



PUBLIC NOTICE

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CONSUMER & GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON PETITION FOR DECLARATORY RULING RELATING TO COMMISSION'S JURISDICTION OVER INTERSTATE TELEMARKETING

CG Docket No. 02-278

Comments Due: 30 Days After Publication in the Federal Register
Reply Comments Due: 50 Days After Publication in the Federal Register

On April 29, 2005, a coalition of 33 organizations, including trade associations, individual companies, and non-profit entities engaged in interstate telemarketing activities ("Joint Petitioners"), filed with the Commission a joint petition for declaratory ruling.¹ The Joint Petition raises issues concerning the scope of the Commission's jurisdiction over interstate telemarketing calls under the Telephone Consumer Protection Act ("TCPA").² In particular, Joint Petitioners ask the Commission to issue a ruling declaring the Commission's exclusive regulatory jurisdiction over interstate telemarketing calls and barring state regulation of such calls.³ In this Public Notice, we seek comment on the issues raised in the Joint Petition.⁴

Joint Petitioners assert that, in the TCPA, Congress sought to "establish uniform national standards that balance the concerns of consumers with the legitimate interests of telemarketers."⁵

¹ See Alliance Contact Services, *et al.* Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing, filed April 29, 2005 ("Joint Petition").

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

³ Joint Petition at i. Joint Petitioners assert that their proposed approach would not interfere with states' authority to enforce any state statute of general applicability against interstate telemarketers. Joint Petition at ii.

⁴ We note that the Consumer & Governmental Affairs Bureau is releasing contemporaneously with this Public Notice two additional public notices seeking public comment on earlier-filed petitions for declaratory ruling that raise preemption-related issues. See *Consumer & Governmental Affairs Bureau Reopens Public Comment Period for Petitions for Declaratory Ruling Relating to Preemption of State Telemarketing Laws*, Public Notice, CG Docket No. 02-278, DA 05-1347 (rel. May 13, 2005) (reopening comment cycles relating to six petitions for declaratory ruling in which petitioners seek Commission preemption of state telemarketing laws); *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling on Preemption of California Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 05-1348 (rel. May 13, 2005) (seeking comment on petition for declaratory ruling in which petitioner asks Commission *not* to preempt particular provisions of California's telemarketing laws).

⁵ Joint Petition at 7.

According to Joint Petitioners, states have adopted and proposed “divergent rules applicable to interstate telemarketing that undermine the desired uniform federal regulatory regime.”⁶ Citing dozens of existing and proposed state laws that differ from the Commission’s TCPA rules and that do not distinguish between intrastate and interstate telemarketing calls, Joint Petitioners contend that these state regulations place “undue and at times impossible compliance burdens on interstate telemarketers, and lead[] state courts in enforcement actions to...impose substantial fines on telemarketers for interstate calls expressly permitted by the federal rules.”⁷

To resolve this situation, Joint Petitioners ask the Commission to “revisit” determinations that it made in its *TCPA Order* concerning “the interplay between federal and state authority” over interstate telemarketing activities and “clarify that the FCC has exclusive authority over interstate telemarketing.”⁸ Joint Petitioners contend that the Commission’s conflict preemption approach to resolving alleged conflicts between state and federal telemarketing laws is “unsound” because, in their view, states have no authority to regulate interstate telemarketing.⁹ Joint Petitioners state that the Commission’s regulatory authority under the TCPA must be understood against the backdrop of pre-existing federal law governing the regulation of interstate communications. Specifically, they assert that Congress: (1) provided the Commission with exclusive jurisdiction over interstate communications in section 2(a) of the Communications Act; (2) expanded the Commission’s authority over intrastate telemarketing calls in the TCPA amendments to section 2(b) of the Act; and thus (3) made clear that it considered telemarketing to be “communication” covered by section 2 of the Act.¹⁰ Joint Petitioners also take issue with the Commission’s statement in the *TCPA Order* that section 227(e)(1) of the Act is “ambiguous” as to whether states may regulate interstate telemarketing calls, asserting that that section instead reflects Congress’s desire to “(a) expand[] federal power over intrastate calls, (b) restrict[], but ...not eliminate, state authority over such calls, and (c) ... not grant to the states any authority over interstate calls.”¹¹

Based on the view that Congress intended the Commission to have exclusive jurisdiction over interstate telemarketing calls, Joint Petitioners contend that the Commission cannot lawfully delegate that jurisdiction to the states.¹² Joint Petitioners assert that “acknowledging the Commission’s exclusive jurisdiction over interstate telemarketing” would not deprive states of their ability to protect their residents from unwanted interstate telephone solicitations.¹³ Joint Petitioners note that the TCPA both allows state attorneys general to enforce federal telemarketing rules in federal court and “preserves the right of state attorneys general to proceed in state court against telemarketers ‘on the basis of an alleged violation of any general civil or criminal statute of such State.’”¹⁴ Thus, Joint Petitioners contend, the

⁶ Joint Petition at 8. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CC Docket No. 02-278, FCC 03-153, 18 FCC Rcd 14014 (2003) (“*TCPA Order*”).

⁷ Joint Petition at i, 9-22.

⁸ Joint Petition at ii.

⁹ Joint Petition at 6.

¹⁰ Joint Petition at 33-36.

¹¹ Joint Petition at 35 (emphases omitted)

¹² Joint Petition at 33.

¹³ Joint Petition at ii, 40.

¹⁴ Joint Petition at 40, *citing* 47 U.S.C. § 227(f)(1),(2) & (6).

TCPA does not interfere with state police powers or long-arm statutes, which are used to protect consumers generally against fraud.¹⁵

If the Commission determines that the Communications Act, as amended by the TCPA, does not already bar states from regulating interstate telemarketing, Joint Petitioners argue, in the alternative, that the Commission should exercise its own authority to “categorically preempt” state regulation of interstate telemarketing calls.¹⁶ Joint Petitioners urge the Commission to categorically preempt all state regulation of interstate telemarketing on the basis that such regulation is “inconsistent with the sound, pro-competitive policy of prohibiting multiple, inconsistent regulation.”¹⁷

Pursuant to Sections 1.415 and 1.419 or the Commission’s rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments in this proceeding on or before the 30th day after publication of this Public Notice in the Federal Register, and reply comments may be filed on or before the 50th day after publication of this Public Notice in the Federal Register. When filing comments, please reference CG Docket No. 02-278. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, “get form <your e-mail address>.” A sample form and directions will be sent in reply.

Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission’s contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission’s Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission’s Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Room TW-B204, Washington, DC 20554.

This proceeding shall be treated as a “permit but disclose” proceeding in accordance with the Commission’s *ex parte* rules, 47 C.F.R. § 1.1200. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 C.F.R. § 1.1206(b). Other

¹⁵ Joint Petition at 40.

¹⁶ Joint Petition at 42.

¹⁷ Joint Petition at 42-44, *citing City of New York v. FCC*, 486 U.S. 57, 64 (1988), and *Vonage Holdings Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).

rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, DC 20554, (202) 418-0270. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their web site: www.bcpweb.com or by calling 1-800-378-3160.

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FOR FURTHER INFORMATION CONTACT: Kelli Farmer, Consumer & Governmental Affairs Bureau, Federal Communications Commission, 202-418-2512 (voice), Kelli.Farmer@fcc.gov.

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