

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby submits these Reply Comments in the above-captioned proceeding.<sup>1</sup> Nextel fully supports the many commenters who urge adoption of a safe harbor under the Telephone Consumer Protection Act of 1991 (“TCPA”) for automatic or prerecorded telemarketing calls made to wireless numbers, including numbers recently ported to wireless phones. The Commission should adopt reasonable safe harbor provisions like those used in the Do-Not-Call context. Specifically, marketers should be protected from TCPA liability so long as they follow procedures to (1) remove wireless numbers from calling lists used in automatic or prerecorded telemarketing, and (2) update those calling lists every 31 days. Such a safe harbor would protect marketers that make a good faith effort to comply with the TCPA’s prohibition against automatic and prerecorded calls to wireless numbers. Moreover, the safe harbor would comply with both the letter and the spirit of the TCPA.

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

The TCPA prohibits autodialed or prerecorded calls to wireless numbers, except for calls made by wireless carriers to their subscribers for which the subscriber is not charged.<sup>2</sup> The *Further Notice* sought comment on whether the FCC should adopt a safe harbor provision for marketers who call numbers that recently have been ported from a wireline to a wireless telecommunications service provider.<sup>3</sup>

A limited safe harbor is needed to provide marketers with a reasonable opportunity to comply with the TCPA. As noted by many of the commenters, the implementation of intermodal local number portability (“LNP”) makes it nearly impossible to ensure, on a daily basis, that no prerecorded or autodialed calls are being routed to wireless numbers.<sup>4</sup> Unless and until a solution becomes available that permits real-time compliance with the TCPA, a safe harbor is essential for marketers who make good faith efforts to comply with this wireless prohibition. A safe harbor also is needed to protect marketers from liability for the inadvertent errors that are a necessary consequence of a constantly changing list of restricted telephone numbers. Many companies, including Nextel, rely on third-party vendors in addition to internal sales staff to conduct marketing calls. Coordination and distribution of scrubbed lists among these groups can be a time-consuming and imperfect process. To accommodate these two limitations on marketers’ compliance capabilities, the Commission should adopt a safe harbor that (1) provides

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<sup>2</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 18 FCC Rcd 14014, ¶ 165 & nn. 610 (2003).

<sup>3</sup> *Further Notice*, ¶ 2.

<sup>4</sup> *See, e.g.*, Cingular Comments at 3; AT&T Comments at 7-8; Bell South Comments at 3. Although Neustar is readying its “Intermodal Ported TN Identification service,” which may help make identification of ported numbers easier, no product currently available would enable real-time updates to prohibited phone number lists. *See* Sprint Comments at 2. Moreover, as Sprint observes, “many companies simply do not have systems in place that would allow them to access” prohibited phone number lists from Neustar on a daily basis. *Id.*

marketers with a reasonable amount of time to suppress wireless numbers from calling lists and (2) protects them against liability for inevitable, inadvertent errors that occur despite good-faith efforts to comply with the TCPA.

The FTC already has recognized in the Do-Not-Call context that a 31-day safe harbor period is appropriate.<sup>5</sup> The Commission should adopt that period here. A consistent safe harbor period would further the intent of the TCPA;<sup>6</sup> and it would avoid unnecessary confusion for marketers, without undermining consumer protection.

Moreover, the Commission should adopt Sprint's suggestion of affording marketers a two-week period to implement the list of recently ported numbers.<sup>7</sup> This approach would account for the time that marketers need to distribute LNP-related call suppression information throughout their organizations and to their telemarketing vendors.

Because real time suppression of autodialed and prerecorded calls to recently ported wireless phones currently is not practicable, the Commission should not establish a sunset date for the safe-harbor provision. On the other hand, the Commission may revisit this issue if circumstances change and real-time suppression becomes practicable.

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<sup>5</sup> *Further Notice*, ¶ 2. The FCC also proposed in the *Notice* to amend its safe harbor provision for telemarketers required to comply with the National Do-Not-Call Registry from a quarterly requirement to a 30-day requirement in an effort to remain consistent with the Federal Trade Commission's ("FTC's") proposed amendment to its safe harbor rule. Subsequently, the FTC issued its final rule, adopting a 31-day requirement.

<sup>6</sup> The Commission is expected to "maximize consistency" between its rules and those adopted by the FTC. *Further Notice*, ¶ 52; Do Not Call Implementation Act, H.R. Rep. No. 108-8 at 9, § 3 (2003).

<sup>7</sup> Sprint Comments at 2.

## Conclusion

For the foregoing reasons, Nextel urges the Commission to adopt a safe harbor for autodialed and prerecorded message calls to wireless numbers as described herein.

Respectfully submitted,

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