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	)	

COMMENTS OF THE
CTIA – THE WIRELESS ASSOCIATION™

CTIA – The Wireless Association™ ("CTIA")[1] hereby submits its comments in the above captioned proceeding in support of the Petition for Reconsideration filed by Cingular Wireless LLC ("Cingular").[2] CTIA agrees with Cingular's request that the Commission should reconsider its decision in the *CAN-SPAM Order* and exempt commercial mobile radio service (CMRS) providers, and only CMRS providers, from the general prohibition on sending mobile service commercial messages (MSCMs) to existing subscribers without "express prior authorization."[3] The Commission should permit CMRS carriers to send commercial messages to their customers on an opt-out, rather than an opt-in basis.

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[1] CTIA – The Wireless Association™ (formally known as the Cellular Telecommunications & Internet Association) is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *Cingular Petition for Reconsideration* (filed Oct. 18, 2004) ("*Cingular Petition*").

[3] *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. Aug 12, 2004 ("*CAN-SPAM Order*").

INTRODUCTION AND SUMMARY

CTIA urges the Commission to reconsider its refusal to grant CMRS providers the exemption authorized by Section 14 of the CAN-SPAM Act.[4] As detailed in the *Cingular Petition*, the Commission's refusal is inconsistent with the intent of Congress and prior Commission precedent, and fails to conduct the analysis of the carrier-customer relationship required by the Act.[5] Congress enacted Section 14 of the CAN-SPAM Act with the intent to prevent the substantial harms caused by spam on wireless devices as well as provide a greater degree of protection to CMRS subscribers.[6] Congress also recognized that wireless carriers could be relied upon to not abuse their relationship with their customers by sending unwanted commercial electronic mail messages. The Commission has chosen to ignore the statutory scheme set by Congress and treat MSCMs from carriers the same as those from third parties.

For the reasons set forth below and in CTIA's reply and initial comments, the Commission should reconsider regulations governing MSCMs that properly reflect the statutory language and intent of Section 14.

I. CMRS PROVIDERS SHOULD BE EXEMPTED FROM THE REQUIREMENT TO OBTAIN EXPRESS PRIOR APPROVAL BEFORE SENDING MESSAGES TO THEIR CUSTOMERS

While the CAN-SPAM Act mandates that CMRS subscribers must give their express prior authorization to a sender before receiving an MSCM, the Act empowered the Commission to exempt CMRS providers from the requirement to obtain prior authorization when sending

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[4] 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. C 994 ("CAN-SPAM Act").

[5] *Cingular Petition* at 1.

[6] *See* CAN-SPAM Act, § 2(a).

MSCMs to their own subscribers.[7] Yet, the Commission rejected this option citing its "overall mandate to protect consumers from unwanted MSCMs."[8] Because Congress explicitly recognized an exception to the prior authorization requirement for CMRS providers based on their unique relationship with their customers, the Commission wrongfully denied CMRS providers of that option.

Wireless customers benefit from routine communications with their providers regarding new offers, special discounts, and the availability of upgraded services or products. Because many valuable messages would not fall under the CAN-SPAM Act's definition of "transactional or relationship message"[9] but would nevertheless provide useful and worthwhile information to wireless subscribers, Congress recognized that it would be reasonable for such communications to be sent via commercial electronic messages sent directly to wireless handsets and thus created the exception to the express prior authorization requirement for MSCMs from carriers to subscribers.

When the Commission declined to carve out any exemptions from the "express prior authorization" requirements, it reasoned "any exemption for a particular industry would be in direct conflict with the intent of the Act to protect wireless subscribers from commercial electronic messages that they do not wish to receive."[10] In reaching this conclusion, the Commission dismissed the importance of the relationship between CMRS providers and their

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[7] CAN-SPAM Act § 14(b)(3).

[8] *CAN-SPAM Order* ¶¶ 51, 62.

[9] CAN-SPAM Act, § 3(17).

[10] *CAN-SPAM Order* ¶ 51.

subscribers and wrongfully assumed that wireless subscribers do not want to receive MSCMs from their provider.[11]

Unlike senders who lack any relationship to the recipient, CMRS providers have strong incentives to not abuse their relationships with wireless subscribers. In the highly competitive CMRS industry, carriers are keenly aware that customers are able to take their business (and port their number) to a host of competitors should the carrier's service, prices, or policies displease their customers. With the myriad of competitive wireless plans available today and the advent of local number portability,[12] no wireless carrier will risk alienating a subscriber by sending unnecessary or irrelevant messages. In fact, wireless carriers have substantial incentives to protect their customers from unwanted messages and are taking precautions to prevent them, such as pursuing lawsuits against spammers and deploying spam filters within their networks.[13]

Furthermore, any possible concern that carriers may abuse their relationship by sending customers unwanted messages is negated by the Act's directive that wireless subscribers be permitted to "opt-out" of receiving messages when they subscribe to the wireless service or via a billing mechanism.[14] Several carriers already have established opt-out policies and customarily inform their customers of the ability to opt-out of receiving messages from their wireless carrier.

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[11] *See also Cingular Petition* at 4 (stating the *Can-Spam Order* presumes that an MSCM from a carrier to its customers is "unwanted" and "intrusive" rather than "invited or permitted.")

[12] *See* Heather Forsgren Weaver, *8.5M Customers Switch During First Year of LNP*, RCR WIRELESS NEWS (Nov. 24, 2004).

[13] *See* Emily Motsay, *Trash or Treasure: Industry Tasks on Wireless Spam*, RCR WIRELESS NEWS (July 7, 2003); John L. Guerra, *Wireless Spam:Coming to a Cell Phone Near You?*, BILLING WORLD AND OSS TODAY (March 2004).

[14] CAN-SPAM Act, § 14(b)(3).

The Commission repeatedly has recognized that wireless customers want and expect to be informed of the latest and most innovative services their provider has to offer.[15] A recent study has shown that thirteen percent of U.S. adult wireless users switched service providers in the past year.[16] The study also found that those who are planning or contemplating a switch in the next year indicate that better prices, plan options, increased minutes and additional product features would convince them to stay.[17] Ensuring customer satisfaction requires keeping subscribers well informed of the latest and most attractive service plans and applications. The Commission should give greater weight to carriers' respect for their relationship with their customers and reconsider its rules to facilitate beneficial carrier to customer MSCM communications with an opt-out, rather than a restrictive opt-in mechanism.

II. ALLOWING CMRS PROVIDERS TO UTILIZE OPT-OUT PROCEDURES WILL ADVANCE THE PUBLIC INTEREST

Utilizing the opt-out mechanism will ensure that wireless subscribers do not receive unwanted MSCMs from their carriers. CTIA suggests that the Commission should allow for a variety of methods for wireless subscribers to indicate that they no longer wish to receive carrier MSCMs, as opposed to adopting a specific mechanism for "opting-out." For example,

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[15] *See also Cingular Petition* at 2; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, ¶ 34 (1992) (implementing 47 U.S.C. § 227(a)(3)(B)); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14,014, ¶¶ 42, 43 (2003).

[16] *See Thirteen Percent of U.S. Adult Wireless Users Switched Service Providers in the Past Year*; HARRIS INTERACTIVE (Nov. 4, 2004), *available at* www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=862.

[17] *Id;* Dan Meyer, *13% of Wireless Users Have Switched Providers, 13% More Plan to Switch*, RCR WIRELESS NEWS (Nov. 8, 2004) (noting that just more than half of those customers who said they were considering switching carriers due to pricing said they would stay with their current operators if the prices of their service plans were reduced, while 33 percent said they would stay if offered an increase in the amount of calling minutes, 23 percent if offered a better family plan and 20 percent if offered additional product features.)

subscribers could notify the carrier by calling the carrier's customer service representative, mark a check-box on a written contract when purchasing service, or opt-out via the Internet or a message (SMS or e-mail) sent from their wireless device. Providing consumers with the flexibility to decline provider messages in any number of ways would benefit the public interest by allowing consumers to control the terms of their carrier-customer relationships in the manner that is most appropriate for them.

Additionally, CTIA proposes that the exemption for CMRS providers should encompass all messages sent to subscribers regarding the family of services offered by the wireless provider. Consistent with the Commission's CPNI rules for wireless services, wireless carriers should be permitted to send messages to their subscribers that the customer reasonably expects to receive based on the services it purchases from the wireless provider.[18] Under such an approach, wireless providers would be permitted to send messages regarding enhancements to a subscriber's current service or to explain new features of a service without the subscriber's express prior permission.[19] As the Commission has recognized in the CPNI context, consumers reasonably expect the service providers with whom they deal to advise them about new or additional features, functions, equipment, or service offerings that can be bundled with existing services or equipment, save the consumer money, or provide other consumer benefits.[20]

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[18] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, ¶ 17 (1999).

[19] CMRS carriers also should be permitted to send their customers wireless e-mail regarding partner offerings. Carriers have the same incentives not to alienate their customers with unwanted commercial e-mail, regardless of the content of the message.

[20] *See, e.g.*, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order, 17 FCC Rcd 14860, ¶ 36 (2002); Order on Reconsideration, 13 FCC Rcd 8061, ¶¶ 41, 43 (1999).

CONCLUSION

Consistent with Congress's directives, the Commission should reconsider its finding that CMRS providers are not exempt from the obligation to obtain prior express approval before sending MSCMs. CTIA asks the Commission to permit CMRS carriers to send commercial messages to their customers on an opt-out, rather than an opt-in basis.

Respectfully submitted,

/s/ Marlo Go_____

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