Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

II. THE RECORD IN THIS DOCKET CLEARLY SHOWS THAT CURBING THE INTRUSION CAUSED BY TELEMARKETING AND CREATING AN EFFECTIVE NATIONAL DO-NOT-CALL REGISTRY IS IN THE PUBLIC INTEREST. 2

A. Telemarketers' Use of Predictive Dialers Should Be Further Restricted. 3

B. The Commission Should Tighten the Definition of "Established Business Relationship" and Reject Additional Exemptions to the Commission's Telemarketing Rules. 5

C. The Commission Should Prohibit Telemarketers from Blocking Caller ID. 8

III. THE RIGHT OF CONSUMERS TO AVOID THE INTRUSION OF TELEMARKETING CALLS IN THEIR LIVES OUTWEIGH ANY RIGHT TELEMARKETERS MAY HAVE TO CAUSE SUCH INTRUSION. 10

IV. THE COMMISSION SHOULD COORDINATE WITH THE FTC TO DEVELOP AN EFFECTIVE NATIONAL DO-NOT-CALL REGISTRY THAT WORKS IN CONCERT WITH STATE PROGRAMS THAT PROVIDE GREATER CONSUMER PROTECTION. 12

V. CONCLUSION 14

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I. INTRODUCTION AND SUMMARY

In this proceeding, the Federal Communications Commission ("FCC" or "Commission") has sought comments on several proposed changes to rules that govern the conduct of telemarketing companies toward residential and business consumers. The Commission's proposals have drawn response from more than SIX THOUSAND parties. All but approximately one hundred are members of the public ("public commenters") whose interest in this proceeding is to stop the intrusion of unwanted telemarketing calls into their lives. These public commenters have beseeched this Commission to place further curbs on the intrusive technology used by telemarketers and to help establish an effective national do-not-call registry that works in concert with, instead of preempting, the successful state do-not-call programs that already exist. Interestingly, these public commenters did not submit a form letter or other type of preprinted comments, as has been the case in other proceedings. The individual comments submitted by the public in this proceeding were clearly the thoughts of each person, related in his or her own words.

This clarion call for action from thousands of public commenters stands in stark contrast to the pecuniary interests represented by the commenting parties associated with the telemarketing industry. The public commenters' comments corroborate the views submitted by the National Association of State Utility Consumer Advocates ("NASUCA") and other public interest parties: that the Commission should restrict telemarketers' use of automated dialing systems, narrow the scope of the "established business relationship" exemption, prohibit telemarketers from blocking consumers' Caller ID and work with the Federal Trade Commission ("FTC") to develop an effective national do-not-call registry that complements state programs.

In these Reply Comments, NASUCA urges the Commission to pay heed to the clear message delivered by this overwhelming public response.[1] The Commission should adopt rules that support and strengthen the telemarketing rules recently issued by the FTC.[2]

II. THE RECORD IN THIS DOCKET CLEARLY SHOWS THAT CURBING THE INTRUSION CAUSED BY TELEMARKETING AND CREATING AN EFFECTIVE NATIONAL DO-NOT-CALL REGISTRY IS IN THE PUBLIC INTEREST.

This proceeding has attracted the interest of members of the public like few other proceedings have. More than six thousand public commenters have taken the time to let the Commission know about their own experiences with telemarketers and/or concerns about the Commission's proposed changes to its telemarketing rules. The public commenters' submissions have ranged from one or two sentences to multi-page, detailed commentaries on the practices of the telemarketing industry and on the Commission's proposals.

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[1] The fact that NASUCA does not address all arguments advanced by any party is not necessarily an indication that NASUCA acquiesces to the arguments not addressed in these Reply Comments.

[2] *Final Amended Rule*, FTC File No. R411001, 68 Fed. Reg. 4580 (January 29, 2003) ("FTC Final Rule"). The rule will become effective March 31, 2003.

The message from the public in this proceeding is clear: the Commission should act to reduce the intrusion of telemarketing in consumers' lives without harming effective state do-not-call programs. Not surprisingly, not one public commenter said that telemarketing calls are welcome in his or her home. Instead, the public commenters ask the Commission to rein in an industry that has intruded into consumers' lives, too often without even letting the consumer know who is calling or how to stop further intrusions.

The public commenters' submissions lend support to many of the proposals advanced by NASUCA and other public interest parties. Among the major issues addressed by public commenters are abandoned calls caused by predictive dialers and other automated dialing systems, the need for a more restrictive definition of "established business relationship" and the blocking of Caller ID by telemarketers.

A. Telemarketers' Use of Predictive Dialers Should Be Further Restricted.

Some industry parties oppose lowered abandonment rates for predictive dialers, claiming that such dialing systems actually benefit consumers. The Magazine Publishers of America ("MPA"), the Newspaper Association of America ("NAA") and WorldCom assert that predictive dialers lower prices for goods and services by increasing the efficiency of telemarketers.[3] WorldCom estimates that "86% to 89% of all outbound dialing does not reach an actual person."[4] WorldCom does not estimate what percentage of those calls is a result of the dialing of multiple numbers by an automated dialing system. WorldCom does indicate, however, that an abandonment rate as low as three percent still obtains productivity benefits for predictive dialers.[5]

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[3] MPA Comments at 19-21; NAA Comments at 15-16; WorldCom Comments at 41-42.

[4] WorldCom Comments at 41.

[5] *Id.* at 44.

NASUCA and others urged the Commission to restrict further the use of automated dialing systems in order to reduce the number of abandoned calls that each consumer receives.[6] The experiences of several public commenters demonstrate that abandoned calls continue to be a cause of considerable annoyance and frustration for consumers.[7] The benefit of ridding customers of this nuisance should outweigh any cost that might result from lowering abandonment rates.

The FTC Final Rule also effectively limits the abandonment rate on outbound telemarketing calls to three percent of all calls that are answered by an individual.[8] Although this is an improvement over the five percent voluntary guideline set by the Direct Marketing Association ("DMA"),[9] the FTC's standard unfortunately does not contain a limitation on the number of abandoned calls that an individual consumer may receive, unlike the DMA's two-per-month guideline.[10]

Consumers are annoyed by the abandoned calls they receive, not by the abandoned calls that others may receive. Thus, the rules should also limit the number of abandoned calls that a consumer may receive, with the limit set as close to zero as possible. The FTC's rule would allow unlimited abandoned calls to each consumer, so long as the calling telemarketer plays the required recording and has no more than a three percent abandonment rate overall. The DMA's two-per-month guideline would still allow each telemarketer to abandon 24 calls per year to

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[6] See, e.g., NASUCA Comments at 4-7; Comments and Recommendations of the National Association of Attorneys General at 34-35; Comments of the Electronic Privacy Information Center, *et al*. at 12.

[7] See, e.g., Comments of Wayne G. Strang at 14; Comments of J. Melville Capps at 4-5; Comments of Thomas Pechnik at 2; Comments of Martin C. Kaplan; Comments of David Schwartz; Comments of Tom W.L. Walcott.

[8] See FTC Final Rule, § 310.4(b)(4)(i), 68 Fed. Reg. at 4673.

[9] See *Notice of Proposed Rulemaking*, FTC File No. R411001, 67 Fed. Reg. 4492, 4523 (2002).

[10] See *id.*

every consumer in the country. Although a step in the right direction, the FTC's rule is inadequate in this regard. Thus, NASUCA urges the Commission to work with the FTC in establishing a per-individual limit on abandoned calls, in addition to the three percent limit.

As part of the abandoned call restriction, the FTC also requires telemarketers to let the consumer's phone ring four times or 15 seconds before abandoning a call and, whenever a sales representative is unable to speak with the consumer, to identify the entity on whose behalf the call is made and a telephone number of the entity within two seconds after the call is answered.[11] This provision, however, does not require the entity's telephone number to be toll-free. Consumers should not have to pay to ask a telemarketer to stop calling them. The Commission should work with the FTC to require the number to be toll-free.

B. The Commission Should Tighten the Definition of "Established Business Relationship" and Reject Additional Exemptions to the Commission's Telemarketing Rules.

Another overriding message expressed by the public commenters is that the Commission must tighten the definition of "established business relationship" for purposes of exemptions from the telemarketing rules.[12] Many of the public commenters' recommendations are similar to NASUCA's proposal for the Commission to redefine "established business relationship" to include only those situations where a consumer has made a purchase or a payment to the entity on whose behalf the call is being made during the previous 24 months.[13] The relationship should not be transferable to affiliates of such entities.

The FTC has developed a somewhat similar definition of "established business relationship." The FTC considers an established business relationship to be one where the

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[11] See FTC Final Rule, § 310.4(b)(4)(ii) and (iii), 68 Fed. Reg. at 4673.

[12] See, e.g., Pechnik Comments at 9; Comments of Robert Briggerstaff at 38-39.

[13] NASUCA Comments at 16-18.

consumer has made a purchase from or had a financial transaction with the caller during the 18 months immediately preceding the call, or has made an inquiry or application regarding a product or service offered by the caller within the three months immediately preceding the call.[14] Although NASUCA agrees with the first part of the FTC's definition, the provision dealing with inquiries and applications is open to abuse. For example, it is unclear whether a consumer who asks questions about a product or service offered during an outbound telemarketing call could be making an "inquiry" and thus could be subjected to additional telemarketing calls.

The "established business relationship" exemption in the Commission's rules is considerably broader than that in the FTC's rules. The FTC uses the exemption only in its application to the national do-not-call registry; an entity may make a telemarketing call to a consumer with whom the entity has an established business relationship, even if the consumer's number is on the national do-not-call registry.[15] On the other hand, the Commission's rules concerning the use of artificial or prerecorded messages allow an exemption for an established business relationship.[16]

In addressing the provision allowing telemarketing to a consumer within three months after an inquiry or application, the FTC stated, "A simple inquiry or application would reasonably lead to an expectation of a prompt follow-up telephone contact close in time to the initial inquiry or application, not one after an extended period of time."[17] Although consumers may expect a follow-up call regarding the initial inquiry, they would likely not expect to receive telemarketing calls – especially artificial or prerecorded calls – concerning other products or

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[14] FTC Final Rule, § 310.2(n), 68 Fed. Reg. at 4669.

[15] *Id.*, § 310.4(b)(1)(iii)(B)(ii), 68 Fed. Reg. at 4672.

[16] 47 C.F.R. 64.1200(c).

[17] FTC Final Rule, 68 Fed. Reg. at 4593.

services because of such an inquiry. NASUCA urges the Commission to adopt the FTC's definition of "established business relationship" without the provision concerning inquiries.

In addition, several special-interest parties urge the Commission to expand the exemptions from the national do-not-call registry. The MPA asserts that magazines and newspapers should be exempt because they disseminate news and information and because restricting the telemarketing of such publications "sends the wrong message" regarding literacy.[18] The NAA adds that newspapers should be exempt because "they are dependent on local goodwill and are sensitive to community standards" and because their financial viability would be undermined absent an exemption.[19] The National Energy Marketers Association ("NEMA") contends that energy marketers should also be exempt from national do-not-call registry restrictions because calls placed by energy marketers serve "an educational purpose" concerning the availability of energy suppliers.[20] The Direct Selling Association ("DSA") and Ameriquest Mortgage Company ("Ameriquest") argue that "occasional and incidental" telephone solicitations by sellers who make in-home presentations or who complete a sale at a later face-to-face meeting should also be exempt.[21] Scholastic, Inc. calls for an exemption for telemarketing of educational and related materials for children.[22]

The Commission should reject proposals to expand the exemptions to the Commission's telemarketing rules. Allowing additional exemptions would only open the floodgates for even more exemptions, resulting in watered-down consumer protection standards. Some states have

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[18] MPA Comments at 13-14.

[19] NAA Comments at 12-14.

[20] NEMA Comments at 5.

[21] DSA Comments at 6-7; Ameriquest Comments at 12-15.

[22] Scholastic, Inc. Comments at 8-11.

numerous exemptions to their telemarketing laws, rendering the laws practically meaningless. For example, in Ohio there are 28 categories of exemptions to most of the telemarketing laws, including an exemption for retailers that have been in business for more than one year and telemarketers that have been in business at least five years.[23] The Commission should not travel down this path.

In addition, 47 U.S.C. § 227 constrains the Commission's ability to create exemptions from the do-not-call rules. Section 227(a)(3) is explicit in the types of calls that do not constitute telephone solicitations – calls to a person with that person's prior express invitation or approval, calls to a person with whom the caller has an established business relationship and calls by a tax exempt organization. Moreover, Section 227(b)(2)(B) exempts certain types of calls only from the statutory prohibition on making calls using artificial or prerecorded messages contained in Section 227(b)(1)(B).

There is nothing in Section 227, however, that allows the Commission to establish exemptions to the use of the national do-not-call database permitted by Section 227(c)(3). Instead, the statute states that the regulations for the national do-not-call database "*shall* … prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database…."[24] Thus the Commission should refrain from adopting additional exemptions.

C. The Commission Should Prohibit Telemarketers from Blocking Caller ID.

Several public commenters also urged the Commission to prohibit telemarketers' blocking of Caller ID.[25] The FTC's revised Final Rule prohibits telemarketers from blocking

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[23] Ohio Rev. Code § 4719.01(B).

[24] 47 U.S.C. § 227(c)(3)(F) (emphasis added).

[25] See, e.g., Comments of Janet Crossman at 2-3; Comments of John R. Clarke at 1; Strang Comments at 15-16.

consumers' caller ID.[26] The Rule requires telemarketers to transmit at least their number, and include their name if possible. Telemarketers may substitute the name and number of the entity on whose behalf the call is made.

Several parties have urged the Commission to refrain from prohibiting telemarketers from blocking Caller ID. A few assert that the calling systems used by some telemarketers are unable to transmit Caller ID information.[27]

NASUCA urges the Commission to adopt a Caller ID provision similar to the FTC's revised rule. The FTC addressed technical feasibility of transmitting telemarketers' Caller ID information, citing comments in its proceeding by DialAmerica.[28] There, DialAmerica noted that its carrier assigns a telephone number to each of its call centers. When a call is made from a call center, that center's Caller ID information is transmitted to the called party. The FTC also noted that other moderate-sized telemarketers voluntarily transmit Caller ID information.[29] This led the FTC to conclude that such Caller ID arrangements are not cost prohibitive.[30]

The FTC noted several benefits to its Caller ID rule, including the protecting consumers' privacy, giving consumers value for the cost of telephone privacy features, enhancing accountability of the telemarketing industry and improving enforcement efforts.[31] The Commission should adopt the same rule.

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[26] FTC Final Rule, § 310.4(a)(7), 68 Fed. Reg. at 4672.

[27] See Comments of Nextel Communications, Inc. at 17-18; Comments of Comcast Cable Communications, Inc. at 14; NAA Comments at 17.

[28] FTC Final Rule, 68 Fed. Reg. at 4624-28. DialAmerica also filed comments in the instant proceeding, stating (at 11) that it delivers Caller ID on all calls made in conjunction with its Sponsor Magazine Program.

[29] FTC Final Rule, 68 Fed. Reg. at 4625, n. 511.

[30] *Id.*

[31] *Id.* at 4625-26.

III. THE RIGHT OF CONSUMERS TO AVOID THE INTRUSION OF TELEMARKETING CALLS IN THEIR LIVES OUTWEIGH ANY RIGHT TELEMARKETERS MAY HAVE TO CAUSE SUCH INTRUSION.

The public commenters' submissions focused on consumers' ability to avoid intrusion into their lives by telemarketers. Despite telemarketers' claims to the contrary,[32] many individuals who commented characterized telemarketing calls as a nuisance and an invasion of privacy.[33] Significantly, not one public commenter stated a desire to hear from telemarketers.

Some telemarketers claim that additional restrictions on their ability to make intrusive telephone calls would infringe on their constitutional rights to communicate with potential buyers.[34] They assert that any additional restrictions would contravene the constitutional test set forth in *Central Hudson*[35] by eliminating even "desired" telemarketing calls.[36]

The telemarketers' assertions are groundless. First, *Central Hudson* should not apply to a national do-not-call registry, as SBC asserts. *Central Hudson* is applicable to laws that restrict commercial speakers' access to the public at large. The proposed national do-not-call registry, on the other hand, would restrict access only to those individuals who have indicated that they do not want calls from telemarketers. In other words, the registry allows the individual to exercise his or her right to be free from intrusive telemarketing calls.

Second, application of the *Central Hudson* test to a national do-not-call registry and the Commission's other telemarketing regulations shows that the telemarketers' arguments lack merit. *Central Hudson* sets out a three-part test to determine the validity of a governmental

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[32] See NAA Comments at 5.

[33] See, e.g., Comments of Jeff Bryson; Comments of Dennis Robins; Comments of Franklin E. Brody at 1; Crossman Comments at 2; Clarke Comments at 1; Capps Comments at 1; Henriques Comments; Walcott Comments.

[34] See, e.g., SBC Comments at 16-17.

[35] *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

[36] See, e.g., SBC Comments at 16-17.

restriction on lawful commercial speech.[37] First, the government must show a substantial interest in regulating the speech. Second, the restriction must directly and materially advance that interest. Third, the restriction must be no more intrusive than necessary to serve the interest.

It is clear that the government has an interest in regulating telemarketers' access to consumers. Both this Commission and the FTC have noted the increase in telemarketing-related complaints lodged with their respective agencies. In addition, the views of the public commenters – both in this proceeding and the FTC's – demonstrate a real need for government intervention to make calls from telemarketers less intrusive in the lives of consumers.

It is also clear that further restrictions are necessary to advance that interest. A national do-not-call registry would provide a convenient source for those consumers who do not want telemarketing calls to make their wishes known to all telemarketers, rather than requiring those consumers to notify, one-by-one, each of the thousands of telemarketers that may call. In addition, further restrictions on the use of automated dialing systems are necessary to lessen the annoyance caused by abandoned telemarketing calls.

A national do-not-call registry would be no more intrusive than necessary to serve the interest. The registry does not prohibit telemarketers from calling *all* consumers. Rather, it prohibits telemarketing to only those consumers who have chosen to be placed on the list. Telemarketers would still be free to call consumers who are not on the registry or who have not asked to be placed on the company-specific do-not-call list. In addition, if the extreme case occurs, i.e., that *all* consumers in the nation sign up for the national do-not-call registry, that would be a strong indication that the public interest is being served.

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[37] 447 U.S. at 565.

Any commercial speech rights asserted by the telemarketers must be weighed against the rights of consumers to be free from intrusive telemarketing calls. Obviously, the rights of telemarketers to make sales calls, most of which are considered unwanted and annoying by consumers, should be secondary to the rights of consumers to the quiet enjoyment of their homes. As the Supreme Court has noted regarding mailings to individuals:

> Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even a king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. … That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.[38]

By working with the FTC to establish a national do-not-call registry and making the rule changes suggested by NASUCA in its comments, the Commission will heighten consumers' ability to rid themselves of unwanted telemarketing calls.

From the above, it is clear that telemarketers' constitutional arguments must fail. The Commission should not let these arguments act as a deterrent to the adoption of regulations that give consumers more protection from intrusive telemarketing calls.

IV. THE COMMISSION SHOULD COORDINATE WITH THE FTC TO DEVELOP AN EFFECTIVE NATIONAL DO-NOT-CALL REGISTRY THAT WORKS IN CONCERT WITH STATE PROGRAMS THAT PROVIDE GREATER CONSUMER PROTECTION.

Numerous telemarketing interests have argued that the Commission should preempt state do-not-call registry laws. Their primary argument is that preemption is necessary in order for

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[38] *Rowan v. Post Office Dept.*, 397 U.S. 728, 737-38 (1970) (internal citations omitted). See also FTC Final Rule, 68 Fed. Reg. at 4634-37.

them to avoid dealing with federal do-not-call requirements that may differ from state requirements, and to avoid requirements that may differ from state-to-state.[39]

The Commission should reject these arguments. 47 U.S.C. § 227(e) allows the Commission to preempt only those state laws that prescribe technical and procedural standards for the use of autodialers, fax machines and artificial or prerecorded voice systems, or that prohibit the use of a national do-not-call database. Under 47 U.S.C. § 227(e)(1), states may have more restrictive intrastate regulation of, or even prohibit, telemarketing or telemarketers' use of fax machines, automated dialers and artificial or prerecorded voice systems.

Preemption would harm consumers by diminishing the consumer protection contained in more restrictive state telemarketing laws. Consumers would also be confused about their rights concerning telephone solicitations, given that telemarketers generally do not identify the state from which they are calling.

Companies must comply with the consumer protection laws of each state in which they do business. These laws vary from state-to-state. Complying with the do-not-call laws of each state in which a company does business should not be more burdensome than complying with other state consumer protection laws.

The Commission should not weaken state laws that are more beneficial to consumers than the Commission's rules. Instead, the Commission should work with the FTC to develop a national do-not-call registry that works in concert with state programs. The national registry should be able to share information with state programs in order to provide consumers with maximum protection from intrusive telemarketers.

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[39] See, e.g., Comments of Telatron Marketing Group, Inc. at 7-10; MPA Comments at 9-11.

V. CONCLUSION

The record in this proceeding clearly demonstrates the need for an effective national do-not-call registry and a tightening of the Commission's telemarketing regulations. Comments by consumers and public interest organizations who call for greater empowerment of consumers regarding telemarketing outweigh the views of the telemarketing interests who want less regulation of a highly intrusive industry. The Commission should further the public interest by placing additional restrictions on the use of autodialers, adopting a more consumer-oriented definition of "established business relationship," prohibiting telemarketers from blocking consumers' Caller ID and coordinating with the FTC to create a consumer-friendly national do-not-call registry that does not preempt more restrictive state laws.

Respectfully submitted,

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