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

CG Docket No. 04-53

In the Matter of

Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003

COMMENTS OF CINGULAR WIRELESS LLC

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Summary

In enacting the CAN-SPAM Act, Congress intended to protect subscribers of wireless services from the proliferation of unwanted commercial messages that have plagued users of the internet. In Section 14 of the Act, Congress directed the Federal Communications Commission ("FCC") to adopt rules to implement that protection.

In adopting rules to implement Section 14, the FCC should place the burden of compliance with the CAN-SPAM Act squarely where it belongs, *i.e.*, with senders of commercial messages to wireless subscribers. The Commission should recognize that the wireless data industry in this country is in its infancy. The Commission should be especially careful to adopt no rules that would interfere with the relationship between wireless service providers and their customers. The provision of wireless data services in this country is highly competitive, and providers of wireless services have every incentive to satisfy their customers' wishes with regard to receipt of commercial messages on their wireless devices. No regulatory mandate is necessary for wireless carriers to incorporate sophisticated anti-SPAM capabilities into their service offerings. As authorized by Section 14(b)(3) of the Act, the Commission should exempt communications with their customers by wireless service providers from any restrictions adopted generally for senders of mobile service commercial messages. Congress clearly intended that wireless carriers be free to communicate with their customers absent an expressed intent on the part of a subscriber to bar future mobile service commercial messages from its wireless carrier.

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Cingular Wireless LLC, ("Cingular"), through undersigned counsel, hereby submits its comments in the captioned proceeding. In 2003, Congress passed the CAN-SPAM Act[1] to address the growing number of unwanted commercial electronic mail messages. The Act charges the Federal Trade Commission ("FTC") with primary enforcement responsibility. It also requires the Federal Communications Commission ("FCC" or "Commission") to adopt rules to protect consumers from unwanted mobile service commercial messages. Cingular supports the Congressional objective and the Commission's efforts to protect consumers from unwanted commercial messages on their mobile communications devices.

I. Background.

In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA").[2] Among other things, the TCPA prohibits, with certain exceptions, autodialed and artificial or prerecorded messages to wireless telephone numbers.[3] Concerned that more

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[1] Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003) ("CAN-SPAM Act" or "Act").
[2] Telephone Consumer Protection Act of 1991, Pub. L. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.
[3] 47 U.S.C. § 227(b)(1)(a)(iii). The Commission has held that autodialed and/or prerecorded "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." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, GC Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14014, note 610 (2003).

than half of all e-mail traffic is unsolicited commercial electronic mail[4], Congress expanded the protection to wireless service subscribers in the CAN-SPAM Act of 2003. Section 14 of the Act requires the Commission to adopt rules to protect consumers from unwanted "mobile service commercial messages."[5] The Commission is required to provide wireless subscribers with the ability to avoid receiving such messages "unless the subscriber has provided express prior authorization to the sender…."[6] The Commission must provide a means for wireless subscribers "to indicate electronically a desire not to receive future mobile service commercial messages from the sender…."[7] The Act allows the Commission to permit wireless service providers to send mobile service commercial messages to their customers without prior express consent provided that such customers are given the ability to "opt-out" of receiving such messages in the future.[8] The Commission is charged with determining how a sender of such messages may comply with the Act, "considering the unique technical aspects, including the functional and character limitations, of devices that receive such messages."[9] The Commission must consider the ability of a sender "to reasonably determine that the message is a mobile service commercial message."[10]

In fulfilling its statutory duties, the Commission should keep in mind that wireless text messaging is in its infancy in this country. Advertisers, carriers and mobile service subscribers are all learning about the potential of marketing products and services to

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[4] CAN-SPAM Act of 2003, §2(a)(2).
[5] CAN-SPAM Act of 2003 §14(b). The term "mobile service commercial message" is defined as "a commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service…in connection with such service." CAN-SPAM Act of 2003 §14(d).
[6] CAN-SPAM Act of 2003 §14(b)(1).
[7] *Id.* §14(b)(2).
[8] *Id.* §14(b)(3).
[9] *Id.* §14(b)(4).
[10] *Id.* §14(c).

consumers of mobile services. The Commission should be very careful not to place undue restrictions on the use of this new medium.

The Commission should be especially reluctant to regulate communications between wireless service providers and their customers. Wireless service providers need the ability to communicate freely with their customers for all three types of messages identified in the CAN-SPAM Act: promotional, transactional and informational. In the highly competitive wireless service marketplace, any carrier who abuses the relationship with its customer will lose the customer to a competitor or will prompt the customer to "opt out" of future promotional messages from the carrier. Thus, the marketplace itself provides wireless service providers with ample incentives to treat their customers in a reasonable and respectful manner. Wireless service providers also have ample incentive to provide their customers with tools to avoid unwanted commercial messages on their wireless devices from third parties.

In fashioning measures to protect consumers mandated by the CAN-SPAM Act, the Commission should act in a manner consistent with the market forces that shape the competitive mobile services marketplace. A wireless service provider that offers its customers a superior means of avoiding unwanted commercial messages will obtain a competitive advantage over a provider that does not meet its customers' expectations. The efficacy of "spam filters" offered by internet service providers is a competitive factor in that marketplace. The Commission can be sure that it will be a competitive factor in the wireless service marketplace as well. Cingular offers its comments on the issues raised in the Notice with this context in mind.

II. Definition of Mobile Service Commercial Message.

The Notice seeks comment on whether messages sent initially to a desktop computer e-mail account and then forwarded by the wireless subscriber to a mobile device are covered by the definition of mobile service commercial message. The Commission's tentative conclusion that such messages do not fall within the definition of a mobile service commercial message is correct. Such messages fall outside of the category of messages "transmitted directly to a wireless device." Rather, such messages reach the wireless device "indirectly", *i.e.*, when the wireless subscriber initiates the forwarding process. It is the subscriber who controls the delivery of such messages to a wireless device, rather then the sender of the message.

The Commission is correct to conclude that reading the definition of mobile service commercial message to reach forwarded messages would expand the scope of Section 14 to reach virtually all electronic mail covered by the CAN-SPAM Act, since virtually all e-mail can be forwarded to a wireless device. This would eliminate the ability of a sender of a message to know whether it would become a mobile service commercial message by virtue of the recipient's act of forwarding the message to a wireless device, and thus would not meet the criteria of Section 14(c).[11]

III. The Ability to Avoid Receiving Mobile Service Commercial Messages.

The Commission seeks comment on technical mechanisms that could be available to wireless subscribers so that they may voluntarily, and at their own discretion, protect themselves against unwanted mobile service commercial messages.[12] As discussed below, wireless service providers have every incentive to supply their customers with

[11] Notice ¶ 17.
[12] Notice ¶ 19.

sophisticated anti-spam capabilities that will allow customers to create lists of acceptable and unacceptable senders of mobile service commercial messages. No regulatory mandate is needed for wireless service providers to incorporate such capabilities into their service offerings.

The Notice seeks comment on how wireless service providers might protect subscribers from mobile service commercial messages transmitted by senders who may willfully violate the Act.[13] Text messaging has been offered in this country by wireless service providers for only a relatively short period and is rapidly gaining in popularity. Messaging is one of the fastest growing segments of the wireless market and is expected to contribute significantly to the economic health of the industry. The Commission does not need to promulgate rules that mandate wireless service providers deploy anti-spam capabilities. Wireless service providers have a tremendous incentive to ensure that their subscribers are not subjected to unwanted mobile service commercial messages so that using the service is a favorable experience. The need to gain a competitive advantage by deploying state-of-the-art servers and software is far more effective than any regulatory mandate.

Cingular Wireless, in mid-2002, began to develop requirements for anti-spam capabilities to be incorporated with its messaging service offerings and a Request for Proposal was released in April, 2003. Cingular had anti-spam processes in place at the time it launched its messaging services and continuously upgrades and adds additional capabilities. Within the next few months Cingular Wireless will launch an entirely new SMS e-mail gateway that includes highly sophisticated anti-spam capabilities. In addition to network protection functionality, the gateway will be rich with customer initiated and

[13] Notice ¶ 19.

controlled features. For example, the subscriber will be able to create lists of acceptable and unacceptable senders at high levels as well as the individual address level. The need to offer services with the capabilities that Cingular Wireless subscribers want and offer the spam protection that they demand was the motivator for this effort, not regulatory mandate. Cingular Wireless is committed to stay abreast of new spamming techniques and continuously upgrade its network to provide its customers with the highest level of anti-spam protection available.

A. Domain Name Solutions.

One reading of Section 14(b)(1) of the CAN-SPAM Act is that Congress intended to prohibit all mobile service commercial messages unless the sender first obtains express authorization from the recipient. The Notice seeks comment on whether, if the Commission adopts this interpretation of the Act, a list of wireless domain names and/or subdomain names could be maintained that would allow potential senders to determine that it is about to send a message to a wireless device.[14]

It is common practice in the wireless industry to use various domain or subdomain names that denote a specific service and assign customers accordingly. Typically this is done for server routing requirements. If the Commission were to establish a registry list where the carriers could post the domain names they use, it could be used by senders of Mobile Service Commercial Messages (MSCMs) to determine if they were sending messages to a wireless device. This would not impose a significant burden on wireless providers and would place the burden of compliance where it should be, on the sender.

[14] Notice ¶27.

If the Commission were to establish such a list of wireless providers' domain names for use by senders of mobile service commercial messages to determine if they were sending messages to wireless subscribers, it then would not be necessary to assign mobile service messaging domain-only or common mobile service messaging subdomain names for use by wireless providers. As the Commission notes,[15] one significant difficulty with this approach is that entities that do not provide mobile service messaging might also adopt such names. Furthermore, wireless providers would be required to expend considerable time and resources in order to change domain names or add subdomain names. If the Commission seeks to employ a domain name solution, maintaining a simple list of wireless domain names utilized by wireless service providers is a far superior solution than mandating a new kind of domain name for use by wireless providers.

B. Challenge and Response Mechanisms.

The Notice seeks comment on whether the Commission should require wireless providers to offer what is known as a "challenge-response" mechanism.[16] The Commission should not adopt such a requirement. In order for a "challenge-response" mechanism to perform as desired, all senders of commercial messages would have to deploy the capability of responding to a challenge by a wireless service provider. Furthermore, the wireless service provider would need to have a means to identify messages as commercial, rather than transactional or informational. Any "challenge-response" mechanism has the potential to slow down the entire text messaging system. Rather than trying to mandate a solution, the Commission should allow wireless service

[15] Notice ¶ 31.
[16] Notice ¶ 32.

providers to offer their customers solutions that best meets the customers' needs. The effectiveness of the means chosen by the various providers will contribute to their competitive success.

C. Commercial Message Identification.

The Notice seeks comment on whether the Commission should require senders of commercial messages to identify or "tag" its messages as commercial.[17] The Commission correctly notes that the issue of "tagging" all commercial e-mail will be addressed by the FTC in a report to Congress. Should the Commission consider requiring "tagging" of mobile service commercial messages by senders, it should keep in mind the limited character capacity of most wireless data handsets.[18] Cingular limits the number of characters in a text message to 160, which includes header information. Any characters that are required to "tag" the message reduce the content that reaches the subscriber. There is no expectation that those character limitations will change in the near future.

IV. Electronically Rejecting Future Mobile Service Commercial Messages.

The Notice seeks comment on how the Commission can implement the requirement in Section 14(b)(2) of the Act that allows recipients of mobile service commercial messages to indicate electronically a desire to receive no further mobile service commercial messages from the sender.[19] The onus should be on the sender, in the first instance, to provide a means such as a hyperlink that will allow mobile service customers to notify the sender electronically to refrain from sending future mobile service commercial messages to that subscriber. However, as discussed above, should the sender

[17] Notice ¶ 33-34.
[18] Notice ¶ 42.
[19] Notice ¶ 37.

ignore the subscriber's wishes, wireless service providers are deploying sophisticated anti-spam capabilities that can identify and block messages from senders that its subscribers list as an unwanted source of messages.

V. Exemption for Providers of Commercial Mobile Services.

Section 14(b)(3) authorizes the Commission to apply the express prior consent requirement of Section 14(b)(1) to messages from commercial mobile service providers to their customers. Before doing so, however, the Commission is instructed to take into consideration "the relationship that exists between providers of such services and their subscribers…." From the existing business relationship that exists between a wireless service provider and its customers, the Commission may presume that the customer is willing to receive information about new products and services that the provider has available. The Commission has consistently held that, in enacting rules implementing the consumer protection provisions of the TCPA, neither the text nor the legislative history indicates any intent on the part of Congress to prohibit messages from wireless carriers to their customers for which the customer is not charged.[20] There is no indication in the CAN-SPAM Act that Congress intended a different result.

Rather than subjecting wireless providers to the requirements of Section 14(b)(1), Congress offered an alternative protection for wireless customers in Section 14(b)(3), which requires wireless service providers to provide their customers with the ability "to allow subscribers to indicate a desire not to receive future mobile service commercial messages from the provider…." This gives wireless customers with the ability to reject future promotions from a wireless provider who abuses the provider/subscriber relationship with unwanted promotional messages.

[20] Notice ¶39, fn 81, citing the *1992 TCPA Order*.

Cingular will offer its customers several simple means to "opt-out" of receiving mobile marketing messages, either at the time the subscriber initiates service or at any time thereafter. Cingular will allow its customers to opt-out from receipt of any promotional messages, or to opt-out for a specific campaign or event. Cingular customers can access a web site that will permit them to opt-out of receiving various forms of mobile marketing messages or by calling Cingular's customer service department.

Cingular and other wireless service providers have every incentive to optimize its customers' wireless service experience. Carefully designed promotional messages inform customers of new service offerings and provide a convenient means for customers to subscribe to such services. Any marketing campaign that is objectionable to subscribers will simply cause those subscribers to opt-out of future promotional messages or, in an extreme case, change service providers. The intense competition among wireless service providers provides every motivation to ensure customer satisfaction.

VI. Conclusion.

Congress adopted the CAN-SPAM Act of 2003 to protect consumers from the burgeoning number of fraudulent, misleading, and often vulgar commercial electronic messages. Congress' stated purpose was to prevent senders of commercial electronic mail from misleading recipients as to the source and content of such messages, and to provide recipients with the right to decline to receive commercial electronic mail from the same source.[21] The Commission should seek cost effective and efficient means to implement Congress' intent in the context of mobile service commercial messages delivered to wireless devices. The Commission should allow wireless service providers

[21] CAN-SPAM Act of 2003, § 2(b).

to compete by offering their customers effective and efficient means to avoid unwanted commercial messages. The Commission need not adopt a "top-down" approach by mandating particular solutions based on current technology. Instead, the Commission should allow the infant wireless data marketplace to develop solutions to problems as they evolve.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lydia Byrd, an employee in the Legal Department of Cingular Wireless LLC, hereby certify that on this 30th day of April , 2004, courtesy copies of the foregoing Comments of Cingular Wireless were sent via first class mail, postage prepaid to the following:

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In addition, the document was filed electronically in the Commission's Electronic Comment Filing System on the FCC website.

s/ Lydia Byrd
Lydia Byrd