Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003	)))	**CG Docket No. 04-53**

REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless respectfully submits reply comments on the *Notice*[1] in the captioned proceeding. Verizon Wireless urges the Commission to confirm that Short Message Service ("SMS") messages originating as Internet e-mail and sent to an e-mail address are subject to the *CAN-SPAM Act.*[2] In addition, the Commission should permit wireless carriers to send mobile service commercial messages ("MSCMs") to their customers as long as they do not charge for these messages. Finally, the record demonstrates that the Commission should not mandate specific anti-spam technologies, except that the Commission should implement a wireless domain name registry.

I. THE COMMISSION SHOULD FIND THAT CERTAIN SMS MESSAGES ARE COVERED BY THE *CAN-SPAM ACT*

The record is divided on whether the Commission should apply the *CAN-SPAM Act* to SMS messages. On the one hand, T-Mobile urges the Commission to find that all SMS messages, including mobile-to-mobile SMS messages and "web-based" SMS that

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[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 Docket No. 04-53, CG Docket No. 02-278 (rel. Mar. 19, 2004) ("*Notice*").

[2] Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003), *codified at* 15 U.S.C. § 7701 ("*CAN-SPAM Act*" or "*Act*").

traverses the Internet via an e-mail address associated with a mobile handset, should fall outside the scope of the *Act.*[3] On the other hand, consumer groups argue that all SMS messages should be subject to the *Act.*[4] Certain other entities suggest that the *CAN-SPAM Act* does not apply to mobile-to-mobile SMS but does extend to SMS messages delivered via the Internet.[5] In some cases, the comments are not clear on whether the Commission should apply the *CAN-SPAM Act* to SMS messages.[6]

The *Act* defines an MSCM to mean a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile services."[7] A "commercial electronic mail message" is any "electronic mail message,"[8] which is "a message sent to a unique electronic mail address."[9] The *Act* in turn defines an "electronic mail address" as "a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the 'local part') and a reference to an Internet domain (commonly referred to as the

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[3] Comments of T-Mobile USA at 4-6.

[4] Comments of Consumer Action, Consumer Federation of America, and the National Consumers League at 2 ("Comments of Consumer Groups"); Comments of the National Association of Attorneys General at 5 (if mobile-to-mobile SMS is outside the *Act* then the *Act* should be amended). *See also* Comments of Intrado at 3.

[5] Comments of Dobson Communications Corporation at 5-6; Comments of Sprint at 2-3.

[6] *See* Comments of CTIA at 7-8 (on the one hand Internet e-mail messages such as NAME@wirelesscarrier.net are "electronic messages" and can be MSCMs but on the other "Given the negligible amount of SMS traffic that traverses the Internet, there is no need to subject the Act's requirements to those rare cases in which SMS messages are first sent through the Internet and then converted into an SMS message associated with a telephone number."); *see generally* Comments of Cingular at 5 (detailing launch of SMS e-mail gateway that includes anti-spam capabilities); Comments of Nextel.

[7] *CAN-SPAM Act* §14(d).

[8] *CAN-SPAM Act,* § 3(2)(A).

[9] *CAN-SPAM Act,* § 3(6).

'domain part'), whether or not displayed, to which an electronic mail message can be sent or delivered."[10]

In urging the Commission to exempt all SMS messages from the scope of the *CAN-SPAM* Act, T-Mobile states that "While 'web-based' SMS messages include an Internet domain name at the point of origination, these domain names are not used in the delivery of messages to the 'destination' customer because, once they reach T-Mobile's SMS gateway, T-Mobile converts the message into a traditional SMS message (without an Internet domain) to the destination customer.[11] T-Mobile relies on a strained interpretation of the *Act* that would effectively nullify it.

T-Mobile attempts to make much of the fact that the *Act* requires an Internet domain to be a "destination" and that the conversion at its gateway to an SMS message (without an Internet domain) justifies exemption of these types of messages. As an initial matter, T-Mobile correctly describes how an e-mail message reaches a wireless customer. Internet e-mail senders use an e-mail address assigned by the wireless carrier, such as wirelessnumber@vtext.com, to address a message to a wireless user. The message is delivered to the Wireless Internet Gateway ("WIG") via Simple Mail Transport Protocol ("SMTP"), at which point it undergoes a conversion to the Short Message Peer-to-Peer Protocol ("SMPP") for delivery as an SMS message.

Contrary to T-Mobile's argument, however, the definition of "electronic mail address" does not require the Internet domain to be the "destination" of the electronic message because the combination of the local part and the domain part need only

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[10] *CAN-SPAM Act,* § 3(5).

[11] Comments of T-Mobile at 6.

constitute an address to which a message can be "sent or delivered." It is axiomatic that when Congress uses two words separated by the disjunctive word "or," Congress intended the words to have different meanings.[12] Although the legislative history does not evince why Congress used these two words, a reasonable interpretation of this section is that Congress intended it to apply when a sender of a message uses the combined local part and domain part as a means to reach a wireless customer, regardless of whether the message is sent to that address directly or through the carrier via a conversion. Although the dictionary definitions of "send" and "deliver" overlap in some ways, they clearly can have different meanings. For example, one definition of "deliver" is "to send (something aimed or guided) to an intended target or destination," whereas a definition of "send" is "to convey or cause to be conveyed or transmitted by an agent."[13]

In addition to the plain meaning of the *Act,* it would be illogical to assume that Congress intended SMS messages sent via Internet e-mail to be excluded from the *Act* when the legislative history specifically references these types of messages. In the context of discussing the *Act's* requirement that the FCC consider the ability of a spammer to determine whether an electronic mail message is an MSCM, one of the *Act's* sponsors stated, "Obviously, as wireless service evolves, more and more consumers will receive Internet e-mails via their commercial mobile service provider's network and directly to their wireless device. If a person has an e-mail address from their commercial

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[12] *See, e.g., FCC v. Pacifica Foundation,* 438 U.S. 726, 739-40 (1978) ("obscene, indecent, or profane" are written in statute as disjunctive, meaning each has a separate meaning); *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979) (canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise).

[13] *Compare* Webster's Ninth New Collegiate Dictionary 336 (9th ed. 1984) *with* i*d.* at 1071.

mobile service provider and it can be readily identified as a wireless address, such as name@verizonwireless.net or name@wireless.net, then the reasonable ability of a potential spammer to recognize that as such is relatively easy."[14]

The Commission should also reject T-Mobile's interpretation of the *Act* because it would eviscerate the *Act.* If the *CAN-SPAM Act* does not apply to Internet messages sent to wireless devices using addresses such as wirelessnumber@wirelesscarrier.com, Verizon Wireless is unaware of any messages that would be impacted by the *Act.*[15] Verizon Wireless shares the concern of consumer groups that regardless of the means of transmission, wireless spam is and will be a major problem.[16] Verizon Wireless urges the Commission to interpret the plain terms of the *Act* in a way that assists wireless carriers in responding to wireless spam.

II. THE COMMISSION SHOULD EXEMPT WIRELESS CARRIERS FROM OPT-IN IF THEY DO NOT CHARGE FOR MSCMs

Predictably, the wireless carriers filing in this docket urge the Commission to grant wireless carriers an exemption from the *Act's* express prior authorization requirement,[17] whereas the parties representing consumer interests urge the Commission not to do so.[18] The Commission can satisfy the concerns of the consumer groups,

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[14] 149 Cong. Rec. H12860 (daily ed. Dec. 8, 2003) (statement of Rep. Markey) ("*Markey Statement*").

[15] T-Mobile also argues that the *Act* should not apply to Wi-Fi service. Comments of T-Mobile at 7. Verizon Wireless urges the FCC to find that the *CAN-SPAM Act* applies whenever commercial electronic mail messages are sent directly to a wireless device, regardless of the technology or air interface used for the service.

[16] Comments of Consumer Groups at 1-2.

[17] Comments of Cingular at 9; Comments of Dobson at 12; Comments of Nextel at 17; Comments of Sprint at 8.

[18] Comments of Consumer Groups at 4; Comments of National Association of Attorneys General at 7; Comments of Electronic Privacy Information Center at 8.

however, if it adopts the position of many of the wireless carriers that opt-in should not be required if wireless carriers suppress charges for MSCMs they send to their customers.

The consumer groups first argue that an exemption for wireless carriers is not necessary because the *CAN-SPAM Act* provides an exception for "transactional and relationship" messages.[19] But as T-Mobile correctly states, wireless carriers routinely communicate with their customers via SMS on a wide variety of subjects that do not fit neatly within the definition of "transactional or relationship" messages.[20] Furthermore, requiring wireless carriers to examine every communication they make with their customers to determine which category of speech the communication falls into would have a chilling effect on communications.[21] The permissibility of sending "transactional or relationship" messages without consent does not sufficiently address the need for an exemption from an opt-in requirement for wireless carriers.

Second, the National Association of Attorneys General makes the claim that exempting wireless carriers from the opt-in requirement without sufficient justification could make the *CAN-SPAM Act* susceptible to a constitutional challenge.[22] To the contrary, as Verizon Wireless demonstrated in its opening comments,[23] requiring wireless carriers to obtain opt-in consent before they can communicate with their customers would increase the likelihood of a First Amendment challenge because it would require the Commission to demonstrate that a serious restriction on speech is warranted.

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[19] Comments of Consumer Groups at 4; Comments of National Association of Attorneys General at 7.

[20] Comments of T-Mobile at 17.

[21] Comments of Dobson at 14.

[22] Comments of the National Association of Attorneys General at 8.

[23] Comments of Verizon Wireless at 14.

The Electronic Privacy Information Center ("EPIC") also argues that the Commission should require wireless carriers to obtain opt-in consent because carriers seeking opt-out consent for use of customer proprietary network information ("CPNI") have allegedly implemented that requirement in an inefficient, cumbersome, and confusing manner.[24] EPIC provides no factual support for its argument. Indeed, it criticizes as "confusing" an opt-out notice that specifically complies with the Commission's "more stringent notice requirements," which largely dictate what must be included in such notices.[25] Moreover, EPIC's criticisms about the form of CPNI opt-out notices should be addressed to rulemaking proceedings in the CPNI docket; they do not impact the validity of opt-out programs in general, or whether to impose an opt-in requirement under the *CAN-SPAM Act*. The *CAN-SPAM Act* requires the Commission to consider the unique relationship that wireless carriers have with their customers,[26] which Verizon Wireless and other wireless carriers detailed in their comments. EPIC has not alleged that any wireless carrier has implemented opt-out in an inadequate manner, but even if it did, this would be wholly irrelevant as to whether the Commission should impose an opt-in requirement in this case. The Commission always maintains its authority to review the actions of common carriers and take action against them if they engage in unreasonable practices.

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[24] Comments of Electronic Privacy Information Center at 8.

[25] *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Third Report and Order and Third Further Notice of Proposed Rulemaking*, 17 FCC Rcd 14860, ¶¶ 89-119 & Appendix B thereto (2002) (adopting "more stringent notice requirements to ensure that customers are in a position to comprehend their choices and express their preferences regarding the use of their CPNI"); *see also* 47 C.F.R. § 64.2008 (CPNI notice requirements).

[26] *CAN-SPAM Act,* § 14(b)(3).

Finally, EPIC also argues that "people want less, not more, spam," and that it makes little difference whether the sender is a "legitimate company, an illegitimate company, or even a company with which individuals regularly transact."[27] But this is contrary to the Commission's own finding that customers expect carriers to communicate with them. As the FCC found in the CPNI docket, consumers expect and desire businesses to use information accumulated in the provision of service to communicate with customers about other offerings.[28]

As EPIC itself suggests, the survival and utility of wireless communications devices and services such as SMS depends on the isolation from constant interruption.[29] Carriers simply cannot afford to abuse the privilege of sending SMS messages to their customers and expect that SMS will be a viable product offering.[30] T-Mobile stressed in its comments that competition generally constrains wireless carriers, in that if wireless carriers were to use SMS products inappropriately, customers would simply switch to a different service provider.[31] And, as Dobson pointed out, the fee that is normally associated with SMS messages was one of the main reasons Congress enacted the MSCM provisions of the *CAN-SPAM Act.*[32] If the Commission adopts a rule that opt-in consent is not required for wireless carriers to send MSCMs to their customers as long as they do

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[27] Comments of the Electronic Privacy Information Center at 8.

[28] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, *Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998), ¶57.

[29] Comments of the Electronic Privacy Information Center at 1.

[30] *See* Comments of Cingular at 5.

[31] Comments of T-Mobile at 17.

[32] Comments of Dobson at 12.

not charge for these messages, this will adequately protect consumers from the concerns raised by the consumer groups.

III. THE COMMISSION SHOULD NOT IMPOSE SPECIFIC TECHNOLOGY SOLUTIONS BUT SHOULD ADOPT A MOBILE DOMAIN REGISTRY

There was general consensus among the carriers filing in this proceeding that the Commission should not impose specific technology solutions on wireless carriers to combat spam.[33] These carriers made it clear that mandated technical solutions could place unneeded and expensive burdens on wireless carriers,[34] and that carriers need flexibility to utilize different technologies and methods to fight spam as different circumstances warrant.[35]

One solution that most parties and Verizon Wireless support, however, is a mobile services domain registry.[36] As Nextel suggests, a mobile domain name list that marketers could consult before sending messages would probably be the most effective way of stopping senders from unknowingly sending MSCMs.[37] Such a list, which would contain no specific customer information but provide the domains associated with mobile services, would be easy to administer because it would likely be short and changes would be infrequent.[38] Verizon Wireless also agrees with those parties that ask the Commission not to mandate that all carriers use the same domain or subdomain names, or to change

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[33] *See, e.g.,* Comments of T-Mobile at 19; Comments of Dobson at 9.

[34] *Id.*

[35] Comments of T-Mobile at 19.

[36] Comments of Cingular at 6; Comments of Dobson at 10; Comments of the Electronic Privacy Information Center at 7; Comments of John A. Shaw at 7; Comments of Nextel at 4; Comments of T-Mobile at 22 (as long as participation is voluntary).

[37] Comments of Nextel at 4; *see also* Comments of CTIA at 20.

[38] *Id.* at 5; Comments of John A. Shaw at 7.

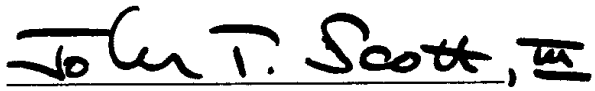
existing customer addresses and domain names.[39] Mandated domain names would impose burdens on carriers to change their systems and notify their subscribers of the change.

CONCLUSION

For the foregoing reasons, the Commission should confirm that SMS messages originating as Internet e-mail and sent to an e-mail address are subject to the *CAN-SPAM Act.* In addition, the Commission should permit wireless carriers to send MSCMs to their customers as long as they do not charge for these messages and implement a wireless domain name registry but no other specific anti-spam measures.

Respectfully submitted,

VERIZON WIRELESS



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[39] Comments of Nextel at 6; Comments of T-Mobile at 21.