

WILKINSON) BARKER) KNAUER) LLP

2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037
TEL 202.783.4141
FAX 202.783.5851
www.wbklaw.com

July 28, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Re: Notice of Ex Parte Presentations
CG Docket No. 04-53*

Dear Ms. Dortch:

On July 28, 2004, the undersigned, on behalf of Verizon Wireless, held a telephone conversation with Jay Keithley, Deputy Chief, Consumer and Government Affairs Bureau, to discuss the above-captioned proceeding dealing with the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“the CAN-SPAM Act” or “Act”).

Verizon Wireless urged the Commission to exempt wireless carriers from the opt-in consent requirement to message their customers, provided that carriers do not charge for their messages. In Section 14(b)(3) of the Act, Congress directed the FCC to make an independent judgment as to whether to subject wireless carriers to an opt-in consent requirement given the unique relationship between carrier and subscriber. Consumer expectations, FCC precedent, and Constitutional protections on commercial speech argue against an opt-in approach for wireless carriers.

As an initial matter, the FCC has already found that “telecommunications consumers expect to receive targeted notices from their carriers about innovative telecommunications offerings that may bundle desired telecommunications services and/or products, save the consumer money, and provide other consumer benefits.” *Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order, 17 FCC Rcd 14860, ¶ 36 (2002). For this reason, the FCC did not require carriers to seek consent at all to market products and services within the “total service” offered the customer. For other carrier use of customer information for communications-related contacts, the FCC adopted an opt-out approach. The Commission has also considered the unique relationship carriers have with their subscribers in providing an “established business relationship” exception to the national “do-not-call” registry. *Rules and Regulations Implementing the Telephone*

Marlene H. Dortch

July 28, 2004

Page 2

Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014, ¶ 42 (2003). Further, the Commission has permitted wireless carriers to autodial their customers as long as they do not charge for these types of calls. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, ¶ 45 (1992).

Wireless carrier messaging to subscribers warrants similar treatment. Indeed, without an exemption, a Commission decision would create the peculiar result in which a wireless carrier could call its customers to market a new service but would be prohibited from messaging them without express prior authorization. It should be noted that under the exemption, Sections 14(b)(3)(A)&(B) of the Act would ensure that carriers must permit customers to opt-out of receiving future messages at the time of subscribing and in any billing mechanism.

Verizon Wireless noted further that a wireless carrier exemption is necessary because the “transactional or relationship” message definition set forth in Section 3(17) of the Act may not cover routine communications regarding new plans or services. For example, it is not clear that a message about a new service or a new rate plan would qualify as a transactional or relationship message because it would not relate to an offering to which the customer already subscribes. Another example involves prepay customers. Verizon Wireless has no effective way to communicate with its prepay customers aside from text messaging them. The transactional or relationship message exception may therefore not be expansive enough to permit carriers to send their customers all of the kinds of messages customers expect without first obtaining opt-in consent.

Finally, Verizon Wireless also urged the Commission to consider the Constitutional protections afforded commercial speech. In this instance, where subscribers have the expectation that their carriers will market new offerings and wireless carriers will not charge for their messages, adoption of an opt-in approach would subject the Commission to substantial questions as to whether such a regulatory regime is more extensive than necessary to address a substantial government interest. See *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557 (1980).

Pursuant to section 1.1206, this *ex parte* notification is being filed electronically with your office. Please contact the undersigned if you have any questions.

Respectfully submitted,


Adam D. Krinsky

cc: Jay Keithley