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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, Charon Phillips of Verizon Wireless and the undersigned met with Sheryl Wilkerson, Legal Advisor to Chairman Michael Powell, and Eric Gunning, an intern in Chairman Powell's office, 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 expressed strong support for FCC implementation of the CAN-SPAM Act as an additional tool to combat spam, which is a growing problem for wireless subscribers. Verizon Wireless urged the Commission to adopt stringent prohibitions, including a definition of Mobile Service Commercial Messages ("MSCMs") that includes, at a minimum, SMS messages that traverse the Internet. In addition, the FCC should ensure that senders of MSCMs obtain "express prior authorization" – meaning opt-in consent – *before* sending any messages to wireless subscribers.

Verizon Wireless also 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 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 and the attached material provided during the meeting are being filed electronically with your office. Please contact the undersigned if you have any questions.

Respectfully submitted,

Adam D. Krinsky

Attachment

cc: Sheryl Wilkerson
Eric Gunning

Verizon Wireless
CAN-SPAM ACT – CG Docket No. 04-53

Verizon Wireless Supports CAN-SPAM as an Additional Tool to Combat Spam

- Wireless spam is a growing problem – spam generators send the Verizon Wireless network over 10 million unsolicited commercial messages each month.
- It is an annoyance to consumers, who often pay on a per-message basis; it can degrade network performance and even bring down networks.
- Verizon Wireless has deployed partially effective technical protections and has pursued litigation against the most egregious spammers.

The FCC Should Adopt Stringent Prohibitions Against Wireless Spam

- CAN-SPAM applies to Mobile Service Commercial Messages (MSCMs) – including SMS – that is sent via the Internet directly to a mobile device.
- Senders of MSCMs must obtain "express prior authorization" – meaning opt-in. Consent must be obtained before sending any messages and must be clear.

Congress Recognized the Unique Relationship between Customers and Their Wireless Carriers and Directed the FCC to Consider an Exemption from Opt-In

- Although Congress adopted stringent requirements for spam sent to wireless customers, it set apart wireless carrier messaging to customers and asked the FCC to make an independent judgment of whether to subject wireless carriers to opt-in.

The FCC Should Grant the Wireless Carrier Exemption

- Wireless carrier messages do not present the same concerns as messages from unknown third parties.
- The exemption would apply only if a carrier does not charge for its message.
- Wireless carrier incentives exist to ensure messages do not overwhelm customers.
- Even with an exemption, carriers must permit customers to opt-out of future messages at the time of subscribing and in every billing mechanism.

Grant of a Wireless Carrier Exemption is Consistent with Relevant Precedent

- Constitutional limit – high burden to show opt-in meets *Central Hudson* commercial speech test.
- CPNI – FCC finding that consumers expect their carriers to advise them of new service offerings that can save them money or provide them benefits; opt-out policy for communications-related offerings.
- TCPA – the Established Business Relationship allows for opt-out; wireless carriers may engage in auto-dialing provided there is no charge to subscribers.

Many Routine Communications with Customers may not Fall within the Definition of "Transactional or Relationship Message"

- A new rate plan that would save the customer money.
- Enhancements / expansions to existing products and services.
- Communications with pre-pay customers.