Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. ("T-Mobile") hereby submits this reply to comments filed in response to the Notice of Proposed Rulemaking ("NPRM") on proposed revisions to the Federal Communication Commission's ("FCC" or "Commission") rules implementing the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

As several commenters point out, the proposed rules would unnecessarily undo long-standing Commission precedent as well as create a number of inconsistencies with Federal Trade Commission ("FTC") telemarketing rules rather than harmonizing the two regulatory schemes as the Commission seeks to do. In addition, no clear public interest benefit flows from rules that reach far beyond telemarketing and potentially restrict carriers' free speech rights. Therefore, T-Mobile urges the Commission to clarify that, if new rules are adopted, the TCPA's prohibitions against autodialer and prerecorded message calls to cell phones will continue to exempt calls for which the recipient is not charged.[1]

As Sprint Nextel Corporation ("Sprint") points out, the proposed rule changes could be interpreted to overturn the Commission's long-standing interpretation of the TCPA as allowing the use of autodialers and prerecording to place free calls or send free SMS messages to cell phones. Nearly 20 years ago, the Commission recognized that neither the TCPA's plain

[1] *See* Comments of Sprint at 1, CG Docket No. 02-278 (filed May 21, 2010) ("Sprint Comments").

language nor its legislative history indicate an intent to interfere with "the delivery of customer services by barring calls to cellular subscribers" for which the recipient is not charged.[2] Indeed, wireless carriers are uniquely positioned to communicate important business information to their customers in a non-intrusive manner through free autodialed and prerecorded wireless telephone calls and text messages.[3]

As currently drafted, however, the proposed amendments could be viewed as overturning the Commission's long-standing and well-reasoned interpretation of the TCPA. The proposed amendments require a consumer to provide "prior express written consent" before receiving an autodialed or prerecorded call.[4] As Sprint points out, this proposed rule change could require wireless carriers to obtain a detailed written consent before initiating an autodialed or prerecorded message, regardless of its subject matter, even when the customer is not charged for the message. T-Mobile joins other commenters in urging the Commission to reject this interpretation of its proposed amendments.[5]

Furthermore, as both Sprint and the United States Telecom Association ("USTelecom") point out, many customers provide wireless numbers as points of contact.[6] An ever-growing number of consumers use wireless service exclusively, leaving no option for communication by landline telephone. The Commission has previously recognized that "the provision of a cell

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[2] *Id*.

[3] As at least one federal Court of Appeals has recognized, the Commission has routinely found that text messages constitute "calls" for the purposes of the TCPA. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 10-18, 75 Fed. Reg. 13471 at App. A (Jan. 22, 2010) ("TCPA NPRM").

[5] Sprint Comments at 6.

[6] Sprint Comments at 5; Comments of United States Telecom Association at 4, CG Docket No. 02-278 (filed May 21, 2010) ("USTA Comments).

phone number… reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number….”[7] As a result, many companies, including T-Mobile, initiate autodialed or prerecorded calls to wireless numbers to convey business and consumer information. It is unclear whether the provision of a wireless contact number would satisfy the Commission’s newly proposed five-part requirement for an agreement that serves as a customer’s “prior express written consent.” If it is deemed insufficient, wireless carriers’ ability to communicate with their customers, and customers’ ability to receive information from their providers, would be seriously compromised.

If adopted, the Commission’s proposed rules could effectively prevent free-of-charge autodialed and prerecorded calls and text messages that companies such as T-Mobile provide to millions of customers to let them know that their bills have been issued and are ready for review and payment, to assist with collection issues, and to inform customers of service and network changes. Such rules could also undermine the objectives of the Commission’s recent proceeding aimed at enhancing the information provided to subscribers to avoid “bill shock.”

The proposed rule changes also are likely to create inconsistencies between the TCPA rules and the Telemarketing Sales Rule (“TSR”), which is administered by the FTC.[8] For example, the TSR’s restrictions are limited to “telemarketers” and accordingly, when a person is not engaged in telemarketing, the TSR’s restrictions do not apply.[9] By contrast, the FCC’s proposed rule changes appear to be applicable even when carriers are collecting payment on a bill, notifying customers that bills are ready for payment, and informing customers of service

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[7] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, CG Docket No. 02-278 at ¶ 9 (Jan. 4, 2008) (“ACA Declaratory Ruling”).

[8] Sprint Comments at 1-2; USTA Comments at 6.

[9] 16 C.F.R. 310.4(b)(1).

changes.[10] Contrary to the NPRM's stated goal, extending telemarketing restrictions to non-telemarketing activity will not ensure that "similarly situated entities" are not "subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's rule."[11]

The Commission should also clarify that wireless carriers may send free autodialed or prerecorded calls, including text messages, without prior written consent if the calls are intended to inform wireless customers about new products that may suit their needs more effectively, so long as the customer has not expressly opted out of receiving such communications. Under current rules, even if considered telemarketing, this would be permitted under the established business relationship exception in combination with the rule that permits autodialed or prerecorded calls to wireless customers in cases in which the customer is not charged. Consumers benefit from these communications, which can help maintain affordability and prevent unexpected surprises on bills. Company specific do-not-call lists already provide a ready means for consumers to do not wish to receive these types of calls to ensure that they do not receive them.

Finally, the proposed rules could have the effect of restricting carrier speech, and thus contravene the First Amendment of the U.S. Constitution. It is questionable whether precluding the use of autodialers and prerecorded calls to deliver free communications is "narrowly tailored to achieve the desired objective" of harmonizing the FCC's and FTC's telemarketing rules. [12] Accordingly, if the Commission changes its telemarketing regulations, it should retain its

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[10] The Commission previously has found that "calls solely for the purpose of debt collection are not telephone solicitations and do not constitute telemarketing." ACA Declaratory Ruling at ¶ 11.

[11] TCPA NPRM at ¶ 22.

[12] *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

previous TCPA interpretations to ensure "a 'fit' between the legislative ends and the means chosen to accomplish those ends."[13]

Respectfully submitted,

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June 21, 2010

[13] *Id.*