

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

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Controlling the Assault of Non-Solicited	)	CG Docket No. 04-53
Pornography and Marketing Act of 2003	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**ORDER**

**Adopted: March 20, 2007**

**Released: March 22, 2007**

By the Commission:

**I. INTRODUCTION**

1. In this order we address a Petition for Reconsideration filed by Cingular Wireless, LLC (Cingular) of the Commission's *CAN-SPAM Order*.<sup>1</sup> Cingular asks the Commission to reconsider its decision to include Commercial Mobile Radio Service (CMRS) providers sending Mobile Service Commercial Messages (MSCMs) to their subscribers in the CAN-SPAM Act's<sup>2</sup> restriction on sending MSCMs to wireless devices.<sup>3</sup> This decision requires CMRS providers such as Cingular to obtain express prior authorization from their subscribers before sending them MSCMs. For the reasons discussed below, we deny the petition.

**II. BACKGROUND**

2. On December 8, 2003, Congress passed the CAN-SPAM Act to address the growing number of unsolicited commercial electronic mail messages.<sup>4</sup> The Act charged the Federal Trade Commission (FTC) and the Department of Justice with general enforcement responsibility, and, in addition, required the Federal Communications Commission (FCC or Commission), in consultation with the FTC, to promulgate rules to protect consumers from unwanted MSCMs.<sup>5</sup> The Act defines "mobile service commercial message" as a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service . . . in connection with such

<sup>1</sup> *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, Petition for Reconsideration (filed Oct. 18, 2004) (Petition); *see also* Order, 19 FCC Rcd 15927 (2004) (*CAN-SPAM Order*).

<sup>2</sup> Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (CAN-SPAM Act or Act), *codified at* 15 U.S.C. §§ 7701-7713, 18 U.S.C. § 1037, and 28 U.S.C. § 994.

<sup>3</sup> Petition at 1; *see also* *CAN-SPAM Order*, 19 FCC Rcd at 15971-72, *codified at* 47 C.F.R. §§ 64.3100(a) and (c)(7).

<sup>4</sup> CAN-SPAM Act, Section 2, *codified at* 15 U.S.C. § 7701.

<sup>5</sup> *Id.*, Section 14, *codified at* 15 U.S.C. § 7712.

service.”<sup>6</sup> A “commercial electronic mail message” is in turn defined as “an electronic message for which the primary purpose is commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).”<sup>7</sup> The Act further states that the term “commercial electronic mail message” does not include a transactional or relationship message.<sup>8</sup> It defines the term “transactional or relationship message” as:

an electronic mail message the primary purpose of which is—(i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; (ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; (iii) to provide (I) notification concerning a change in the terms or features of; (II) notification of a change in the recipient’s standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; (iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or (v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.<sup>9</sup>

3. The CAN-SPAM Act prohibits the sending of MSCMs without the recipient’s express prior authorization.<sup>10</sup> The Act gives the Commission the discretion to exempt providers of commercial mobile services sending electronic messages to their subscribers from the prohibition on the sending of MSCMs to wireless devices without express prior authorization.<sup>11</sup> The Act directs the Commission, in determining whether to exempt such providers, to “take into consideration . . . the relationship that exists between providers of such services and their subscribers.”<sup>12</sup> It further states that, if the Commission determines to exempt commercial mobile services providers sending electronic messages to their subscribers from the ban on sending MSCMs without express prior authorization, it shall require such providers to allow their subscribers to indicate a desire not to receive future messages at the time of subscribing to service and in any billing mechanism.<sup>13</sup>

4. Pursuant to these directives, the Commission in the *CAN-SPAM Order* adopted rules that implement the statutory definitions of the terms “mobile service commercial message,” “commercial electronic mail message,” and “transactional or relationship message.”<sup>14</sup> The Commission’s rules also cross reference FTC rules that define the criteria for determining whether the primary purpose of an

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<sup>6</sup> *Id.*, Section 14(d), *codified at* 15 U.S.C. § 7712(d).

<sup>7</sup> *Id.*, Section 3(2)(A), *codified at* 15 U.S.C. § 7702(2)(A).

<sup>8</sup> *Id.*, Section 3(2)(B), *codified at* 15 U.S.C. § 7702(2)(B).

<sup>9</sup> *Id.*, Section 3(17), *codified at* 15 U.S.C. § 7702(17).

<sup>10</sup> *Id.*, Section 14(b)(1), *codified at* 15 U.S.C. § 7712(b)(1).

<sup>11</sup> *Id.*, Section 14(b)(3), *codified at* 15 U.S.C. § 7712(b)(3).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15972, *codified at* 47 C.F.R. §§ 64.3100(c)(2), (7) and (8).

electronic message is commercial or transactional or relationship.<sup>15</sup> Further, the Commission's rules establish a variety of methods for senders of MSCMs to obtain a recipient's express prior authorization, require senders of MSCMs to provide a recipient the means to revoke any express prior authorization, and mandate the inclusion of specified disclosures in requests for express prior authorization.<sup>16</sup>

5. The Commission also determined not to exempt CMRS providers sending MSCMs to their subscribers from the ban on sending MSCMs without express prior authorization.<sup>17</sup> In making this determination, the Commission considered the record developed in response to the *CAN-SPAM Notice of Proposed Rulemaking*,<sup>18</sup> in which it asked whether a separate exemption for CMRS providers sending messages to their subscribers was necessary in light of the Act's exclusion of transactional or relationship messages. The Commission expressly asked CMRS providers to supply specific examples of messages sent to their customers that did not already fall outside the ban because of this exclusion.<sup>19</sup> In response, CMRS providers argued that they should be exempt from the ban, but failed to provide specific examples of messages not already covered by the Act's exclusion of transactional or relationship messages.<sup>20</sup> In contrast, several consumer groups, the National Association of Attorneys General, and the non-profit Electronic Privacy Information Center all argued against a special exemption for CMRS providers.<sup>21</sup> Consumer groups and individuals in particular emphasized that wireless subscribers deserved greater protection from unwanted commercial electronic mail undiluted by an exemption for their wireless service providers, and were concerned regarding the nuisance caused by receiving unwanted messages on their wireless devices.<sup>22</sup> These commenters also argued that the bulk of CMRS providers' messages to

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<sup>15</sup> See *Federal Trade Commission*, RIN 3084-AA96, Definitions and Implementation Under the CAN-SPAM Act, Final Rule, 70 Fed. Reg. 3110-3129 (Jan. 19, 2005), codified at 16 C.F.R. §§ 316.1-316.5 (*FTC Primary Purpose Final Rule*); see also *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, 20 FCC Rcd 5931 (2005).

<sup>16</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15973, codified at 47 C.F.R. § 64.1300(d). The Act establishes a less stringent requirement, "prior affirmative consent," for sending commercial electronic mail messages other than MSCMs. CAN-SPAM Act, Section 5(a)(4), codified at 15 U.S.C. § 7704(a)(4); see also *CAN-SPAM Order*, 19 FCC Rcd at 15943-44, para. 42. The Act defines "affirmative consent" as the recipient's express consent to receive a message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative, and clear and conspicuous notice at the time consent is communicated that the recipients' electronic mail address can be transferred to another party for the purpose of initiating commercial electronic mail messages. CAN-SPAM Act, Section 3(1), codified at 15 U.S.C. § 7702(1).

<sup>17</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15953, para. 71.

<sup>18</sup> *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, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 19 FCC Rcd 5056, 5072-73, para. 39 (2004) (*CAN-SPAM NPRM*).

<sup>19</sup> *Id.* Further, the Commission posed the question of how to implement the Act's "opt out" requirements for subscribers desiring to cease receiving MSCMs if the Commission decided to adopt an exemption for CMRS providers. *Id.* at 5073, para. 40.

<sup>20</sup> See *CAN-SPAM Order*, 19 FCC Rcd at 15950-51, para. 65.

<sup>21</sup> *Id.* at 15951, para. 66 (citing *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, Comments of Consumer Action, Consumer Federation of America, and the National Consumers League at 4 (filed Apr. 30, 2004) (Consumer Action, et al. Comments); Comments of the National Association of Attorneys General at 7 (filed Apr. 30, 2004) (NAAG Comments); Comments of the Electronic Privacy Information Center at 7-8 (filed Apr. 30, 2004) (EPIC Comments)).

<sup>22</sup> *Id.*

their customers were transactional or relationship messages.<sup>23</sup>

6. On the basis of the record before it, the Commission concluded that safeguarding wireless consumers from unwanted MSCMs from their CMRS providers was consistent with Congressional intent in passing the Act to ensure consumers received “less, not more, spam.”<sup>24</sup> The Commission further reasoned that MSCMs sent by CMRS providers were not fundamentally different from those sent by other senders.<sup>25</sup> The Commission noted that, while CMRS providers could send messages without charging their customers, Congress stated in passing the Act that unwanted electronic mail could still result in costs for storage and time spent accessing, reviewing, and discarding it.<sup>26</sup> Finally, the Commission found that CMRS providers had unique channels such as monthly statements and web sites for obtaining express prior authorization from their customers, and that the CAN-SPAM rules allowed senders a number of means, such as oral, written, or electronic, to obtain express prior authorization.<sup>27</sup>

7. On October 18, 2004, Cingular filed its petition for reconsideration of the Commission’s decision not to exempt CMRS providers sending MSCMs to their subscribers from the ban on sending MSCMs without express prior authorization.<sup>28</sup> The Commission sought comment on Cingular’s petition.<sup>29</sup> CTIA – The Wireless Association, formerly known as the Cellular Telecommunications & Internet Association, and T-Mobile filed comments supporting Cingular’s petition, and an individual consumer, John Shaw, filed comments opposing the petition.<sup>30</sup>

### III. DISCUSSION

8. Cingular argues in its petition that the Commission’s inclusion of CMRS providers sending messages to their subscribers in the ban on sending MSCMs without express prior authorization is inconsistent with the intent of Congress in passing the CAN-SPAM Act and prior Commission precedent.<sup>31</sup> According to Cingular, because Congress contemplated a possible exemption for CMRS providers, the Commission’s failure to adopt one is arbitrary and capricious and a violation of a Congressional mandate.<sup>32</sup> Cingular further argues that the Commission failed to analyze the relationship between CMRS providers and their customers as required by the CAN-SPAM Act, and that the inclusion

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<sup>23</sup> See *id.* at 15951, para. 67 (citing Consumer Action, et al. Comments at 4; NAAG Comments at 7; *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, Reply Comments of the National Consumers Union at 4 (filed May 17, 2004); Reply Comments of John A. Shaw at 6 (filed May 17, 2004)).

<sup>24</sup> *Id.* at 15952, para. 70, (citing 149 Cong. Rec. H12195).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, see also *id.* at 15944, paras. 42-43.

<sup>28</sup> See n.1, *supra*.

<sup>29</sup> See *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, CG Docket No. 04-53, Public Notice, Report No. 2680 (rel. Oct. 29, 2004); see also 68 Fed. Reg. 67737 (Nov. 19, 2004).

<sup>30</sup> See *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, CG Docket No. 04-53, Comments of CTIA – The Wireless Association (filed Dec. 6, 2004) (CTIA Comments); Reply Comments of T-Mobile USA (filed Dec. 16, 2004) (T-Mobile Reply Comments); Opposition of John A. Shaw to Petition for Reconsideration Submitted by Cingular Wireless LLC (filed Nov. 15, 2004) (Shaw Opposition).

<sup>31</sup> Petition at 1, 2-4.

<sup>32</sup> See *id.* at 4, 8.

of CMRS providers in the ban unduly limited their First Amendment right to commercial free speech, thereby rendering the Act unconstitutional as applied to Cingular.<sup>33</sup> Cingular or other CMRS providers made most of these same arguments in response to the *CAN-SPAM NPRM*.<sup>34</sup> The Commission addressed these arguments in the *CAN-SPAM Order*, and also carefully analyzed the relationship between CMRS providers and their subscribers. We address these arguments again below.

#### A. Congressional Intent

9. Cingular asserts that the Commission's decision regarding CMRS providers is contrary to Congressional intent and cites the Act's language authorizing the Commission to determine whether to subject CMRS providers to the ban, after considering the relationship that exists between providers and their subscribers.<sup>35</sup> CTIA asserts that "Congress also recognized that wireless carriers could be relied upon not to abuse their relationship with their customers by sending unwanted commercial electronic mail messages,"<sup>36</sup> but provides no support for this argument.

10. These arguments ignore the plain language of the Act, which does not exempt CMRS providers, but merely permits the Commission to exempt them after examining the relationship between CMRS providers and their subscribers.<sup>37</sup> The Act thus authorizes the Commission to choose not to exempt CMRS providers.<sup>38</sup> The legislative history of the Act is unambiguous regarding the need to curb spam in general, supplying repeated references to the harms and costs of spam.<sup>39</sup> With respect to wireless spam in particular, the *CAN-SPAM Order* pointed to portions of the legislative history that refer to the huge wireless spam problem in Japan of 800,000 million spam messages a day, a problem Congress intended the statute to circumvent.<sup>40</sup> This legislative history also notes that the wireless spam provisions of the Act "require an FCC rulemaking to assess and put in place additional consumer protections[.]" and describes the FCC rulemaking as a "proceeding [that] permits the FCC to examine the nature of a consumer's relationship with their wireless phone and service [provider] and to take into account the potentially unique technical characteristics which may warrant wireless-specific rules."<sup>41</sup> This legislative history indicates no absolute intent of Congress to exempt CMRS providers from these Commission rules,

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<sup>33</sup> *Id.* at 1, 4-8.

<sup>34</sup> See e.g., *CAN-SPAM Order*, 19 FCC Rcd at 15952, para. 69 (citing *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, Comments of T-Mobile USA at 16 (filed Apr. 30, 2004) (T-Mobile Comments); Comments of Verizon Wireless at 14-16 (filed Apr. 30, 2004)).

<sup>35</sup> Petition at 2; see also T-Mobile Reply Comments at 2; CAN-SPAM Act, Section 14(b)(3), *codified at* 15 U.S.C. § 7712(b)(3).

<sup>36</sup> CTIA Comments at 2. Similarly, CTIA provides no support for its claim that, "Congress explicitly recognized an exception to the prior authorization requirement for CMRS providers based on their unique relationship with their customers . . ." *Id.* at 3.

<sup>37</sup> See CAN-SPAM Act, Section 14(b)(3), *codified at* 15 U.S.C. § 7712(b)(3) ("The Federal Communications Commission, in promulgating the rules, shall . . . take into consideration, in determining whether to subject providers of commercial mobile services to [the ban on sending MSCMs without express prior authorization], the relationship that exists between providers of such services and their subscribers, but if the Commission determines that such providers should not be subject to [the ban], the rules shall require such providers, in addition to complying with the other provisions of this Act, to allow subscribers to indicate a desire not to receive future mobile services commercial messages from the provider[.]").

<sup>38</sup> *Id.*

<sup>39</sup> See e.g., 149 Cong. Rec. H12195.

<sup>40</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15952, n.197 (citing 149 Cong. Rec. H12854-08 at 12860).

<sup>41</sup> See 149 Cong. Rec. H12854-08 at 12860.

but instead a desire to have the Commission give particular consideration to the relationship between wireless service providers and their subscribers in determining whether such an exemption is appropriate. The Commission's *CAN-SPAM Order* correctly evaluated Congressional intent in deciding to include CMRS providers sending MSCMs to their subscribers in the general ban on sending MSCMs without express prior authorization.<sup>42</sup>

## B. Relationship Between CMRS Providers and Their Subscribers

11. Cingular asserts that the Commission failed to analyze the relationship between CMRS providers and their customers as directed by the CAN-SPAM Act.<sup>43</sup> CTIA argues that, “[w]ireless customers benefit from routine communications with their providers regarding new offers, special discounts, and the availability of upgraded service.”<sup>44</sup> CTIA further claims, as it claimed in response to the *CAN-SPAM NPRM*, that such messages would not fall within the transactional or relationship exclusion, but fails to explain why.<sup>45</sup> CTIA also asks, as it requested in response to the *CAN-SPAM NPRM*, that we permit CMRS providers to send their subscribers, without express prior authorization, MSCMs regarding “partner” service offerings.<sup>46</sup> T-Mobile asserts that “all parties agree that wireless customers want the carriers to advise them of new services, plans, and product offerings.”<sup>47</sup>

12. The Commission carefully examined the relationship between CMRS providers and their subscribers in the *CAN-SPAM Order*. First, the Commission refused to presume customers’ willingness to receive messages from their CMRS providers because several groups representing consumers and many individual consumers stated that they did not want to receive any MSCMs without express prior authorization.<sup>48</sup> Second, the Commission concluded that most of the electronic mail messages that CMRS providers send to their customers are excluded “transactional or relationship” messages, as defined by the CAN-SPAM Act.<sup>49</sup> These messages would include “account balance information or other type of account statement with respect to a subscription, membership, account, loan or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender.”<sup>50</sup> The Commission reached this conclusion because, despite a specific request in the *CAN-SPAM NPRM* for examples of messages that would fall outside the transactional or relationship exclusion, CMRS providers supplied none.

13. In this proceeding T-Mobile provides a general description of three types of messages

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<sup>42</sup> See *CAN-SPAM Order*, 19 FCC Rcd at 15952-53, para. 70; see also Shaw Opposition at 6-7.

<sup>43</sup> Petition at 4-5. Cingular’s argument appears to be rooted in the Commission’s refusal to accept Cingular’s assertion in its response to the *CAN-SPAM NPRM* that customers could be presumed to be willing to receive information about their providers’ new products and services. See *CAN-SPAM Order*, 19 FCC Rcd at 15952, para. 69 (citing, e.g., *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, Comments of Cingular Wireless LLC at 5-6 and 9 (filed Apr. 30, 2004)).

<sup>44</sup> CTIA Comments at 3.

<sup>45</sup> *Id.* at 3; see also *CAN-SPAM Order*, 19 FCC Rcd at 15952, n.192.

<sup>46</sup> CTIA Comments at 6, n.19; see also *CAN-SPAM Order*, 19 FCC Rcd at 15950-51, para. 65; Shaw Opposition at 7.

<sup>47</sup> T-Mobile Reply Comments at 1.

<sup>48</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15952-53, para. 70 (citing Consumer Action et al. Comments at 4; NAAG Comments at 7; EPIC Comments at 7-8; Reply Comments of Consumers Union at 4).

<sup>49</sup> *Id.* at 15953, para. 71.

<sup>50</sup> See CAN-SPAM Act, Section 3(17), codified at 15 U.S.C. § 7702(17).

that it argues could fall outside the exclusion.<sup>51</sup> T-Mobile's examples are substantially the same as those considered in the *CAN-SPAM Order*, and would likely fall within the transactional or relationship exclusion.<sup>52</sup> Additionally, the FTC conducted a lengthy and thorough rulemaking to determine when the primary purpose of an electronic mail message is transactional or relationship, giving CMRS providers ample opportunity to clarify whether the electronic mail messages they send their customers fall within the exclusion.<sup>53</sup> The FTC provided additional guidance on when messages should be considered transactional or relationship.<sup>54</sup> Finally, the Commission noted in the *CAN-SPAM Order* that CMRS providers have several unique outlets unavailable to other senders of MSCMs, such as bills and web sites, to obtain their customers' express prior authorization.<sup>55</sup>

14. CTIA argues that the market for wireless services is sufficiently competitive that customers receiving unwanted wireless messages from their providers can simply switch to a new provider.<sup>56</sup> T-Mobile made similar arguments in response to the *CAN-SPAM NPRM*.<sup>57</sup> While subscribers may indeed exercise this option, it may not be without cost. Further, customers could be discouraged from switching providers by the assumption that a new provider would be just as likely to send unwanted messages, particularly if we were to grant the exemption for all CMRS providers. Finally, it is far easier for customers desiring MSCMs to provide their express prior authorization than for customers not wanting MSCMs to switch wireless providers. For these reasons, we decline to lift the ban on CMRS providers sending their subscribers MSCMs without express prior authorization.

### C. Prior Commission Precedent

15. Cingular and its supporters claim the Commission diverged from precedent by including CMRS providers sending MSCMs to their subscribers in the ban on sending MSCMs without express prior authorization.<sup>58</sup> Specifically, Cingular and T-Mobile assert that the Commission's failure to exempt CMRS providers from the express prior authorization requirement is inconsistent with its recognition of an "established business relationship" in the context of its rulemakings under the Telephone Consumer Protection Act (TCPA).<sup>59</sup> CTIA similarly cites these rulemakings as support for the claim that, "[t]he

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<sup>51</sup> T-Mobile Reply Comments at 5. T-Mobile's examples are: 1) account balance information that may not be sent "regularly;" 2) advice that a \$39/600 minute rate plan has been converted to a \$39/800 minute rate plan that the customer may not be entitled to receive in the subscription contract; and 3) a reminder that a customer should use a credit under a promotional offer before it expires.

<sup>52</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15951, para. 67 (noting that messages "alert[ing] consumers about fraud" are not commercial messages and that messages alerting "a prepaid customer that his account balance is running low" would fall under the exclusion for a transactional or relationship message). As to T-Mobile's examples here: account balance information likely falls within the transactional and relationship message exclusion; a change in the terms of a pricing plan, even if the customer is not entitled to received notice of the change, likely falls within the exclusion; and a reminder to use a credit likely falls within the exclusion.

<sup>53</sup> See *FTC Primary Purpose Final Rule*, n.15, *supra*.

<sup>54</sup> See *Federal Trade Commission*, RIN 3084-AA96, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Notice of Proposed Rulemaking, 70 Fed. Reg. 25426-25455 (May 12, 2005).

<sup>55</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15952-53, para. 70.

<sup>56</sup> CTIA Comments at 4.

<sup>57</sup> T-Mobile Comments at 17.

<sup>58</sup> Petition at 2-4; T-Mobile Reply Comments at 2; CTIA Comments at 5.

<sup>59</sup> Petition at 2-4; T-Mobile Reply Comments at 2 (*citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8770-71, para. 34 (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 14014, 14042-43, para. 42 (2003) (*2003 TCPA Order*)); see also Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

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.”<sup>60</sup>

16. Cingular and its supporters’ reliance on the TCPA’s “established business relationship” exemption is misplaced.<sup>61</sup> In the TCPA, Congress expressly exempted from its definition of “telephone solicitation” any telephone call or message “to any person with whom the caller has an established business relationship.”<sup>62</sup> In the CAN-SPAM Act, Congress stated that the Commission *could* establish an exemption for CMRS providers from the prohibition on sending MSCMs without express prior authorization, after considering the relationship between such providers and their subscribers.<sup>63</sup> Thus, while the TCPA contains an express exemption, the CAN-SPAM Act contains only a permissible exemption to be granted or not granted after examination by the Commission. Further, while the legislative history of the TCPA indicates that it was not intended unduly to interfere with ongoing business relationships, the legislative history of the CAN-SPAM Act contains strong statements stressing the need for additional protections for consumers from the costs and intrusion of MSCMs sent to their wireless devices.<sup>64</sup>

17. Further, the Commission has consistently imposed more stringent regulations on unsolicited calls and electronic messages to wireless devices than unsolicited calls and electronic messages to wireline devices. For example, the Commission’s TCPA rules implement the TCPA’s express ban on autodialed or prerecorded calls to wireless devices with a single exception: calls to subscribers for which the subscriber is not charged.<sup>65</sup> In adopting its CAN-SPAM rules, the Commission implemented the CAN-SPAM Act’s prohibition on sending MSCM’s without express prior authorization, and, after considering the relationship between CMRS providers and their subscribers, decided not to exempt CMRS providers from the prohibition.<sup>66</sup> In making this decision, the Commission considered arguments, repeated here by T-Mobile,<sup>67</sup> that MSCMs from CMRS providers *may* be provided without additional cost to subscribers, but concluded that, “[a]n MSCM from a CMRS provider may be just as intrusive, and costly in other respects, as an MSCM from a third party.”<sup>68</sup> Only two wireless carriers, Verizon Wireless and Nextel, supported an exemption for CMRS providers that would apply only when the subscriber paid no charge for the message.<sup>69</sup> Neither Verizon Wireless nor Nextel specified that subscribers purchasing “buckets” of minutes of use for a fixed monthly fee would not have minutes

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<sup>60</sup> CTIA Comments at 5 (*citing 1992 TCPA Order*, 7 FCC Rcd at 8770-71, para. 34 (1992); *2003 TCPA Order*, 18 FCC Rcd at 14042-43, paras. 42 and 43 (2003)).

<sup>61</sup> See Shaw Opposition at 3 (“The regulations adopted in this [CAN-SPAM] docket serve a different purpose [from the TCPA regulations] – 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.”).

<sup>62</sup> See 47 U.S.C. § 227(a)(3)(B).

<sup>63</sup> CAN-SPAM Act, Section 14(b)(3), *codified at* 15 U.S.C. § 7712(b)(3).

<sup>64</sup> See para. 10, *supra*; see also *1992 TCPA Order*, 7 FCC Rcd at 8770-71, para. 34 (*citing House Report 102-317 at 13*, 102d Cong., 1<sup>st</sup> Session (1991)).

<sup>65</sup> See *2003 TCPA Order*, 18 FCC Rcd. at 14111, para.160 (*citing 1992 TCPA Order*, 7 FCC Rcd at 8775, para. 45).

<sup>66</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15952-53, paras. 70-71.

<sup>67</sup> T-Mobile Reply Comments at 4.

<sup>68</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15952-53, para. 70.

<sup>69</sup> *Id.* at 15950, n.177 and 15950-51, para. 65.



deducted for time spent accessing, reading, storing, or discarding the MSCMs they send.<sup>70</sup> Congress made clear in the CAN-SPAM Act that it was concerned with such costs, as well as the “significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutions that carry and receive such mail[.]”<sup>71</sup> Thus, contrary to the assertions of Cingular and its supporters, the Commission has not diverged from precedent in refusing to exempt CMRS providers from the prohibition against sending MSCMs without express prior authorization, but has consistently examined and applied express statutory language, legislative history, and the record before it in adopting rules for unsolicited calls and messages to wireless devices.

#### D. Constitutionality

18. Cingular includes in its petition an argument made by Verizon Wireless in response to the *CAN-SPAM NPRM* that the Commission’s inclusion of CMRS providers in the ban on sending MSCMs without express prior authorization violates the First Amendment right of such providers to free commercial speech.<sup>72</sup> The Commission gave this argument full consideration in the *CAN-SPAM Order*.<sup>73</sup> Using the analytical framework established by the Supreme Court in *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, the Commission determined that its CAN-SPAM rules advanced a substantial government interest and were no more extensive than necessary to serve that interest.<sup>74</sup> Cingular has advanced no new facts, law, or arguments here that would cause us to change the Commission’s determination in the *CAN-SPAM Order* that nothing in the CAN-SPAM rules violates CMRS providers’ First Amendment rights.

#### IV. CONCLUSION

19. We conclude that the Commission’s decision to include CMRS providers sending MSCMs to their subscribers in the general ban on sending MSCMs without express prior authorization is consistent with Congressional intent in enacting the CAN-SPAM Act and prior Commission precedent. We further conclude that the Commission adequately analyzed the relationship between CMRS providers and their subscribers in reaching this decision. Further, as the Commission concluded in the *CAN-SPAM Order*, the CAN-SPAM rules do not violate CMRS providers’ First Amendment rights. For these reasons, we deny Cingular’s petition.

#### V. MATERIALS IN ACCESSIBLE FORMATS

20. To request materials in accessible formats (such as Braille, large print, electronic files, or audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This order can also be downloaded in Word and Portable Document Formats (PDF) at <http://www.fcc.gov/cgb/>.

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<sup>70</sup> See *2003 TCPA Order*, 18 FCC Rcd at 14115, n.610 (determining that forbearing from deducting minutes for time spent on autodialed or prerecorded messages to wireless devices is a necessary prerequisite for an exemption from the TCPA’s ban on such messages).

<sup>71</sup> CAN-SPAM Act, Sections 2(a)(3) and 2(a)(6), *codified at* 15 U.S.C. §§ 7701(a)(3) and 7701(a)(6).

<sup>72</sup> Petition at 6; *see also CAN-SPAM Order*, 19 FCC Rcd at 15035, para. 21.

<sup>73</sup> *CAN-SPAM Order*, 19 FCC Rcd at 15935-36, paras. 21-23.

<sup>74</sup> *Id.* at 15935, para. 21 (*citing Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557 (1980)).

**VI. ORDERING CLAUSES**

21. Accordingly, IT IS ORDERED that, pursuant to sections 0.361 and 1.429 of the Commission's rules, 47 C.F.R. §§ 0.361 and 1.429, the petition for reconsideration of Cingular Wireless, LLC, filed in CG Docket No. 04-53, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary