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

CG Docket No. 04-53

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*In the Matter of*

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

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**PETITION FOR RECONSIDERATION**

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**PETITION FOR RECONSIDERATION**

To The Commission:

Cingular Wireless LLC (Cingular), through undersigned counsel, pursuant to 47 C.F.R. § 1.429, hereby petitions for reconsideration of the decision in the *CAN-SPAM Order*<sup>1</sup> refusing to allow a Commercial Mobile Radio Service (CMRS) provider to send a Mobile Service Commercial Message (MSCM) to an existing subscriber without obtaining “express prior authorization” from the subscriber. As set forth below, the Commission’s action is inconsistent with the intent of Congress and prior Commission precedent, failed to conduct the analysis of the carrier/customer relationship required by the Act, and renders the CAN-SPAM Act<sup>2</sup> unconstitutional as applied by the Commission. For these reasons, the Commission should reconsider its refusal to grant to CMRS providers the exemption authorized by Section 14 of the CAN-SPAM Act.

**I. Requiring CMRS Carriers to Obtain “Express Prior Authorization” From Their Customers Prior to Sending a MSCM is Contrary to Commission Precedent and the Intent of Congress.**

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<sup>1</sup> 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; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, *Order*, FCC 04-194, rel. August 12, 2004 (*CAN-SPAM Order*). A summary of the *CAN-SPAM Order* was published in the Federal Register on September 16, 2004.

<sup>2</sup> 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. § 7701-7713; 18 U.S.C. § 1037, and 28 U.S.C. § 994 (*CAN-SPAM Act*).

In the *CAN-SPAM Order* the Commission acknowledged that Congress expressly authorized it to exempt CMRS providers from the requirement to obtain “express prior authorization” from their subscribers before sending a MSCM. The Commission declined to do so, citing its “overall mandate to protect consumers from unwanted MSCMs.”<sup>3</sup> The Commission accepted uncritically the allegations of professional consumer advocates that wireless subscribers consider promotional messages from their carrier “unwanted” commercial messages.<sup>4</sup> In fact, as the Commission has recognized repeatedly, customers expect and want their carrier to inform them of new products and services and new pricing plans that may be more advantageous to the subscriber.<sup>5</sup> As discussed below, the use of a MSCM to do so is no more intrusive than other methods expressly permitted by the Commission, such as live or autodialed voice calls or SMS text messages.

**A. The Denial of the CMRS Exemption is Inconsistent with the Commission’s Prior Findings Regarding an “Established Business Relationship.”**

In its 1992 order implementing the Telecommunications Consumer Protection Act of 1991, the Commission implemented Congress’ exception to the autodialer prohibition for businesses which had an established business relationship with the telephone subscriber.<sup>6</sup>

We conclude ... that a solicitation to someone with whom a private business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship.

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<sup>3</sup> *CAN-SPAM Order* ¶ 62.

<sup>4</sup> *CAN-SPAM Order* ¶ 66.

<sup>5</sup> See Commission orders cited in Section IA, *infra*.

<sup>6</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, *Report and Order*, 7 FCC Rcd 8752 1992)(1992 *TCPA Order*), implementing 47 U.S.C. § 227(a)(3)(B).

Additionally, the legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships; barring autodialer solicitations or requiring actual consent to prerecorded message calls where such relationships exist could significantly impede communications between businesses and their customers.<sup>7</sup>

In its 2003 order implementing the national do-not-call list, the Commission again carved out an exemption for companies with an “established business relationship” with the telephone subscriber.

42. Established Business Relationship. We agree with the majority of industry commenters that an exemption to the national do-not-call list should be created for calls to consumers with whom the seller has an established business relationship. We note that section 227(a)(3) excludes from the definition of telephone solicitation calls made to any person with whom the caller has an established business relationship. We believe the ability of sellers to contact existing customers is an important aspect of their business plan and often provides consumers with valuable information regarding products or services that they may have purchased from the company.<sup>8</sup>

In the rulemaking leading to the *2003 TCPA Order* consumer advocates argued against the exemption. The Commission pointed to the company-specific do-not-call list as an adequate protection for customers that do not want to receive calls from companies with which they have an established business relationship.

43. To the extent that some consumers oppose this exemption, we find that once a consumer has asked to be placed on the seller’s company-specific do-not-call list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller. We believe that this determination constitutes a reasonable balance between the interests of consumers that may object to such calls with the interests of sellers in contacting their customers. This conclusion is also consistent with that of the FTC.<sup>9</sup>

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<sup>7</sup> *1992 TCPA Order* ¶ 34.

<sup>8</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14,014 (2003)(*2003 TCPA Order*) ¶ 42.

<sup>9</sup> *2003 TCPA Order* ¶ 43.

This is precisely the same balance that Congress struck in Section 14(b)(3) of the CAN-SPAM Act. Congress authorized an exemption to the express prior consent requirement for providers of commercial mobile services, provided the subscriber is allowed to decline future commercial messages from the provider either at the time of subscribing to the service or in any billing mechanism.<sup>10</sup> The careful balance of provider and consumer interests that the Commission and Congress previously have adopted was upset when the Commission denied the exemption to the express prior consent requirement authorized by Section 14(b)(3) of the CAN-SPAM Act.<sup>11</sup> The Commission's unexplained departure from the "established business relationship exception" is particularly inappropriate since the Commission failed to make the analysis required of it by the statute.

**B. The Commission Failed to Analyze the Carrier/Customer Relationship as Required by the CAN-SPAM Act.**

As the Commission acknowledges, in considering whether to grant the exemption authorized by the Act, Congress instructed the Commission to take into consideration the "relationship that exists between providers of such services and their subscribers."<sup>12</sup> The Commission failed to perform this required analysis in the *CAN-SPAM Order*. Contrary to the Commission's prior findings with regard to the "established business relationship" exception to the TCPA, the *CAN-SPAM Order* presumes that an MSCM from a carrier to its customer is "unwanted" and "intrusive"<sup>13</sup> rather than "invited or permitted."<sup>14</sup> Nor did

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<sup>10</sup> 15 U.S.C.A. § 7712(b)(3).

<sup>11</sup> Section 14(a) of the CAN-SPAM Act states that "Nothing in this chapter shall be interpreted to preclude or override the applicability of Section 227 of Title 47 or the rules prescribed under section 6102 of this title." Both Section 227 and the Commission's implementing regulations recognize an "established business relationship" exception to the prohibitions contained therein.

<sup>12</sup> *CAN-SPAM Order* ¶ 62, citing 15 U.S.C. § 7712(b)(3).

<sup>13</sup> *CAN-SPAM Order* ¶ 70.

<sup>14</sup> *1992 TCPA Order* ¶ 34.

the *CAN-SPAM Order* explain why the Commission has abandoned its prior finding that the lack of an “established business relationship” exception “could significantly impede communications between businesses and their customers.”<sup>15</sup>

Instead of performing the analysis required by the Act, the *CAN-SPAM Order* relies upon the fact that the Act does not apply to “transactional and relationship” messages. The Commission acknowledges that the Federal Trade Commission (FTC) will ultimately define the criteria for when an MSCM is considered “commercial” and therefore subject to the prohibitions of the Act.<sup>16</sup> The Commission opines, however, that “the bulk of CMRS providers’ communications with their customers are already expressly exempted under the CAN-SPAM Act as ‘transactional and relationship’ messages.”<sup>17</sup> The FTC recently issued a Notice of Proposed Rulemaking establishing “a single fundamental principle: determining the ‘primary purpose’ of an email message must focus on what the message’s recipient would reasonably interpret the primary purpose to be.”<sup>18</sup> Whatever the outcome of the FTC rulemaking, CMRS carriers will be reluctant to send messages that contain both “transactional and relationship” content and “commercial” content when compliance with the law will be determined by applying such an “eye of the beholder” standard. Failure to adopt the exception for CMRS carriers authorized by Congress clearly will chill the willingness of carriers to include commercial content in “transactional and relationship” messages. This chilling effect violates the Constitutional commercial speech rights of CMRS providers.<sup>19</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *CAN-SPAM Order* ¶ 68.

<sup>17</sup> *CAN-SPAM Order* ¶ 67.

<sup>18</sup> Federal Trade Commission, Notice of Proposed Rulemaking, 69 Fed.Reg. 50091, 50094 (Aug. 13, 2004).

<sup>19</sup> See Section II, *infra*.

## **II. Applying the “Express Prior Consent” Requirement to CMRS Carriers Communications with Their Customers Violates the First Amendment.**

In its comments in this proceeding, Verizon pointed out to the Commission that requiring CMRS providers to obtain “express prior consent” to send MSCMs to their customers would violate the carriers’ First Amendment rights to free commercial speech. The Commission summarily dismissed Verizon’s arguments, citing cases upholding bans on prerecorded telephone solicitations, unsolicited fax advertising and the ban on solicitations to customers who sign on to the national do-not-call registry.<sup>20</sup>

The Commission’s First Amendment analysis misses the point. The cases cited by the Commission upheld statutory provisions and regulations that contained an express exemption for an “established business relationship.” Verizon did not argue that a general requirement to obtain express prior authorization to send a MSCM to wireless customers was unconstitutional. Rather, it argued that applying such a requirement to CMRS providers’ communications with their existing customers was unconstitutional. As Verizon noted: 1) only CMRS carriers have an “established business relationship” with their customers; 2) only CMRS carriers can suppress charges for MSCMs sent to their customers; 3) requiring express prior consent imposes significant restrictions on commercial speech, and 4) Congress provided the Commission with a less restrictive alternative in Section 14(b)(3).<sup>21</sup> Restrictions on commercial speech are unconstitutional when there is a less restrictive alternative available. In the cases cited by Verizon, the courts struck down “opt-in” requirements for carrier use of customer proprietary network information (CPNI) in marketing to its customers for failure to adopt a less restrictive

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<sup>20</sup> *CAN-SPAM Order* ¶¶21-23 and n. 73.

<sup>21</sup> Verizon at 12-13.

alternative (opt-out).<sup>22</sup> Here Congress expressly defined a less restrictive alternative when it authorized the Commission to exempt CMRS carrier MSCMs from the opt-in requirement of the Act, provided the Commission’s rules contain an effective opt-out alternative. As noted above, the Commission has previously endorsed an opt-out alternative in the context of the national do-not-call registry. The *CAN-SPAM Order* does not discuss, much less distinguish, this prior finding.

The Commission purports to apply the three part test for valid restrictions on commercial speech announced by the Supreme Court in *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*<sup>23</sup> In that case, the Court established a framework for analyzing restrictions on commercial speech for consistency with the First Amendment: a restriction on commercial speech will be upheld if 1) there is a substantial government interest; 2) the regulation directly advances that interest; and 3) the proposed regulation is no more extensive than necessary to serve that interest.<sup>24</sup> Contrary to the Commission’s analysis, refusal to allow CMRS providers to e-mail their customers, i.e., people with whom the carrier has an established business relationship, without prior express authorization fails all three prongs of the *Central Hudson* test.

First, the “substantial government interest” identified by the Commission is protecting the privacy of wireless subscribers.<sup>25</sup> While the Commission is certainly correct that a general ban on spam to wireless phones protects important privacy interests, the Commission has expressly held that there is no expectation of privacy within an

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<sup>22</sup> Verizon at 14-16, citing *U.S. West Inc. v. FCC*, 182 F.3d 1224 (10<sup>th</sup> Cir. 1999), cert. denied 530 U.S. 1213 (2000); *Verizon Northwest, Inc. v. Showalter*. 282 F.Supp.2d 1187 (W.D. Wash. 2003).

<sup>23</sup> *CAN-SPAM Order* ¶¶ 21-23.

<sup>24</sup> *Id.* ¶ 21.

<sup>25</sup> *Id.* ¶ 22.

established business relationship.<sup>26</sup> The Commission has held that “a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship.”<sup>27</sup> Second, requiring a carrier to obtain express prior consent before sending an MSCM to an existing customer does not advance the customer’s privacy interest in light of the fact that carriers are permitted to phone or send an SMS text message to the customer without express prior authorization. Does the Commission really consider an e-mail to be a greater disturbance of customer privacy than a dinner-time phone call or an SMS message? Third, the prior express authorization requirement is more restrictive than necessary in light of the opt-out alternative expressly authorized by Congress. Thus, refusal to grant the opt-out alternative to CMRS providers violates those carriers’ First Amendment commercial free speech rights.

### **III. Conclusion.**

In the context of the TCPA and the national do-not-call registry both Congress and the Commission recognized that customers want and expect promotional offers from companies with whom they have an established business relationship. Any customer not wanting to receive such solicitations can simply opt-out on a company-specific basis. The Commission’s refusal to allow CMRS providers to send MSCMs to their customers without express prior authorization is arbitrary and capricious and a violation of the carriers’ First Amendment rights. Congress expressly authorized the Commission to exempt CMRS providers, and only CMRS providers, from the general prohibition on sending MSCMs to mobile devices without express prior authorization. On reconsideration, the Commission should do so.

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<sup>26</sup> 1992 TCPA Order ¶ 34.

<sup>27</sup> *Id.*

Respectfully submitted,

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October 18, 2004

**CERTIFICATE OF SERVICE**

I, Lydia Byrd, an employee in the Legal Department of Cingular Wireless LLC, hereby certify that on this 18th day of October, 2004, courtesy copies of the foregoing Petition for Reconsideration were sent via first class mail, postage prepaid to the following:

Marlene H. Dortch, Secretary  
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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