Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

I. INTRODUCTION

The Commission's objective of harmonizing its rules, promulgated under the Telephone Consumer Protection Act of 1991 (TCPA), with the Federal Trade Commission's (FTC) recent changes to its Telephone Sales Rule (TSR) (promulgated under the same statute)[1] is sound both legally and as a matter of policy; and Qwest Communications International Inc. supports that objective. The desired alignment between the two sets of rules can be accomplished through fairly modest and limited changes. The proposed rule changes outlined in the *Notice*, however, can be read to go far beyond what is necessary or desirable to harmonize the rules, primarily in the area of potential application of the Commission's rules to non-marketing communications.

It is entirely possible that this type of broad application, *e.g.*, to communications that have no marketing content, was not intended and results from very strict parsing of language in particular paragraphs. But strictly read, certain of the *Notice* proposals open the door to rules that could (1) require written prior express consent before non-marketing calls could be made to wireless telephone numbers provided by customers as their contact calling number; and (2) impose an opt-out message and capability be provided at the beginning of prerecorded

[1] *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd 1501 at 1502 ¶ 1, 1508 ¶ 16, 1509 ¶ 18, 1510 ¶ 22, 1513 ¶ 28 (2010) (*Notice*); *see also* Statement of Chairman Julius Genachowski ("Today's action will help reconcile differences between FTC and FCC rules.") *Id.* at 1533.

messages where there is no marketing content and the content may be critical for the caller to hear.

For this reason, Qwest supports those commentors that seek clarification regarding the *Notice*'s sometimes-suggested notion (however unintended) that prior written consent might be required before autodialers or prerecorded messages can be used in the context of *non-marketing* communications (including calls to wireless individuals who have provided their wireless number as a contact number).[2] We also agree with those commentors arguing that should the Commission adopt an opt-out choice at the beginning of prerecorded marketing messages (similar to the FTC's rule), it not extend the reach of such rule to non-marketing communications.[3]

II. CERTAIN PROPOSED RULE CHANGES ARE UNNECESSARY TO ACHIEVE ALIGNMENT WITH THE FTC'S RULES ON PRIOR WRITTEN CONSENT FOR PRERECORDED *TELEMARKETING* MESSAGES.

A. Autodialed and Prerecorded Informational (Non-Marketing) Messages Should Be Permitted Without Prior Written Consent

The FTC's TSR only requires prior *written* consent for a telemarketer to make automated or prerecorded telemarketing calls.[4] Unlike the FTC's TSR, the rule amendments outlined in the *Notice* potentially would extend a prior written consent requirement to *all* autodialed or prerecorded communications by telephone, regardless of their purpose or content.[5] As noted

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[2] Comments of Arbitron, DIRECTV, Portfolio Recovery Associates, LLC (PRA), Loeb & Loeb, LLP on behalf of VISA, USTA, Walgreens.

[3] DIRECTV.

[4] 16 C.F.R. § 310.4(b)(v). The FTC defines "telemarketing" as requiring as an essential element communication "to induce the purchase of goods or services or a charitable contribution." *Id.* at 310.2(cc).

[5] *See Notice*, 25 FCC Rcd at 1510 ¶ 20 (proposing to adopt a written consent requirement with respect to both 227(b)(1)(A) (generally prohibiting prerecorded messages without prior express consent to emergency lines, health care facilities and cellular subscribers) and 227(b)(1)(B)

above, this result was most likely unintended;[6] and comes about from a proposed rule amendment that is framed in a way that does not conform to the structure of the statutory language.[7] Accordingly, the proposed rule amendment should be changed to something more in line with the Commission's apparent objective.[8]

As commentors point out, autodialer and prerecorded technology is embedded in businesses across industry sectors.[9] That technology increases commercial efficiency, reduces

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(generally prohibiting prerecorded message calls without prior consent to residential telephone lines). In that paragraph, there is no mention that the Commission has construed a cellphone subscriber's provision of her cellphone number as a contact number to be "prior express consent" for purposes of a business sending non-marketing messages; and that the Commission had already exempted informational calls from the prohibition on prerecorded messages. Appending a "prior written consent" requirement across the board, then, would be contrary to prior Commission interpretations and, in any event, not sound policy or commercially feasible.

[6] The *Notice* "note[s] that the rule revisions proposed herein would make no changes with respect to categories of prerecorded message calls that are not covered by our TCPA rules . . . [including] calls for . . . noncommercial purposes, including those that deliver purely 'informational' messages" (*id.* at 1502-03 ¶ 3); and stating that comment is not sought on "prerecorded message calls that do not include a solicitation (*e.g.*, calls notifying customers of product recalls, or of scheduled deliveries") (*id.* at 1514 n. 81). *And see* paragraphs in the *Notice* that specifically frame the issues on which comment is being sought as prior express written consent in the context of prerecorded telemarketing messages (*id.* at 1508 ¶ 16, 1509 ¶ 18) or reference the Commission's desire to draft a "requirement similar to the FTC's" that would be confined to telemarketing calls (*id.* at 1509 ¶ 17, 1510 ¶ 22, 1513 ¶¶ 27-28).

[7] *See* note 5, *supra*. *And see* Arbitron at 7 (the proposed change is likely the result of "inartful drafting"); DIRECTV at 2 (referencing the *Notice's* proposal that the 47 U.S.C. § 227(b)(1)(A) and (B) be treated the same with respect to prior written consent, even though they pertain to different fact situations); (PRA at 3-4, 8-9 (pointing out the structural problem of any proposed amendment that might treat the provisions the same with respect to prior written consent).

[8] PRA at 13-14 and Appendix A (proposing rule change language that would meet the Commission's objective).

[9] ACA (finance), Arbitron (surveys), DIRECTV (television), PRA (debt collection), USTA (telecommunications). Qwest agrees with ACA that the issue of whether predictive dialers should continue to be considered "autodialers" for purposes of the TCPA is a matter that should be addressed in this proceeding. ACA at 41-57, 66-70. We also agree with the ACA position that such dialers should *not* be considered "autodialers" unless the dialers have been programmed to do random or sequential dialing for marketing purposes. ACA at 37-57. *Cf. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of*

costs, and facilitates the communication of important information to individuals.[10] Automated dialing technology is used to communicate messages by live operators [11]or through prerecordings that range from surveys[12] to installation or order appointments or confirmations to service maintenance and performance calls (*e.g.*, service outages or interruptions) to billing alerts or dispute resolutions[13] to information that might affect the health and safety of an individual.[14] Changing the *status quo* of autodialer and prerecorded technology in the context of non-marketing calls would not benefit consumers. Quite the contrary. It would limit communications on matters of importance or interest to them;[15] and it would do so only at great cost to service providers; costs which, inevitably, would be passed onto consumers despite any demonstrable benefit to them.

B. Providing Opt-Out Information at the Beginning of a Non-Marketing Call Is Unnecessary to Reconcile the FCC's Rules With Those of the FTC

Qwest supports the position of those commentors who oppose any potential rule revision that might require a business to provide an opt-out communication at the beginning of a

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1991, Reconsideration Order, 10 FCC Rcd 12391, 12400 ¶ 19 (1995) (noting that dialing equipment can be "specifically programmed [to] contact numbers").

[10] *See* the Commission's *1992 TCPA NPRM*, *In the Matter of The Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 7 FCC Rcd 2736, 2738 ¶ 15 (1992) (noting that some businesses use autodialers to improve efficiency [there addressing debt collectors]). *And see* Arbitron at 2; PRA at 5-6, 11-12 (outlining the significant investment that only a single company has made in automated dialing technology, with the concomitant benefits of less downtime, less misdialed numbers, accurate and consistent legal disclosures; and the weaning out of nonproductive calls.

[11] *1992 TCPA NPRM*, 7 FCC Rcd at 2738 ¶ 15 (noting that predictive dialers often delivered answered calls immediately to live operators).

[12] Arbitron at 11.

[13] DIRECTV at 2-3; USTA at 4-5.

[14] Walgreens at 2.

[15] *See, e.g.*, DIRECTV at 2-3, 5-6; Loeb & Loeb at 1-2; Walgreens at 2-4.

prerecorded *non-marketing* communication.[16] First of all, providing such an option is not necessary to reconcile the Commission's current rules with those of the FTC, the opt-out message there required only in the context of prerecorded marketing calls. Second, it would be counter-productive to provide such option where the content of the message is informational and something the caller believes should be communicated to the called party for that party's benefit. Third, 47 U.S.C. § 227(d)(3) identifies two items that must be applicable to "all" prerecorded system calls; but it does not preclude the Commission from adopting an additional technical measure that would only apply to a certain segment of prerecorded calls, *e.g.*, those of a marketing nature. Accordingly, should the Commission determine to adopt an "opt-out" choice mechanism for consumers similar to that adopted by the FTC, it need not -- and should not -- extend that capability to prerecorded calls delivering non-marketing messages.

Respectfully submitted,

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[16] *See Notice*, 25 FCC Rcd at 1517-18 ¶ 39 (noting that 47 U.S.C. § 227(d)(3) gives the Commission the authority to set technical and procedural standards for "any" prerecorded message systems, and inquiring if they could limit a mandated technical standard to only marketing communications). *And see* DIRECTV at 5-6 (opposing a preliminary opt-out message with respect to non-marketing calls).

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in CG Docket No. 02-278; and 2) served, via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Ross Dino

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