BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

In the Matter of:	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991.	)	CG Docket No. **02-278**; DA 05-1348
	)	
	)	

COMMENTS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION

Pursuant to the Federal Communications Commission's ("FCC") procedural schedule established in the above docket, the Michigan Public Service Commission ("MPSC") hereby submits its comments.

I. SUMMARY.

- The MPSC supports Mr. Boling's proposed distinction between the *initiation* and the *dissemination* of a telemarketing call, and agrees with his conclusion that the Telephone Consumer Protection Act ("TCPA"), 47 USC 227 *et seq* would not, under that interpretation, conflict with a state regulation concerning unsolicited prerecorded messages received in a state through interstate calls.
- The TCPA does not conflict with state requirements.
- Congress intended the TCPA to supplement state laws.
- States retain regulatory power to protect the health and safety of its citizen consumers from predatory, annoying and fraudulent actions by telemarketers.
- As long as state laws do not discriminate against out-of-state entities, the states can prescribe more restrictive state laws.

- Due to new communications technologies, the dissemination or reception of calls, rather than origin, will become the primary focus of enforcement of telemarketing laws.
- State and federal agencies should work cooperatively to protect consumers from predatory, annoying and fraudulent actions by telemarketers.

II. INTRODUCTION.

On May 13, 2005, the FCC requested comments regarding Mark Boling's Petition for Declaratory Ruling on Preemption of California Telemarketing Rules.[1]

Mark Boling filed a petition on August 11, 2003, with the Federal Communications Commission ("FCC") "on behalf of California Consumers and California businesses which compete with those business entities that allegedly utilize unlawful business practices" (Petition, p 1) requesting a declaratory ruling that the Telephone Consumer Protection Act ("TCPA"), 47 USC 227 *et seq* does not preempt the California Consumer Legal Remedies Act ("CLRA") California Civil Code, §§ 1750 *et seq*.

The Petition alleges that various telemarketers had asserted that specific provisions of the CLRA regarding unsolicited prerecorded messages placed through interstate calls are preempted by the TCPA. In his Petition for Declaratory Ruling, Mr. Boling relied upon the FCC's Report and Order, adopted June 26, 2003 and released July 3, 2003,[2] and argued that the TCPA, Section

[1] Petition for Declaratory Ruling, CG Docket No. 02-278; DA 05-1348.

[2] The Commission's Report and Order revised the then-current TCPA rules and adopted new rules concerning unwanted telephone solicitations. Specifically, the order established, with the Federal Trade Commission, a national do-not-call registry.

227(e)(1)[3], limited "the Commission's ability to preempt any state law that prohibits certain telemarketing activities, including the making of telephone solicitations. *This provision is ambiguous, however, as to whether this prohibition applies both to intrastate and interstate calls, and is silent on the issue of whether state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted*." (Petition, p 3.) [Mr. Boling's original emphasis]. In addition, Mr. Boling relied upon that part of the FCC's Report and Order that affirmed that the Commission would "consider any alleged conflicts between state and federal requirements and the need for preemption on a case by case basis." (Petition, p 4.)

In its Report and Order, the Commission noted:

> 82. Second, pursuant to section 227(e)(1), we recognize that states may adopt more restrictive do-not-call laws governing intrastate telemarketing. With limited exceptions, the TCPA specifically prohibits the preemption of any state law that imposes more restrictive intrastate requirements or regulations. Section 227(e)(1) further limits the Commission's ability to preempt any state law that prohibits certain telemarketing activities, including the making of telephone solicitations. This provision is ambiguous, however, as to whether this prohibition applies both to intrastate and interstate calls, and is silent on the issue of whether state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted. As set forth below, however, we caution that more restrictive state efforts to regulate interstate calling would almost certainly conflict with our rules.

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[3] This section reads in part:

(e) Effect on State law

(1) State law not preempted - Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

> 83. We recognize that states traditionally have had jurisdiction over only intrastate calls, while the Commission has had jurisdiction over interstate calls. Here, Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. Congress did so based upon the concern that states lack jurisdiction over interstate calls. Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.
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> 84. We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted. We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission. We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules. [Footnotes omitted.]

Mr. Boling's petition examined segments of the FCC's Report and Order, the TCPA and the CLRA and addressed the issue of "conflict preemption". (Petition, p 2.) Mr. Boling argued in his petition:

> [T]he CLRA controls the DISSEMINATION of a prerecorded message and does NOT control the telephone call containing that message. The TCPA controls the CALL, and not the dissemination of the message. Therefore, when the defendant initiates the unlawful call it violates TCPA and when the unlawful message is received in California it violates the CLRA. Under the CLRA, **the interstate nature of the sending call is irrelevant**. The fact that the dissemination (reception) of the unlawful activity is made in California is relevant to the violation of the CLRA. [Petition, p 6; emphasis in original.]

Mr. Boling argued that because the laws do not conflict with each other regarding the technical and procedural requirements for identification of senders of telephone facsimile messages or autodialed artificial or prerecorded voice messages, the TCPA does not preempt the CLRA.

Finally, Mr. Boling concluded that the "purpose and aims of the CLRA is consistent with the TCPA to deter the nuisance and invasion of privacy caused by the unsolicited prerecorded messages". (Petition, p 7.)

III. DISCUSSION.

The purpose underlying the TCPA is clear. In *International Science & Technology Institute, Inc v Inacom Communications, Inc,* 106 F3d 1146, 1150 (CA 4, 1997), the Court observed:

> In 1991, Congress amended the Communications Act of 1934, 47 U.S.C. § 201 *et seq*., with the enactment of the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). The TCPA was enacted to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. Rep. No. 102-178, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968.

The construction advanced by Petitioner Boling advances the purpose underlying the TCPA.

The MPSC supports Mr. Boling's proposed distinction between the *initiation* and the *dissemination* of a telemarketing call, and agrees with his conclusion that the TCPA would not, under that interpretation, conflict with a state regulation concerning unsolicited prerecorded messages received in a state through interstate calls. MPSC believes Congress did not intend to supplant state laws and that states retain, for health and safety reasons,[4] the police powers of the state.

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[4] The need for a state to protect its citizens from abusive unsolicited pre-recorded calls is illustrated in *National Federation of the Blind, et al v FTC,* 303 F Supp 2d 707, 716 (DC Md, 2004):

> Plaintiffs claim that the call abandonment provisions actually amount to a regulation of predictive dialers, and that the FTC has no authority to regulate these dialers because the authority to do so was given by Congress to the FCC.

The U.S. Supreme Court, in *New York Blue Cross v Travelers Ins*, 514 US 645, 654-655 (1995), summarized the scope of federal preemption analysis as follows:

> [T]he Supremacy Clause, U.S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. . . . And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. . . . Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [Citations omitted.]

Thus, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm*, 476 US 355, 369 (1986). Furthermore, as the Court noted in *Cipollone v Ligget Group, Inc*, 505 US 504, 517 (1992), "[c]ongress' enactment of a provision defining the preemptive reach implies that matters beyond that reach are not pre-empted."

State regulatory power will not be deemed preempted by federal regulation unless Congress has "unmistakably so ordained." *Florida Lime and Avocado Growers v Paul*, 373 US 132, 142 (1963). An expressed intent to nullify a state regulatory program will not be lightly inferred. *Cf. Pacific Gas & Electric Co v California Energy Resources Conservation and*

> For support, they point to the TCPA, which restricts the use of telephone equipment and refers specifically to predictive dialers. 47 U.S.C. § 227(a)(1). However, Plaintiffs ignore the fact that while the FCC may have authority to regulate predictive dialers, the FTC was given authority in the Telemarketing Act to regulate abusive telemarketing practices. The FTC found in its notice and comment period that **abandoned calls are "one of the most invasive practices of the telemarketing industry," because they frighten consumers**, invade their privacy, and waste their time. 68 Fed. Reg. at 4642 n.723. Although the FTC cannot regulate the dialers themselves, the Telemarketing Act does not restrict its authority to regulate abusive practices that may involve the use of dialers. [Emphasis added.]

Development Comm, 461 US 190 (1983). This is particularly so where, as here, the police power of the state is implicated. In *City of Columbus, et al v Ours Garage and Wrecker Service, Inc*, 536 US 424, 444 (2002), the U.S. Supreme Court observed:

> Preemption analysis "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (internal quotation marks and citation omitted). Section 14501(c)(2)(A) seeks to save from preemption state power "in a field which the States have traditionally occupied." *Ibid*. (internal quotation marks and citation omitted).

It is clear that the TCPA was intended to supplement state regulation and not prohibit more restrictive state laws. Nor do more restrictive state laws preempt the TCPA. In *Texas v American Blast Fax, Inc,* 121 F Supp 2d 1085 (WD Tex, 2000), the Court noted:

> Section 227 is the TCPA. By specifically exempting the TCPA from the Communications Act's general ban on intrastate regulation, Congress necessarily intended the TCPA to cover both interstate and intrastate communications. See *Hooters of Augusta, Inc. v. Nicholson,* 245 Ga. App. 363, 366, 537 S.E.2d 468, 2000 WL 973601, at *3 (Ga. App. 2000) ("Congress expressed its intent to regulate both interstate and intrastate communications under the TCPA by amending 47 USC § 152(b) to specifically except the TCPA from the 'interstate' limitation of 47 U.S.C. § 152(a).").[2]

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[2]Blastfax also argues the legislative history of the TCPA indicates the statute was intended to cover only interstate taxes. However, the excerpts cited by Blastfax simply show the TCPA was meant to supplement state law. …

The Court then went on to hold:

> While the TCPA does provide that more restrictive state laws are not preempted by the TCPA, see 47 U.S.C. § 227(e), it does not follow that, should a state pass more restrictive laws regarding junk faxes, the TCPA is then preempted in that state. The TCPA contains no "reverse preemption" clause for its ban on unsolicited fax advertisements.

It is also clear that the TCPA was not intended to preempt state regulation where state laws do not discriminate against out-of-state entities. In *Gottlieb v Carnival Corp,* 367 F Supp 2d 301, 310-311 (ED NY, 2005), the Court observed:

> Section 227(e)(1) states that the Act does not preempt "any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits (A) the use of telephone facsimile machines or other electronic devises to send unsolicited advertisements...." (emphasis added). Moreover, the legislative history of the TCPA indicates that Congress acted pursuant to the Commerce Clause to prohibit interstate communications where the states could not because they lack jurisdiction. See U.S. Const. Art. I, § 8, cl. 3.[10] Congress found that "over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices." § 227, Congressional Statement of Findings (7). See also *Van Bergen v. Minn.*, 59 F.3d 1541, 1548 (8th Cir. 1995) (congressional finding (7) "suggests that the TCPA was intended ... to provide interstitial law preventing evasion of state law by calling across state lines"). Courts recognize that Congress enacted the TCPA to supplement similar state legislation to protect the privacy interests of residential phone subscribers against unwanted interstate phone and facsimile solicitations "because states do not have jurisdiction over interstate calls." *Foxhall*, 156 F.3d at 437 (citing S. Rep. No. 178, 102nd Cong., 1st Sess. 1, 1 (1991), U.S. Code Cong. & Admin. News at 1968, 1968); see also *ErieNet*, 156 F.3d at 515 ("state regulation of telemarketing activity was ineffective because it could be avoided by interstate operations"); *Int'l Science*, 106 F.3d at 1154; *Schulman*, 268 A.D.2d at 175 (states do not have jurisdiction over interstate calls alleged to violate the TCPA); *Giovanniello v. Hispanic Media Group USA, Inc.*, 4 Misc. 3d 440, 780 N.Y.S.2d 720, 721 (N.Y. Sup. Ct. 2004) (citing congressional record statement that the TCPA "facilitate[s] interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers").[11]

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[10]While plaintiff acknowledges that the legislative history of the TCPA reveals Congress's belief that states did not have jurisdiction over interstate faxes or phone calls, he characterizes this belief as "unsubstantiated." Pl. Opp. at 9. Yet he invokes Commerce Clause jurisprudence holding that states may enact laws affecting interstate commerce only where the laws do not discriminate against out-of-state entities. *Id.* This contention is unpersuasive because instead of providing support for the conclusion that § 396-aa applies to both interstate and intrastate communications, it merely argues that the law would be permissible if it did apply to both interstate and intrastate communications.

[11]In *Texas v. Am. Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1087 (W.D. Tex. 2000), the court considered whether the TCPA applies to both interstate and intrastate faxes. It concluded that the Act does apply to intrastate faxes. "Congress has

> authority to regulate intrastate faxes ... because telephones and telephone lines-even when used solely for intrastate purposes-are part of an aggregate interstate system and therefore are inherent instrumentalities of interstate commerce." *Id.* In so holding, the court recognized that "the TCPA was meant to supplement state law." *Id*. at 1088 n.2.

The courts have rejected assertions that the TCPA preempts state regulation in the area. In *Van Bergen v Minnesota,* 59 F3d 1541, 1548 (CA 8, 1995), the Court held:

> Federal law can preempt state law without an express statement by Congress when the federal statute implies an intention to preempt state law or when state law directly conflicts with federal law. See *New York Conference of Blue Cross v. Travelers Ins*., 131 L. Ed. 2d 695, 115 S. Ct. 1671, 1676 (1995); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983). The TCPA carries no implication that Congress intended to preempt state law; the statute includes a preemption provision expressly not preempting certain state laws. If Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision. Further, the preemption provision makes it clear that Congress did not intend to "occupy the field" of ADAD regulation, see *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963), or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulation of intrastate ADAD calls that differs from federal regulation. The congressional findings appended to the TCPA state that "over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices." 47 U.S.C. § 227, Congressional Statement of Findings (7). This finding suggests that the TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines.

With the rising use of internet protocol and wireless technologies for telephone-like services, the distinction between the origin of interstate and intrastate calls will become increasingly blurred. In time, it may be impossible to determine the exact origin of such calls. The MPSC submits that the *dissemination,* or reception, of recorded or live voice, rather than its origin, will necessarily become a primary focus for state enforcement of telemarketing laws.

Because both state and federal governments share the goal of deterring "the nuisance and invasion of privacy caused by the unsolicited prerecorded messages", other telemarketing annoyances, and harassing and threatening calls, state governments should be permitted to enforce state laws that best accomplish this shared purpose. Whenever a business telemarkets a customer or leaves a telephone message with a customer, it is conducting business *within the state*. The MPSC maintains that individual states should be permitted to regulate the *dissemination of messages* within its boundaries.[5] As reflected above, state telemarketing laws that are more restrictive than the federal telemarketing laws are not necessarily preempted by the federal act.

IV. CONCLUSION.

In conclusion, the MPSC supports Mr. Boling's proposed distinction between the *initiation* and *dissemination* of a telemarketing call, and agrees with his conclusion that the purposes underlying the TCPA and state statutes do not conflict with regard to the prohibition of unsolicited prerecorded messages placed through interstate calls.

With the emergence of new telecommunications technologies, regulators should focus on the place of dissemination of the offending activity as opposed to the place of origin of such telemarketing calls.

The MPSC believes that a state should have a right to determine how companies conduct business within the state and when companies disseminate telemarketing calls or messages within a state's boundaries, they should be susceptible to state law. In cases where both state and federal law have been violated, consumers should be afforded the protections of both state and

[5] See: NAAG Comments at 12.

federal law, and federal law should supplement not preempt state law to better protect consumers from predatory, annoying and fraudulent actions.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

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