



PUBLIC NOTICE

Federal Communications Commission
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DA 05-1348

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CONSUMER & GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON PETITION FOR DECLARATORY RULING ON PREEMPTION OF CALIFORNIA TELEMARKETING RULES

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 August 11, 2003, Mark Boling filed a petition for declaratory ruling “individually and on behalf of California consumers and California businesses” asking the Federal Communications Commission (“Commission”) to declare that particular provisions of the California Consumer Legal Remedies Act (“CLRA”), as applied to interstate telephone calls, are not preempted by the Telephone Consumer Protection Act (“TCPA”).¹ In this Public Notice, we seek comment on the issues raised in the *Petition*.²

Mr. Boling states that he has acted as a party, representative party, or legal representative in numerous California lawsuits in which defendants have asserted as a defense that particular provisions of the CLRA are preempted by the TCPA. Mr. Boling indicates that the CLRA, as set forth in California Civil Code § 1770(a), contains a list of unlawful practices. He notes that California Civil Code § 1770(a)(22)(A), in particular, makes unlawful the “disseminat[ion] [of] an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the

¹ See *Petition for Declaratory Ruling*, CG Docket No. 02-278, filed August 11, 2003 (*Petition*). Mr. Boling cites California Civil Code §§ 1750 *et seq.*

² We note that the Consumer & Governmental Affairs Bureau is releasing contemporaneously with this Public Notice two additional public notices seeking public comment on separate 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 Relating to Commission’s Jurisdiction Over Interstate Telemarketing*, Public Notice, CG Docket No. 02-278, DA 05-1346 (rel. May 13, 2005) (seeking comment on joint petition filed by 33 organizations engaged in interstate telemarketing activities in which petitioners ask Commission to declare its exclusive regulatory jurisdiction over interstate telemarketing).

telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.”³

Mr. Boling further notes that section 227(b)(1)(B) of the Communications Act, as amended by the TCPA, makes it unlawful for any person “to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).”⁴ Asserting that this provision of federal law poses no conflict with the relevant provisions of the CLRA, Mr. Boling explains that:

In this instance, the CLRA controls 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 [a party] initiates the unlawful call it violates [the] TCPA and when the unlawful message is received in California it violates the CLRA.⁵

As such, Mr. Boling asserts that “[n]o conflict exists in the enforcement of the TCPA or the CLRA as it relates to the activities set forth in this action, as the actionable conduct in each law is separately defined.”⁶ Finally, Mr. Boling asserts that, because the practices at issue in the *Petition* do not pertain to technical and procedural requirements for identification of senders of telephone facsimile messages or autodialed artificial or prerecorded voice messages, as described in section 227(d) of the TCPA, they are not subject to federal preemption provisions contained in section 227(e) of the TCPA.⁷ Accordingly, Mr. Boling asks the Commission to issue a declaratory ruling that the identified provisions of the California Civil Code, as applied to interstate calling, are not preempted by the TCPA.⁸

Pursuant to sections 1.415 and 1.419 of 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.

³ See *Petition* at 5 (citing Calif. Civil Code § 1770(a)(22)(A)).

⁴ See *Petition* at 5-6 (citing 47 U.S.C. § 227(b)(1)(B)).

⁵ See *Petition* at 6 (emphasis from original text omitted).

⁶ See *Petition* at 6.

⁷ See *Petition* at 7.

⁸ See *Petition* at 7.

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 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.bcpiweb.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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