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December 18, 2006

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex K)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

**Re: TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification,
Project No. R411001**

Verizon¹ hereby responds to the Commission's Notice² regarding proposed amendments to its rules governing the method for measuring the maximum allowable call abandonment rate and the use of prerecorded messages in telemarketing. The Commission should modify its rules to track as closely as possible the language employed by the Federal Communications Commission ("FCC") rules, in order to "maximize consistency" between the two regimes as Congress intended.³ Specifically, the Commission should amend its rules to permit a

¹ The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc. and Verizon Online.

² *Telemarketing Sales Rule Part III*, Proposed Rules, 71 Fed. Reg. 58716 (Oct. 4, 2006) (hereinafter "Notice").

³ See Do-Not-Call Implementation Act, Section 3, P.L. 108-10, 117 Stat. 557 (2003) (requiring the FCC to "consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission" and requiring both agencies to file an annual report with Congress outlining inconsistencies and "proposals to remedy any such inconsistencies").

telemarketer to calculate its abandoned call rate over a thirty-day period, which will more closely align the Commission's rules with the FCC's telemarketing regulations. In addition, the Commission should reconsider its decision regarding prerecorded telemarketing calls and should align its rules with the FCC's by permitting entities to use prerecorded telemarketing messages to communicate with their existing customers.

I. Like The FCC, The Commission Should Calculate A Telemarketer's Abandoned Call Rate Over A Thirty-Day Period

Verizon supports the Commission's proposed amendment to its abandoned call rules, which would permit telemarketers to measure their abandoned call rate over the length of a specific telemarketing campaign or over a thirty-day period, whichever is shorter. The Commission's rules, as well as the FCC's rules, prohibit a telemarketer from abandoning more than 3% of telemarketing calls dialed by predictive dialers. *See* 16 C.F.R. § 310.4(b)(4)(i); 47 C.F.R. § 64.1200(a)(6). The way that the abandoned call rate is calculated, however, is different under the two agencies' current rules. The FCC's rules calculate a telemarketer's abandoned call rate as a percentage of all telemarketing calls placed over a thirty-day period. *See* 47 C.F.R. § 64.1200(a)(6). By contrast, the Commission's current rules require a telemarketer to measure its abandoned call rate daily for each individual telemarketing campaign. *See* 16 C.F.R. § 310.4(b)(4)(i).

As the Commission recognized in its Notice, its current rule calculating abandoned calls on a daily basis is more difficult for telemarketers to comply with than a rule like the FCC's, which calculates abandoned calls over a longer period.⁴ As previous commenters have explained, calculating the abandoned call rate on a daily basis means that telemarketers have a small window of time in which to slow their call rate to recover from any unexpected increase in

the number of calls that are answered and abandoned. Predictive dialers place outgoing calls based on a projection of the average number of consumers who will answer and the number of sales agents available. The predictive dialer constantly recalculates the projected average answering rate while calls are being made, based on the results of its outgoing calls. A predictive dialer that registers an increase in the answer rate will therefore slow the rate of outgoing calls, which will decrease the likelihood of abandoned calls and bring down the overall abandoned call rate. When the call abandonment rate is calculated over a longer period, the telemarketer can place outgoing calls at a slower rate, with a lower rate of abandoned calls, for the amount of time needed to bring down the overall abandonment rate. But if the call abandonment rate is calculated daily, the telemarketer may not have a sufficient amount of time to recover from unexpected spikes in the answer rate, particularly if one of those spikes occurs near the end of the day.⁵

This effect is exacerbated in the case of targeted telemarketing campaigns directed to smaller groups of consumers. Many companies, including Verizon, use market research and data research to tailor different telemarketing campaigns to appeal to different groups of consumers and to focus individual telemarketing campaigns on those consumers most likely to be interested in the particular product being offered. For example, Verizon commonly limits its telemarketing campaigns and associated offers to consumers in those locations where Verizon has network capabilities in place to render the services being offered. As a result of such segmented marketing efforts, the number of consumers called as part of any given telemarketing campaign is comparatively small. Segmented marketing benefits both consumers and business. From the

⁴ Notice, 71 Fed. Reg. at 58729-30.

⁵ *See, e.g.*, Notice, 71 Fed. Reg. at 58728-29 (summarizing comments by the Direct Marketing Association and the American Teleservices Association).

consumer point of view, tailored marketing means that consumers are most likely to receive those offers that are relevant to them, and less likely to receive telemarketing calls for products and services that are not. From the business point of view, targeted marketing allows businesses to focus on smaller groups of consumers, which lowers marketing costs. And, lower marketing costs are ultimately passed onto customers in the form of lower prices, providing yet another benefit to consumers.

Despite the benefits of smaller telemarketing campaigns, as the Commission recognized, its current rule requiring telemarketers to calculate their abandoned call rate on a daily basis may have the unintended consequence of preventing companies from conducting these more focused telemarketing campaigns efficiently. Basic principles of statistics indicate that when the group of consumers to be called is smaller, the deviation from expected answer rates – and expected abandonment rates – is greater. Thus, the smaller the group of consumers to be called, the more likely it is that there will be an unexpected fluctuation in the answer rate, and the abandonment rate, from which the telemarketer cannot recover within a single day. Companies may find that they have to alter their campaigns in ways that do not benefit consumers, just to ensure compliance with the 3% abandonment rate on a daily basis. For example, a company conducting a small campaign may abandon predictive dialers altogether, relying instead on more expensive, manual dialing. Other companies with small campaigns may program the dialer with a substantially lower abandonment rate in an effort to reduce the chances that an unanticipated end-of-day spike in the answer rate will push the daily abandonment rate over 3% threshold. Such programming sacrifices many of the efficiencies of predictive dialers by slowing the rate of outgoing calls, thereby increasing operators' down-time between calls. Either of these options therefore raises the costs of marketing, which are ultimately passed on to consumers in the form

of higher prices. Still other companies may expand their campaigns to larger groups of customers, in order to minimize the effect of unexpected changes in answer and abandonment rates. Thus, rather than encouraging companies to limit telemarketing campaigns to smaller groups of consumers, the Commission's current rule analyzing abandonment rates on a daily basis is likely to have the opposite effect – such that consumers receive *more*, rather than fewer, telephone solicitations in which they have no interest.⁶

The Commission should therefore align its rules on call abandonment rates with those of the FCC, which permit telemarketers to calculate a single call abandonment rate across all campaigns over a period of 30 days. As the FCC explained in adopting its rule, measuring the abandonment rate over a thirty-day period acknowledges the effect that “variations in telemarketing campaigns such as calling times, number of operators available, number of telephone lines used by the call centers, and other similar factors” have on abandonment rates while still “ensur[ing] that consumers consistently receive fewer disconnected calls.”⁷ By adopting a similar standard to the FCC, the Commission would enable telemarketers to adjust their outgoing call rate in response to the daily fluctuations inherent in telemarketing, so that companies can conduct cost-effective, targeted marketing campaigns directed to those consumers most likely to be interested in the offer. Amending the Commission's rule in accordance with the FCC rule would also ensure that all telemarketing is governed by a consistent standard, minimizing consumer confusion as to permissible telemarketing and minimizing compliance burdens for telemarketers.

⁶ Notice, 71 Fed. Reg. at 58729.

⁷ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd 14014, ¶ 152 (rel. July 3, 2003).

In the alternative, if the Commission decides not to align its rule completely with the FCC's rule, the Commission should adopt the amendment proposed in its Notice and should extend the period for calculating abandonment rates for each telemarketing campaign from one day to thirty days. Such an amendment would recognize that answer and abandonment rates can fluctuate within a single day and would enable telemarketers to make adjustments to calling rates within a single telemarketing campaign to correct for those fluctuations. The Commission's proposed amendment would also bring the Commission's rules into closer alignment with the FCC's rules, reducing the extent to which a company's permissible telemarketing activity turns on whether the telemarketers are under the jurisdiction of the Commission or the FCC.

II. The Commission Should Permit Prerecorded Telemarketing Messages Within An Established Business Relationship

The Commission should also align its rules regarding prerecorded messages with the FCC's rules. In its Notice, the Commission announced its decision denying the petition filed by Voice Mail Broadcasting Corporation ("VMBC") and concluding that prerecorded telemarketing messages would not be permitted under the Commission's rules unless the caller had obtained the recipient's prior express consent. The Commission also announced that it would no longer forbear from bringing enforcement actions against telemarketers who deliver prerecorded telemarketing messages to established customers.⁸ For the reasons discussed in its comments to VMBC's petition, which are attached for the Commission's convenience, Verizon respectfully disagrees with the Commission's conclusion.⁹

⁸ Notice, 71 Fed. Reg. at 58716.

⁹ See Comments of Verizon Telephone Companies, *Prerecorded Message EBR Telemarketing*, Project No. R411001 (comment number OL-113893)(Jan. 10, 2005) (attached hereto as Exhibit A).

The Commission should instead adopt rules similar to the FCC's rules on prerecorded messages, which permit a company to deliver prerecorded telemarketing messages to those customers with whom it has an established business relationship. Under the FCC's approach, established customers that do not wish to receive such messages can still avoid them merely by asking to be placed on the telemarketer's company-specific do-not-call list. See 47 C.F.R. § 64.1200(d)(3). The Commission has essentially followed the same approach since November 2004, when the Commission adopted its well known policy of not bringing enforcement actions against telemarketers who deliver prerecorded telemarketing messages to established customers.¹⁰

Permitting prerecorded telemarketing calls within an established business relationship strikes the appropriate balance between protecting consumers from unwanted telemarketing calls while permitting businesses to use a variety of methods (including prerecorded messages) to communicate marketing offers to established customers. That this is the appropriate balance is demonstrated by the overwhelming success of the national do-not-call registry during the past two years, when both the Commission and the FCC permitted these prerecorded calls. Indeed, as the Commission reported in its Annual Report to Congress, a survey conducted in December 2005 (during the Commission's forbearance policy) indicated that 92% of adults who placed their telephone numbers on the do-not-call registry reported receiving fewer unwanted telemarketing calls.¹¹ The FCC's rule and the Commission's current practice of permitting prerecorded telemarketing messages to established customers therefore provides adequate

¹⁰ *Telemarketing Sales Rule*, Proposed Rules, 69 Fed. Reg. 67287 (Nov. 17, 2004).

¹¹ See Federal Trade Commission, Annual Report to Congress for FY 2005 Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry at 4-5 (July 2006).

protection of consumers' privacy interests, without infringing upon businesses' ability to communicate with their customers using prerecorded marketing messages. The Commission should not change its practice now, but instead should amend its rule to mirror the FCC rule and to match the Commission's practice since November 2004.

* * * *

For these reasons, the Commission should amend its Telemarketing Sales Rules to permit a telemarketer to measure its abandoned call rate over a thirty-day period. The Commission should also align its regulation of prerecorded telemarketing messages with the FCC rules permitting entities to place such calls to their existing customers.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amy P. Rosenthal".

Amy P. Rosenthal

ATTACHMENT A

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January 10, 2005

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600 Pennsylvania Avenue, NW.
Washington, DC 20580

Re: Prerecorded Message EBR Telemarketing, Project No. R411001

Verizon¹ hereby responds to the Commission's request for public comment on the letter from Voice Mail Broadcasting Corporation ("VMBC") regarding the rules regulating telemarketing call abandonment. The Commission should modify its rules to track as closely as possible the language employed by the Federal Communications Commission rules, in order to

¹ The Verizon companies ("Verizon") include local exchange carriers, long distance companies, and Internet services. For purposes of this filing, "Verizon" refers to the Verizon Telephone Companies, which are listed in Attachment A; Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance; NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions; Verizon Select Services Inc.; and Verizon Online-New Jersey LLC, Verizon Internet Services Inc. and GTE.Net LLC d/b/a Verizon Internet Solutions (which operate under the trade name Verizon Online). Some of these companies are carriers, not covered by the Commission's telemarketing rules, but which are subject to the telemarketing regulations of the Federal Communications Commission ("FCC").

“maximize consistency” between the two regimes, as Congress intended.² Specifically, the current FTC rules regarding call abandonment – which define a call as “abandoned” when the called party is not connected to a sales representative within two seconds of answering the call – should be amended so as not to prohibit prerecorded message calls, which are not designed to connect to a live representative. Rather, the FTC should instead follow the FCC model, and simply require the prerecorded message to start within two seconds. If necessary to avoid abusive telemarketing practices, it also can require telemarketers who make such calls to state the identity of the calling party, and provide a telephone number the consumer can use to make a do-not-call request.³ It should specifically allow entities with established business relationships to make such calls.

Like the FCC, The FTC Should Not Deem Prerecorded Message Calls To Be Abandoned, But Instead Should Ensure That The Messages Begin Promptly, and That Called Parties Are Informed Of How To Make Do-Not-Call Requests

Currently, the FTC rules define a call as “abandoned” if “a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person’s completed greeting.” 16 C.F.R. § 310.4(b)(1)(iv). The FTC has opined that the use of entirely prerecorded telemarketing messages *per se* violates the call abandonment rule, because

² See Do-Not-Call Implementation Act, Section 3, P.L. 108-10, 117 Stat. 557 (2003) (requiring the FCC to “consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission” and requiring both agencies to file an annual report with Congress outlining inconsistencies and “proposals to remedy any such inconsistencies”).

³ See 47 C.F.R. § 64.1200(b) (FCC rule regarding artificial or prerecorded messages).

the called party will not be connected to a live sales representative.⁴ However, as VMBC points out, the FTC's interpretation of its rules effectively prohibits calls that the FCC deems lawful, and that customers often find helpful. VMBC Letter, at 1-5. The FTC interpretation of its call abandonment rule conflicts with the FCC rules in at least two respects. First, the FCC specifically allows carriers to make prerecorded message calls to persons with whom they have "an established business relationship," without the called party's consent. *See* 47 C.F.R. § 64.1200(a)(2). Second, the FCC rules do not consider prerecorded message calls to be "abandoned" so long as the message starts within two seconds.⁵ Rather, the FCC simply requires the caller to identify itself in the message, and provide the called party with information regarding how to request to be placed on the caller's do-not-call list. 47 C.F.R. § 64.1200(b).

In attempting to address the concerns raised by VMBC, the FTC has proposed establishing a "safe harbor," which would allow a seller with an "established business relationship" to the called party to make a prerecorded message call without violating the call abandonment rules if, among other things, within two seconds after the call is answered, the message "Presents an opportunity to assert an entity-specific Do Not Call request . . . at the outset of the message."⁶ However, the FTC's proposal conflates several concepts – call abandonment, an "established business relationship" exemption, and providing customers with

⁴ *See Telemarketing Sales Rule*, Notice of Proposed Rulemaking, 69 Fed. Reg. 67287, 67288 (2004) ("*Notice*"); *see also* Letter from William B. Baker, Wiley Rein & Fielding LLP, to Allen W. Hile, FTC, at 5 (filed Nov. 14, 2003) (quoting FTC's online compliance guide ("*VMBC Letter*").

⁵ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, ¶ 156 (2003) ("[P]rerecorded messages sent by companies to customers with whom they have an established business relationship will not be considered 'abandoned' under the revised rules, if they are delivered within two (2) seconds of the person's completed greeting").

⁶ *See Notice*, at 67289.

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access to avenues to make do-not-call requests – that are separate, and treated separately in the FCC rules. Rather than lumping all of these concepts into one call abandonment rule, and creating a rule that still is in conflict with the FCC, the FTC should adopt rules that track the FCC rules. Specifically, it should:

- **Clarify that when prerecorded messages begin within two seconds, the call is not abandoned.** As VMBC pointed out, the concerns the FTC was attempting to address with the call abandonment rule simply do not apply to calls that consist of entirely prerecorded messages. VMBC Letter, at 6. As the FTC itself explains, “[c]all abandonment” results when companies use “‘predictive dialers’ – telemarketing equipment that increases telemarketers’ productivity by calling multiple consumers for every available sales representative.” *Notice*, at 67287. While such equipment minimizes the time representatives spend waiting to reach prospective customers, it will also result in the dialer reaching more consumers than can be connected to available sales representatives. “In those situations, the dialer will either disconnect the call (resulting in a ‘hang-up’ call) or keep the consumer connected with no one on the other end of the line in case a sales representative becomes available (resulting in ‘dead air’). The call abandonment provision is designed to remedy these abusive practices.” *Id.*

In the case of prerecorded message calls, however, there is no similar danger of hang-up or dead air calls, because the caller does not have to wait to speak to a live representative. There also are no “abusive practices” for the Commission to guard against, because there are no technical or marketing reasons why the prerecorded messages would not start promptly after the caller answered the telephone.⁷ Because there is no reason to apply the call abandonment

⁷ See *Notice*, at 67288 (noting that the types of prerecorded message calls described in the VMBC letter would not be likely to raise the concerns that prompted the call abandonment provision).

provision to prerecorded message calls, the Commission could simply clarify that such calls do not fall within the call abandonment provisions of the rule. Alternatively, it could clarify that, if the message starts within two seconds, the call is not abandoned. Such a clarification would make the FTC rules consistent with the FCC call abandonment provisions, in accordance with Congressional intent.

- **Clarify that parties can initiate prerecorded message calls to those with whom they have an “established business relationship,” without the prior consent of the called party.** Currently, the FTC proposes to roll the “established business relationship” exemption into the call abandonment safe harbor. *See Notice*, at 67289. However, as explained above, there normally is no question of “call abandonment” regarding prerecorded message calls. *All* prerecorded message calls should be exempted from the call abandonment requirement, or found compliant if the message starts within two seconds. If the FTC nevertheless believes that, in order to avoid abusive telemarketing practices, there is a separate policy reason why it must nonetheless limit the entities that can make prerecorded telemarketing calls, it should provide such a limitation in a separate provision of the rules. Again, to “maximize consistency” and avoid creating situations where parties governed by FTC rules cannot undertake activities that are lawfully participated in by those governed by the FCC, any new rules should track the FCC provisions as closely as possible. Specifically, like the FCC, the FTC should allow those with an existing business relationship with the customer, as well as nonprofit entities, to conduct telemarketing via prerecorded messages. *See* 47 C.F.R. § 64.1200(a)(2). Because the FTC rules only apply to “abusive telemarketing acts or practices,” 16 C.F.R. § 310.4, prerecorded message calls made for purposes other than telemarketing – such as calls made for emergencies, non-commercial, or non-solicitation purposes – should be outside the scope of the rule, and not

regulated. *See* 47 C.F.R. § 64.1200(a)(2) (FCC rule specifically exempting such calls from limitations on prerecorded messages).

- **Tailor any requirements regarding do-not-call requests to track the FCC rules.** Finally, the *Notice* contemplates that, under the FTC's rules, consumers would be given the ability to "immediately assert" a do-not-call request in a prerecorded message call – for example, by pressing a button during the message in order to speak to a live representative or automated system to make a do-not-call request. *Notice*, at 67289. Again, if the FTC believes it is necessary to adopt regulations regarding customer notification of do-not-call rights in prerecorded messages, any such rule should (a) be separate from a call abandonment provision, and (b) track the FCC rules as closely as possible. As the FTC notes, the FCC rules specify particular content that must be contained in prerecorded messages, including the requirement to "state clearly the telephone number" the customer can use for making do-not-call requests. 47 C.F.R. § 64.1200(b)(2). In order to maximize consistency with the FCC rules, the FTC provisions should parallel the FCC requirements. In particular, the FCC rules require that "during or after the message" the telemarketer give the telephone number where a do-not-call request can be made, rather than (as the FTC proposes) placing a do-not-call request option "at the outset" of the call. *Compare id.* with 69 Fed. Reg. at 67290. Because the FCC rules require other information to be placed "[a]t the beginning of the message," the proposed FTC requirement appears to conflict with the FCC rule.⁸

⁸ *See* 47 C.F.R. § 64.1200(b)(1) (requiring that all prerecorded message calls shall "[a]t the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated. . .").

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In addition, while the FCC rule requires that the customer be given a telephone number for making an opt-out request, the FTC instead proposes an “interactive feature (pressing a button during the message to connect to a sales representative or an automated system to make a Do Not Call request)” as theoretically being “ideal.” *Notice*, at 67289. However, it is not clear that a customer would prefer such a method. He may wish to have a do-not-call request number he can use immediately; however, he may wish to exercise any do-not-call option later, when it is more convenient to do so, or after he has had an opportunity to consult with others in his household about their preferences regarding the receipt of additional telephone solicitations. A requirement for an interactive feature does not expand those options. To the extent a company would include *both* an interactive feature and a do-not-call request number in order to give the customer a choice and satisfy an FTC rule, the end result would be to make the solicitation call longer, which is inconvenient for those customers who do wish to hear the message. Moreover, to the extent the FCC has adopted rules that already have been in place and are familiar to customers, there is no reason (and Congress specifically did not intend) for there to be different regulations in place depending on whether telemarketers are under the jurisdiction of the FTC or FCC.

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For these reasons, Verizon urges the FTC to exempt prerecorded message calls from the call abandonment provisions of its rules, or clarify that the call is not abandoned if the message starts within two seconds. Any new FTC rules should track the Federal Communications Commission rules regarding the regulation of such messages.

Sincerely, 

Ann H. Rakestraw

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

**Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.**