

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

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

**OPPOSITION OF JOHN A. SHAW  
TO PETITION FOR RECONSIDERATION  
SUBMITTED BY CINGULAR WIRELESS LLC**

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Submitted November 15, 2004

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## 1. Introduction

Pursuant to 47 C.F.R. §1.429(f), I respectfully submit this Opposition to the Cingular Wireless LLC (“Cingular”) Petition for Reconsideration<sup>1</sup> of the Commission’s Order<sup>2</sup> in this docket. The petition asks the Commission to reconsider its refusal to grant to Commercial Mobile Radio Service (CMRS) providers the exemption authorized by Section 14 of the CAN-SPAM Act<sup>3</sup>. The petition has no merit and should be denied.

I submitted comments and reply comments to the Notice of Proposed Rulemaking<sup>4</sup> on this docket. My interest is as a telephone subscriber only. I am not connected in any way with the wireless telephone business or with any organization with an interest in this matter.

## 2. Summary and Scope of Opposition

The Commission was correct in refusing to grant to CMRS providers an exemption to the regulations. As discussed below, the requirement that CMRS providers must obtain

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<sup>1</sup> Petition for Reconsideration filed by Cingular Wireless LLC on October 18, 2004 (*Petition*).

<sup>2</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, Order, FCC 04-194, August 12, 2004 (*CAN-SPAM Order*).

<sup>3</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*).

<sup>4</sup> *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, CG Docket Nos. 04-53, Notice of Proposed Rulemaking, 19 FCC Rcd 5056 (2004) (*CAN-SPAM NPRM*).

express prior authorization from their customers prior to sending a MSCM is consistent with other Commission regulations, is consistent with the intent of Congress, and is consistent with the first amendment.

### **3. Background**

Congress passed the CAN-SPAM Act on December 8, 2003. Section 14 of the Act required the FCC to develop rules to protect wireless telephone subscribers from unwanted mobile service commercial messages. Section 14(b)(3) of the act allowed the Commission to exempt commercial mobile service providers' messages to their subscribers provided that their subscribers are given the opportunity to refuse to receive the messages.

On March 19, 2004 the Commission issued a Notice of Proposed Rulemaking seeking comments on the regulation, including a solicitation for comments concerning the exemption for CMRS providers from the requirement to obtain express prior authorization.<sup>5</sup> I submitted comments and reply comments on the NRPM.

On August 12, 2004 the Commission released an order adopting regulations enforcing the CAN-SPAM Act. The Commission declined to provide the CMRS exemption.<sup>6</sup>

On October 18, 2004, Cingular Wireless LLC petitioned for reconsideration asking the Commission to reconsider the decision and exempt CMRS providers from the

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<sup>5</sup> *CAN-SPAM NRPM* ¶¶38-40.

<sup>6</sup> *See CAN-SPAM Order* ¶¶62-71.

“express prior authorization” requirement. I am submitting this opposition to Cingular’s petition.

**4. The Petition Ignores a Significant Difference Between the Telemarketing Regulations and the Cellular Messaging Regulations.**

In claiming that the regulations are “contrary to Commission precedent”, the petition relies entirely upon the Commission’s orders<sup>7</sup> in the matter of the Telephone Consumer Protection Act that protects the consumer from unwanted intrusion of telemarketing telephone calls.

The regulations adopted in this docket serve a different purpose—the protection of consumers from text messages sent to a wireless phone. These unwanted text messages, in addition to the intrusiveness caused by calls to wireline phones, may interrupt the subscriber while in locations where the subscriber cannot receive such messages (e.g., while driving, while in meetings, etc.). A higher level of protection is given to wireless subscribers than to wireline subscribers.

The Commission’s actions regarding unsolicited fax transmission are a more relevant comparison to the CAN-SPAM actions. In their order establishing a Do-Not-Call list, the

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<sup>7</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*); 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*)

Commission established a requirement that advertisers receive written permission to send faxes.<sup>8</sup>

The provisions of the telemarketing rules, including the Do-Not-Call regulations, do not set a precedent for the CAN-SPAM regulations.

**5. There is No Relevant Commission Precedent Contrary to the Regulations.**

All of the references in the petition supporting the assertion that the denial of the CMRS exemption was “inconsistent with the Commission’s prior findings regarding an ‘Established Business Relationship’” refer to the 1992 and 2003 TCPA Orders. These Orders regulate the calling of residential telephones by telemarketers. As discussed above, the sending of MSCMs is different from telephone calls and is treated differently. Cingular raises no example in the CAN-SPAM Order that is inconsistent with relevant Commission action.

A comparison between the Commission’s action regarding unsolicited fax transmission to the action regarding MSCMs is more relevant. In the 2003 TCPA Order, the Commission reversed its prior conclusion that an existing business relationship was sufficient to show express permission and, instead, required written permission.<sup>9</sup>

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<sup>8</sup> 2003 TCPA Order ¶ 191

<sup>9</sup> 2003 TCPA Order ¶¶189-191

**6. The Commission Adequately Analyzed the Carrier/Customer Relationship as Required by Congress.**

Cingular complains that the Commission “failed to analyze the carrier/customer relationship as required by the CAN-SPAM Act.”<sup>10</sup>

The Commission provided an adequate analysis in their Order, pointing out that CMRS providers have other channels, including billing mail and web sites, where they can request prior express authorization from a subscriber.<sup>11</sup>

Cingular stated “Nor did 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>12</sup> This statement is based on a comparison of the CAN-SPAM Order with the 1992 TCPA Order. The Commission is not required to make such an explanation because the CAN-SPAM Act bases the subscriber protection on “express prior authorization” rather than “existing business relationship”.<sup>13</sup> The 1992 TCPA Order showed concern for regulations that could impede communications between businesses and customers if an existing business relation would not allow telemarketing<sup>14</sup>. However, as the CAN-SPAM Order pointed out, the CMRS providers have “other channels such as

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<sup>10</sup> See *Petition at 4*, citing 15 U. S. C. § 7712(b)(3).

<sup>11</sup> See *CAN-SPAM Order*, ¶¶62-70.

<sup>12</sup> See *Petition at 4 - 5*, citing *1992 TCPA Order* ¶ 34.

<sup>13</sup> *CAN-SPAM Act*, §14 (b)(1).

<sup>14</sup> *1992 TCPA Order* ¶ 34.

monthly statements and web sites, through which they can request a subscriber's prior express authorization."<sup>15</sup> Therefore the concern expressed in 1992 about impeding communications between businesses and their customers does not apply to the communications between CMRS providers and their subscribers.

## **7. The Current Regulations Are Not Contrary to the Intent of Congress.**

The petition states that the current regulations are contrary to the intent of Congress. The CAN-SPAM Act does not require any exemption for CMRS providers but simply requires the Commission to "take into consideration, in determining whether to subject providers of commercial mobile services to paragraph (1), the relationship that exists between providers of such services and their subscribers".<sup>16</sup> The CAN-SPAM Act specifically uses the term "express prior authorization" rather than the term "existing business relationship" used in the TCPA.<sup>17</sup> The Commission, in its Order, did satisfy the Congress's intent as well as statutory requirements.

The petition states that "The Commission accepted uncritically the allegations of professional consumer advocates that wireless subscribers consider promotional messages from their carrier 'unwanted' commercial messages."<sup>18</sup> However, in addition to comments from Consumers Union, EPIC, and National Consumers League, the

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<sup>15</sup> *CAN-SPAM Order* ¶ 71.

<sup>16</sup> *CAN-SPAM Act*, §14 (b)(3)

<sup>17</sup> *Compare CAN-SPAM Act*, §14 (b)(1) *with* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 §3, 47 U.S.C. § 227(a)(3)(A).

<sup>18</sup> *See Petition* at 2.

Commission cited comments from individual consumers who are not “professional consumer advocates”<sup>19</sup>. There were no consumer comments that contradicted the comments cited.

The petition is correct in its statement that “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.” However, the petition is incorrect in its assumption that customers expect and want this information to come by way of text messages. In support of the statement, the petition cites Commission orders regarding telemarketing, not the order regarding spam. Because there were individual consumer and organization comments that MSCMs from CMRS providers are unwanted but no consumer or organization comments to the contrary, the Commission was correct in concluding that “consumers are concerned with the nuisance of receiving such messages.”<sup>20</sup>

#### **8. The “Express Prior Consent” Requirements Do Not Violate the First Amendment.**

According to Cingular’s petition, the regulations, because of the lack of a CMRS exemption, violate the First Amendment right of free speech. This matter was discussed in the Order, prompted by NPRM comments of Verizon. The Commission did not

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<sup>19</sup> See, e.g., Balsey Comment to the CAN-SPAM NPRM at 2, Shaw Comment to the CAN-SPAM NPRM, Shaw Reply Comment to the CAN-SPAM NPRM.

<sup>20</sup> *CAN-SPAM Order*, ¶66

summarily dismiss Verizon's argument, as the petition alleges<sup>21</sup>, but applied the usual *Central Hudson*<sup>22</sup> three-prong test.

The Cingular petition attacks the analysis of the first prong of *Central Hudson* by claiming that there is no "substantial government interest" in protecting wireless subscribers from unwanted MSCMs from their wireless providers, basing their arguments on the statements in the TCPA orders that consumers have no expectation of privacy when there is an existing business relationship.

As discussed above, the regulations against unwanted MSCMs are different from the TCPA regulations against telephone calls. The government interest is in protecting wireless subscribers from unwanted interruptions of cell phone text messages and from any undue burden of having to protect themselves from such messages. MSCMs from CMRS providers cause no less interruption than similar messages from others.<sup>23</sup> CMRS messages are particularly unnecessary for consumers because each consumer's provider, unlike most other entities, has other means (e.g. invoice mail and payment web sites) to communicate news about special offers or new features.

The second prong of *Central Hudson* requires that the regulation directly advances the government interest. Clearly, prohibiting unwanted MSCMs advances the interest of preventing unwanted MSCMs.

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<sup>21</sup> See *Petition* at 6.

<sup>22</sup> *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557 (1980).

<sup>23</sup> See *CAN-SPAM Order* ¶20. See also NAAG NPRM comments at 4.

The third prong of *Central Hudson* requires that the regulation be no more extensive than necessary to serve the government interest. Cingular claims that an opt-out approach would also serve the same interest. I disagree. The opt-out approach places the burden on the consumer to take action to prevent MSCM interruptions and, in order to enforce the regulations, to record the fact that the opt-out was made. As I discussed regarding the first prong test, the government interest includes protection of the wireless subscriber from such burdens.

Courts have upheld the restriction on unsolicited fax advertising, ruling that the third prong test of *Central Hudson* allows an express authorization requirement rather than a less restrictive opt-out requirement. For example, in *American Blast Fax*<sup>24</sup> the Eighth Circuit specifically addressed a contention by Fax.Com, Inc. that Congress could have adopted an opt-out mechanism for unsolicited fax messages rather than adopting an express authorization requirement (similar to the MSCM requirement at issue here). The court allowed the express authorization requirement for commercial fax transmissions. Similar reasoning should apply to the express authorization requirements for CMRS provider MSCMs.

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<sup>24</sup> *State of Missouri v. American Blast Fax*, 323 F.3d 649 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 1043 (2004)

## 9. Conclusion

The regulations adopted by the Commission provide needed consumer protection, comply with the intent of Congress, and are constitutional. The CMRS provider exemption requested by Cingular's petition would lessen the consumer protection against intrusive commercial messages from cell phone providers and should be denied.

I thank the Commission for the opportunity to submit this opposition and respectfully request that the Commission deny the petition of Cingular for reconsideration of the Commission's Order.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Opposition to Cingular Wireless LLC's Petition for Reconsideration has been served to M. Robert Sutherland on this 15<sup>th</sup> day of November 15, 2004 by e-mail (with permission).

/s/ John A. Shaw