number AT&T expects to see. If it is not commensurate, what steps is AT&T taking to diagnose and correct any defects in its process for updating the national database in a manner that accurately reflects the number of disconnects?

Access to Consumer Complaints. The Commission also should ensure that telemarketers have access to complaints filed with the FTC. MCI is committed to complying with the FCC's do-not-call rules, including any amendments to the 90-day safe harbor rule. However, as the Commission considers tightening the restrictions on telemarketers, it should also take appropriate steps to help telemarketers to better judge their performance and remedy any potential problems as soon as possible.

For instance, MCI is aware that there are consumers who file complaints with the FTC alleging that MCI has violated the FCC's do-not-call rules. The FTC does not serve those

¹⁸ See Telemarketing Sales Rule, Final Rule, Federal Trade Commission, 68 Fed. Reg. 4580, 4640 (2003) ("TSR Order").

¹⁹ As noted, the national database currently contains about 58.4 million numbers. Sixteen percent of that figure equals 9.34 million numbers that are expected to be deleted each year, or about 779,000 numbers per month.

complaints on MCI. The FCC should obtain such complaints and serve them on MCI as part of its Informal Complaint process²⁰ for two critical reasons. First, as a company that takes customer service very seriously, MCI is troubled that it is deprived of an opportunity to address consumers' concerns as quickly as possible, perhaps causing some consumers to believe that their concerns are being ignored. Second, without the opportunity to address these complaints, MCI cannot evaluate and correct expeditiously any problem that may exist (*e.g.*, a software glitch) with its implementation of the do-not-call rules.²¹

Access to Date of Consumer Registration. In order to respond accurately to consumer complaints alleging violations of the FCC's do-not-call rules, MCI often must determine the date on which a consumer registered a telephone number with the national registry. Ascertaining that date allows MCI to determine whether, for instance, the alleged call was made after the consumer had registered his or her telephone number, but before MCI was required to download an updated list; or whether the complaint was based on mistaken information. Obtaining the date of registration thus ensures that MCI will provide a more accurate response to the complainant.

The national do-not-call registry website allows MCI to obtain the date that a consumer placed his or her telephone number on the national registry, but only for ten or fewer phone

²⁰ 47 C.F.R. § 1.716.

²¹ The FTC generally does not use individual consumer complaints as a basis for pursuing an enforcement action against a telemarketer. See FTC Consumer Complaint Form, located at <[https://m.ftc.gov/pls/dod/wsolcq\\$.startup?Z_ORG_CODE=PU01](https://m.ftc.gov/pls/dod/wsolcq$.startup?Z_ORG_CODE=PU01)> (stating that “the FTC does not resolve individual consumer problems”). By contrast, the FCC's Enforcement Bureau relies on individual consumer complaints – including complaints filed at the FTC – as a basis for appropriate enforcement action. See *Do Not Call Order* ¶ 214 & n.776. Unless telemarketers are able to gain access to such complaints in an expeditious manner, telemarketers may find themselves subject to FCC enforcement actions that could have been avoided had they had earlier knowledge of the complaints.

numbers.²² Specifically, a party is permitted to submit a request to verify the registration of up to three telephone numbers at one time via e-mail. A return e-mail is sent with the requested registration dates and status of each telephone number. After the submission of ten numbers, the requestor's e-mail address is permanently blocked from further inquiries. The Commission should assist MCI and other similarly situated companies in gaining unlimited access to this website. As a purchaser of the national database, MCI would be willing to log in or enter a security code that would identify MCI as the requesting party.

III. THE FCC SHOULD ADOPT SAFE HARBORS FOR NUMBERS PORTED TO WIRELESS CARRIERS

In the *Further Notice*, the FCC sought comment on whether it should adopt a 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 wireline to wireless service.”²³ As an initial matter, MCI reiterates that the TCPA does not apply to numbers ported from a wireline to a wireless carrier.²⁴ Assuming for purposes of these comments that such ported numbers are subject to the TCPA, however, MCI urges the FCC to adopt a safe harbor stating that a telemarketer will not be liable for violating the prohibition against calling wireless

²² See <<https://www.donotcall.gov/default.aspx>>. Although an alternative site, <<https://telemarketing.donotcall.gov/>>, permits MCI to research registration status with unlimited access, that site does not provide the date on which on which a phone number was registered by a consumer.

²³ *Further Notice* ¶ 49.

²⁴ Opposition of MCI to Petitions for Reconsideration, CG Docket No. 02-278, at 9 (Oct. 14, 2003). The FCC 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”). See *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) & (5). 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.

numbers if the telemarketer can demonstrate that the violation is the result of error, and that as part of the telemarketer's routine business practice it meets the following standards:

1. Written procedures. The telemarketer has established and implemented written procedures to comply with the prohibition on calls to wireless numbers;
2. Training of personnel. The telemarketer has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the prohibition on calls to wireless numbers; and
3. Recording. The telemarketer has maintained and recorded a list of telephone numbers (including wireless numbers) that the telemarketer may not contact.

MCI also urges the FCC to establish a reasonable safe harbor period that would afford telemarketers adequate time to obtain data on recently ported numbers and to remove such numbers from their call lists.

In light of the difficulties that telemarketers currently face in complying with the FCC's current prohibition on calls to wireless numbers,²⁵ the Commission should adopt expeditiously both of the above-described safe harbors, and make them effective as soon as possible. Finally, it would be premature for Commission to establish a date on which either safe harbor would sunset.²⁶ The FCC can revisit this issue in the future if it determines that the factual basis for establishing the safe harbors has changed.

²⁵ See, e.g., *Further Notice* ¶ 48 (“we recognize that once a number is ported to a wireless service, a telemarketer may not have access to that information immediately in order to avoid calling the new wireless number”).

²⁶ See *Further Notice* ¶ 49.

IV. CONCLUSION

For the foregoing reasons, MCI urges the Commission to ensure that any amendment to the existing safe harbor for downloading the national do-not-call list is fair and feasible, and to adopt appropriate safe harbors regarding any rules governing telemarketing calls to phone numbers ported from wireline to wireless carriers.

Respectfully submitted,

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