

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

In the Matter of:)	
)	
CONSUMER BANKERS ASSOCIATION)	CG Docket No. 02-278
)	
Petition for Expedited Declaratory Ruling with)	
Respect to Certain Provisions of the Indiana)	
Revised Statutes and Indiana Administrative Code)	

**STATE OF INDIANA’S REPLY COMMENTS
IN SUPPORT OF ITS MOTION TO DISMISS AND IN OPPOSITION TO THE
CONSUMER BANKERS ASSOCIATION’S PETITION FOR DECLARATORY RULING**

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SUMMARY

Comments concerning the Consumer Bankers Association's Petition for Declaratory Ruling—thousands of which have been filed by individual consumers—have overwhelmingly opposed the petition and supported Indiana's right to enforce its own do-not-call law against interstate telemarketers. The few comments that support the CBA's petition merely reiterate the standard industry arguments that the Commission has jurisdiction over all telemarketing calls based on the FCA and the TCPA and that therefore Indiana's do-not-call law should be preempted by federal law. As Indiana has already set forth in its Comments in Opposition to the CBA's Petition, neither the FCA nor the TCPA authorize preemption of state do-not-call laws, nor should they. Thousands of Indiana residents have filed comments with the Commission testifying as to their satisfaction with Indiana's law and as to the harm that would follow if federal law preempts it. And two of the CBA's own members—Old National Bank and Union Federal Bank—have broken ranks with the CBA. Old National has filed comments opposing preemption and supporting the common-sense notion that states should be able to enact their own telephone privacy regulations. Union Federal has, effective today, February 17, 2005, *withdrawn its membership* in the CBA as a consequence of the CBA's petition. (See Exhibit A) The Commission should heed the demands and warnings of these citizens and rule against preemption here.

In addition, in its Opposition to Motion to Dismiss Petition, the CBA argues that sovereign immunity is not a bar because this is not an adjudicative proceeding. But CBA ignores that the entire basis it has asserted for FCC jurisdiction is 5 U.S.C. § 554 of the Administrative Procedure Act, which explicitly governs only “adjudications.”

COMMENTS

I. States May Apply Consumer Protection Regulations To Interstate Telephone Harassment And The FCC Has No Power To Interfere

The relative handful of comments that support the CBA's petition presume that the FCA "unambiguously vests the Commission with exclusive jurisdiction over *all* interstate and foreign communications," including consumer protection regulations involving interstate telephone calls. *See* Am. Teleservices Ass'n Reply Comments at 7-8 (CG Docket No. 02-278) (filed with the FCC Dec. 2, 2004) (emphasis added) (as quoted in Comments of the Am. Teleservices Ass'n in Supp. of CBA Pet. for Expedited Decl. Ruling at 3). As Indiana illustrated in its opening comments, this assumption is baseless. *See* State of Ind.'s Comments in Opp'n to CBA's Pet. at 5 (CG Docket No. 02-278) (filed with the FCC Feb. 2, 2005) (hereinafter State of Ind. Comments). Specifically, the FCA itself and the cases that relate to FCA preemption deal solely with the regulation of interstate telephone facilities and services, and courts have specifically held that not all state law is preempted in the area of interstate telecommunications. *Id.* at 5-8. Furthermore, FCA preemption is appropriate only to prevent states from enacting laws that interfere with the FCA's goal of providing uniform, efficient telecommunications service, and Indiana's do-not-call program does not interfere with this goal.

Nor does the TCPA authorize preemption of state do-not-call laws. MBNA asserts that the TCPA grants *intrastate* jurisdiction to the Commission, but does not grant states *interstate* jurisdiction. MBNA America Bank Comments at 2-3 (CG Docket No. 02-278) (filed with the FCC Feb. 2, 2005) (hereinafter MBNA Comments). This observation is insignificant, however, because neither the FCA nor the TCPA prevents states from applying their consumer protection laws to interstate telephone calls. Unlike the FCC, which may act *only* as authorized by Congress, states have inherent police powers to enact consumer protection regulations that apply

even where injurious conduct crosses state lines. Furthermore, the TCPA expressly forecloses preemption of state laws that prohibit the making of telephone solicitations. 47 U.S.C. §227(e)(1)(D). *See* State of Ind. Comments at 14-15; *see also* NARUC Comments at 4 (CG Docket No.02-278) (filed with the FCC Feb. 11, 2005) (agreeing that 47 U.S.C. § 227(e)(1)(D) forecloses preemption).

The CBA's supporters also emphasize that the Commission warned in its 2003 Report and Order of preemption for "any state regulation of interstate telemarketing calls that differs from our rules" MBNA Comments at 3 (quoting Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C. Rcd. 14014 ¶ 83 (2003) (hereinafter Report and Order)); MCI, Inc. Comments at 3 (CG Docket No. 02-278) (filed with the FCC Feb. 2, 2005). Again, however, these statements in the Report and Order are based on a misunderstanding that states do not have jurisdiction over interstate calls, an erroneous assumption that should not inform future appraisals of the states' do-not-call laws. State of Ind. Comments at 11-12. Furthermore, the Commission's Report and Order equally acknowledged that Section 227(e)(1) of the TCPA can be read to disclaim preemption of any state laws prohibiting telephone solicitations. Report and Order at ¶ 82; State of Ind. Comments at 15-17.

As if to reinforce Indiana's point that do-not-call laws are about consumer protection and not telephone service, MBNA argues that the Commission should apply the approach it used in *In re Operator Services Providers of America*, 6 F.C.C. Rcd. 4475, Memorandum Opinion and Order (1991), where the Commission recognized that federal law prohibits differing state requirements applicable to interstate operator services. MBNA Comments at 3. Once again, however, that issue had to do with providing telephone *services* (of the type now covered not by the TCPA but by the Federal Telecommunications Act of 1996), not with protecting consumers

from fraudulent or harassing telephone calls. The FCA/FTA '96 line of FCC authority simply does not touch state authority to regulate telemarketing across state lines, and the FCC has no authority to preempt any such state regulations.

II. Preemption Would Be Bad Policy

Even if the Commission does have the power to preempt Indiana's law, it should not do so. As over 4,000 comments from Hoosiers demonstrate, Indiana citizens are very fond of their law just the way it is and have grown highly accustomed to its protections. They oppose imposition of an existing business relationship exemption of any type, so requiring Indiana to follow the federal model and permit calls to existing customers would destroy the residential peace that Indiana citizens have come to enjoy and would thereby contravene the overall goal of the FCC's do-not-call scheme.

Industry comments argue that the EBR exemption is a necessary and useful tool for consumers as well as businesses, asserting that without an EBR exemption consumers' wishes may be frustrated because they may miss crucial information from their long-distance carriers concerning cost-savings plans (such as bundled services). MCI, Inc. Comments at 4. *See also* Verizon Comments at 2 (CG Docket No. 02-278) (filed with the FCC Feb. 2, 2005). First, any marketing barriers that do-not-call laws impose apply equally to those without an existing relationship with registered telephone subscribers as to those with such a relationship. Neither MCI nor Verizon nor anyone else has provided a justification as to why businesses with an existing relationship have a better claim for pitching cost-savings plans—or for trying to “winback” customers—than anyone else.

Second, and more fundamentally, as consumers have commented in this matter, just because a consumer has bought a business's product in the past, that does not mean the consumer

wants to hear from that business again by telephone. In fact, by registering for the telephone privacy list, such consumers have expressly indicated just the opposite. One consumer stated this sentiment as follows:

I have my telephone for my own primary control and discretion. I do not want to be called by anyone, even if a business I typically use, unless I have given express permission for that phone call to occur. My view is that if I want to contact that company/agency, I will initiate that contact. If those companies want to start paying half my phone bill so that [they] can maintain half the control, then we'll talk.

Annie Sebring Comment (filed with the FCC Jan. 25, 2005). Those who would make calls to prior customers such as Ms. Sebring who have registered for the do-not-call list just do not understand the meaning of “no.”

Other consumers' comments have explained that there are other means for businesses with an established relationship to contact their customers. Specifically, “the organization can readily solicit the consumer directly through mail pieces, customer contacts and in-store displays. It is illusory to say that a business suffers by not interrupting the peace and quiet of their customers' home.” Steve Carpenter Comment (filed with the FCC Jan. 26, 2005). Furthermore, “[do] they really think they can sell something to someone they have angered by calling?” Neil Greer Comment (filed with the FCC Jan. 26, 2005).

Perhaps even more noteworthy, those who had lived in other states before moving to Indiana expressed appreciation for the strength of Indiana's law. “I lived in New York and their law allowed carpet cleaners, banks, service providers of all types, to continue to phone us, despite our no-telemarketing-call registration, which was extremely frustrating!” Theresa Freeman Comment (filed with the FCC Jan. 26, 2005). In addition, numerous citizens have used their comments to the Commission to tell personal stories of how their lives had become better and more peaceful and how any increase in the number of telemarketing calls they receive would

not be welcome. *See* Henry L. Smith Comment (filed with the FCC Jan. 25, 2005) (“I am a single parent as well as a student trying to make a better life for my family. The cost of time with my children and studies to answer unwanted phone calls, even from those that I already do business with, is too high.”); George J. Huntley Comment (filed with the FCC Jan. 27, 2005) (“The telephone privacy law has had the single largest positive effect on American home life in the past 30 years of any legislation.”); Scott Emerick Comment (filed with the FCC Jan. 27, 2005); *See also* Fred Goddard Comment (filed with the FCC Jan. 26, 2005); Melinda Doehrman Comment (filed with the FCC Jan. 28, 2005).

Furthermore, not even all CBA members support the CBA’s request for federally imposed changes to Indiana’s law. Old National Bank has disavowed the CBA’s petition and, in its comments opposing that petition, disclosed that, amazingly, “no official or employee of the CBA contacted Old National concerning the Petition in this matter prior to its filing.” Reply Comments of Old Nat’l Bank in Opp’n to the CBA Pet. at 1 (CG Docket No. 02-278) (filed with the FCC Feb. 15, 2005). Notwithstanding its membership in the CBA, Old National “believes in the underlying principles of the Indiana do-not-call law” and believes that the Indiana General Assembly, not the federal government, should remain in control of the contours of that law. *Id.* at 2. For its part, Union Federal Bank, now a *former* member of the CBA, has gone so far as to withdraw from the CBA as a consequence of the CBA’s petition in this matter. (See Exhibit A) These actions of Indiana banks are powerful evidence of the importance of Indiana’s law to Hoosiers.

Finally, Verizon has suggested that preemption is necessary for the FCC’s do-not-call rule to withstand First Amendment scrutiny. Verizon Comments at 4-5. This is preposterous. The Tenth Circuit has already upheld the federal do-not-call program, and in doing so the court

mentioned nothing about the need for a single national law to make the federal program sufficiently narrowly tailored (nor did it mention the need for an EBR exemption in that regard). *See Mainstream Marketing Services, Inc. v. Federal Trade Commission*, 358 F.3d 1228, 1243-46 (10th Cir. 2004). Furthermore, laws must be scrutinized for First Amendment compliance on their own, not in connection with any matrix of other laws that may also exist. Here, with respect to the “narrow tailoring” inquiry, the overall national level of burden on telemarketers is irrelevant. All that the First Amendment requires is that the federal law (or, under independent analysis, the state law) not burden vastly more speech than necessary to achieve the law’s purpose. As discussed, *Mainstream Marketing* has already explained why the federal law is sound in this regard. *Id.* For its part, Indiana prohibits telemarketing sales calls to its citizens who prefer not to receive them regardless of the location of the caller or the caller’s relationship to the call recipient. Prohibiting each such call further achieves the state’s goal of protecting residential privacy, so there can be no plausible claim that the law burdens more speech than necessary. And as the comments of the State of Indiana and thousands of its citizens in this proceeding attest, Indiana has a very strong interest—and has achieved highly satisfactory results—in applying its own rules to interstate telemarketing calls. The Commission should therefore disregard this First Amendment red herring raised by Verizon.

* * * *

As the Indiana telephone privacy survey and the comments of thousands of Hoosiers attest, the Indiana do-not-call law works just as it should and has had a substantial positive impact on the lives of millions. *See* State of Ind. Comments at 1, 19-20, 24; OUCC Comments at 2-3 (CG Docket No. 02-278) (filed with the FCC Feb. 2, 2005) (outlining the success of Indiana’s do-not-call law and the sentiments of the general public). What other government

programs available to all citizens can boast such dramatic measurable success and overwhelming public support? It would be unfair and confusing to Indiana's citizens to interrupt their three-year stretch of residential privacy by allowing businesses they have patronized to call them notwithstanding their express preferences not to be called. The preemption that CBA requests would place upon consumers the burden to re-demand telephone privacy business-by-business, purchase-by-purchase, inquiry-by-inquiry—a curious and unjustifiable punishment for consumption, to say the least. The Commission should reject this request and honor the telephone privacy that Indiana citizens reasonably demand and have come to expect and enjoy.

III. The Petition Is Barred By Sovereign Immunity

The Commission need not reach any of the merits arguments because the petition is barred by sovereign immunity. CBA argues that *Tennessee v. United States Department of Transportation*, 326 F.3d 729 (6th Cir. 2002), in which an agency's consideration of a preemption request was found not to be an adjudication barred by the Eleventh Amendment, applies here. CBA's Opp'n to Mot. to Dismiss Pet. at 5. CBA fails to recognize, however, that the administrative procedure upheld by the Sixth Circuit in that case "fit[] within the informal rule-making process outlined in the Administrative Procedure Act." *Tennessee v. USDOT*, 326 F.3d at 734. That is, the court was specifically addressing a proceeding directly analogous to 5 U.S.C. § 553, which is the *rulemaking* section of the APA. In contrast, here the CBA has filed its petition pursuant to 5 U.S.C. § 554(e) (CBA Pet. at 1), the APA section expressly authorizing *adjudications*.

This distinction is critical. Under *Federal Maritime Commission*, administrative *adjudications* against states such as this one are subject to Eleventh Amendment objections because they are sufficiently similar to federal court litigation that there is no justification for

treating them any differently for Eleventh Amendment purposes. *Federal Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 757 (2002). Rulemaking proceedings, on the other hand, may not jeopardize state sovereignty interests in the same way. So, because the CBA has expressly brought an adjudicatory proceeding in this case, the Eleventh Amendment applies in a way that it did not in *Tennessee v. USDOT*. Furthermore, the CBA makes no attempt to justify this proceeding under *Ex Parte Young*, 209 U.S. 123 (1908). Accordingly, the Commission should follow *Federal Maritime Commission* and dismiss the CBA's petition as barred by the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the State of Indiana's Motion to Dismiss and Comments in Response to the Petition, the Commission should dismiss or deny the CBA's Petition For Declaratory Ruling and, if it reaches the merits of the petition at all, rule that the TCPA in no way preempts, and in no way authorizes the Commission to preempt, any enforcement of the Indiana Telephone Privacy Act. The Commission should expressly declare that its do-not-call rule and registry do not preempt any similar state laws or registries. In addition, various ongoing events may yield more information or materials relevant to this discussion. Indiana will supply any such additional information or materials to the Commission as it may arise in the form of an addendum to these comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **STATE OF INDIANA'S REPLY COMMENTS IN SUPPORT OF ITS MOTION TO DISMISS AND IN OPPOSITION TO THE CONSUMER BANKERS ASSOCIATION'S PETITION FOR DECLARATORY RULING** was filed electronically and served upon all counsel of record listed below, by United States Mail, first-class, postage prepaid, and email on the 17th day of February, 2005:

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Exhibit A



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February 17, 2005

By fax: 233-2162

Steve Carter
Attorney General
State of Indiana

Dear Steve:

I am writing to inform you that Union Federal Bank of Indianapolis has withdrawn membership from the Consumer Bankers Association effective immediately. Please discontinue inclusion of Union Federal Bank in your list of Consumer Bankers Association members effective immediately. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Kit Stolen", is written over a horizontal line.