

LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

RUTH MILKMAN
PHONE (202) 777-7726

PHONE (202) 777-7700
FACSIMILE (202) 777-7763

June 12, 2003

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W. - Suite TW-A325
Washington, D.C. 20554

Re: *Ex Parte Presentation*
In the Matter of Rules and Regulations Implementing the Telephone
Consumer Protection Act of 1991, CG Docket No. 02-278

Dear Ms. Dortch:

On June 12, 2003, Ruth Milkman of Lawler, Metzger & Milkman, counsel for MCI, sent the attached document discussing the FCC's exclusive jurisdiction over interstate telemarketing calls to the following people: Michelle Carey, William Dever, Margaret Egler, Marcy Greene, Erica McMahon, Richard D. Smith, Dane Snowden and Bryan Tramont.

Pursuant to the Commission's rules, this letter is being provided to you for inclusion in the public record of the above-referenced proceeding.

Sincerely,



Ruth Milkman

Attachment

cc: Michelle Carey
William Dever
Margaret Egler
Marcy Greene
Erica McMahon

Richard D. Smith
Dane Snowden
Bryan Tramont



June 11, 2003
CG Docket No. 02-278

Preemption of State Do-Not-Call Legislation and Regulation Regarding Interstate Calls

As set forth in more detail below, Congress made clear that the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA”), preempts state do-not-call legislation with respect to interstate telemarketing calls. In light of this clear congressional intent, and in light of the numerous practical difficulties that would result from active state regulation in this area, MCI urges the Commission to make clear in its order that TCPA and the Commission’s implementing regulations are intended to, and do in fact, preempt state do-not-call legislation regarding interstate calls.

In particular, this written *ex parte* responds to arguments made in the Reply Comments and Recommendations of the Attorney General of Indiana, submitted in this docket on May 19, 2003 (“Indiana Reply Comments”).

I. The TCPA Preempts State Do-Not-Call Legislation With Respect to Interstate Calls

As MCI’s previous filings in this proceeding demonstrate, the TCPA and the Commission’s implementation of the TCPA preempt state do-not-call legislation and regulations to the extent they purport to regulate interstate calls. The TCPA explicitly exempts from preemption only “State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits . . . the making of telephone solicitations.” 47 U.S.C. § 227(e) (emphasis added). If a State could impose more restrictive regulations on interstate calls, then the word “intrastate” in the TCPA’s preemption provision would be superfluous. Supreme Court precedent, however, precludes such a result. *See, e.g., Duncan v. Walker*, 121 S. Ct. 2120, 2122 (2001) (noting the “Court’s duty to give effect, where possible, to every word of a statute”); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (noting that “a legislature is presumed to have used no superfluous words”).

The structure of the TCPA reinforces the reading of the TCPA that this Supreme Court case law requires. In the congressional findings accompanying the TCPA, for example, Congress explicitly noted the substantial benefits to the economy that telemarketing provides, *see* TCPA § 2(4) (noting that telemarketers accounted for more than \$435 billion in sales in 1990), and stated that the interests of telemarketers and the interests of consumers “must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing.” TCPA § 2(9). That Congress expressly sought to have the Commission balance the interests of

consumers *and* telemarketers strongly suggests that Congress viewed Commission regulation as both a floor and a ceiling, and that state efforts to disrupt the balance struck by the Commission would be preempted. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (“where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation”).

Abundant legislative history further confirms that Congress expected the Commission to conclusively determine the appropriate level of do-not-call regulation for interstate calls. For example, Senator Pressler, a proponent of the legislation, stated that the “Federal Government should act now to provide *uniform legislation* to protect consumers while ensuring that the telemarketing industry continues to be a vigorous player in the U.S. economy.” Senate Report, Additional Views of Mr. Pressler (emphasis added). Similarly, Representative Rinaldo emphasized that “preemption has the important benefit of ensuring that telemarketers are not subject to two layers of regulation.” Cong. Rec. H10342 (Nov. 18, 1991).

Those comments are consistent with the legislative history, including comments by Senator Hollings, the TCPA’s primary Senate sponsor, making clear the absence of state jurisdiction over interstate calls. *See, e.g.*, Report Accompanying S. 1410, at 3 (Oct. 8, 1991) (noting that “States do not have jurisdiction over interstate calls”); Cong. Rec. S16205 (Nov. 7, 1991) (statement of Senator Hollings) (“State law does not, and cannot, regulate interstate calls.”); TCPA § 2(7) (explicit congressional finding that “telemarketers can evade [state] prohibitions through interstate operations”).

Finally, preemption of state efforts to impose do-not-call regulation on interstate calls is consistent with the overall structure of the Communications Act of 1934, as amended (“Communications Act”). The Communications Act created the Commission for the very purpose of “regulating interstate . . . commerce by wire and radio” to create “a rapid, efficient, nationwide and world-wide wire and radio communication service.” 47 U.S.C. § 151. Congress feared, however, that expansive state authority over interstate calls might interfere with the Commission’s statutory responsibility under the Act to create an efficient interstate telephone system. Accordingly, Congress created in the Communications Act a dual jurisdictional structure that generally vested broad interstate authority in the Commission, and placed intrastate authority in the States. *See, e.g., Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986). By recognizing and endorsing this basic jurisdictional divide, the Communications Act, as amended by the TCPA, limits the problems and obstacles to effective nationwide service that would inevitably arise from state-by-state do-not-call regulation of interstate telemarketing calls.

Given this overwhelming evidence of congressional intent, it is no surprise that when confronted with this issue, the Commission’s Network Services Division concluded that States lack jurisdiction to impose do-not-call legislation with respect to interstate telemarketing calls, noting in a 1998 response by the Chief of the Common Carrier Bureau’s Network Services Division, to an inquiry from a Maryland state legislator, that the Communications Act, as amended by the TCPA, “precludes Maryland from regulating or restricting interstate commercial telemarketing calls.” That conclusion was clearly correct, and the Commission should reach the same conclusion today.

II. The Arguments of the Indiana Attorney General Are Unpersuasive

In light of this overwhelming evidence of congressional intent to preempt state do-not-call legislation with respect to interstate calls, the Indiana Attorney General faces an uphill climb. The arguments in the Reply Comments do not come close to accomplishing the task.

The Indiana Reply Comments argue first that, when analyzing the preemptive scope of the TCPA and the Communications Act, the Commission should start with a presumption against preemption. Indiana Reply Comments at 17. But with respect to interstate calls, that argument is misguided. The Supreme Court has stated that “[a]n assumption of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.” *United States v. Locke*, 529 U.S. 89, 108 (2000). No one can dispute that there has been a “significant federal presence” with respect to the regulation of interstate calls. *See, e.g., AT&T Corp. v. Ting*, 319 F.3d 1126, 1136 (9th Cir. 2003) (“[W]e do not apply the presumption against preemption in this case because of the long history of federal presence in regulating long-distance telecommunications.”).

Moreover, the argument for the presumption against preemption is particularly weak with respect to the TCPA. As a general matter, Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), limits the ability of the Commission to regulate intrastate calls. However, Section 2(b) explicitly *exempts* § 227 from its scope, thus allowing the Commission to regulate even *intrastate* telemarketing calls. In light of the expansive delegation to the FCC to regulate even intrastate telemarketing calls, a presumption of non-preemption with respect to interstate calls is illogical.

Moving beyond any presumption, the Indiana Reply Comments suggest that the plain language of § 227 insulates all state prohibitions from preemption. But the AG’s purported plain language argument fails because it fails to confront squarely Congress’ inclusion of the word “intrastate.” Under the interpretation advanced in the Indiana Reply Comments, the word “intrastate” is superfluous and, as noted above, the Supreme Court views with disfavor arguments that render statutory terms superfluous.

Moreover, with respect to the TCPA, such a casual disregard for the term “intrastate” cannot be reconciled with the history of the legislation. The telemarketing bill as initially introduced provided that nothing in the bill shall preempt any state law that imposes “more restrictive requirements or regulations.” *See* H.R. 2921 (introduced July 18, 1989). When the bill was reintroduced, the critical language had been changed to provide that nothing in the bill shall preempt any state law that imposes “more restrictive *intrastate* requirements or regulations.” *See* H.R. 1304 (introduced Mar. 6, 1991) (emphasis added). The limitation of non-preemption to “intrastate” calls was thus intentional. Moreover, as the legislative history quoted above makes clear, there was extensive discussion of preemption and state jurisdiction in the course of enacting the TCPA, and it is thus particularly unlikely that the word “intrastate” appeared as a result of accident or oversight.

The Indiana Reply Comments next argue that the limitation of non-preemption of “intrastate” calls does not extend to the “prohibition” of those calls. Under that interpretation, the FCC can preempt state statutes that impose more restrictive regulations of interstate calls, but cannot preempt state laws that prohibit such calls altogether. But such an interpretation makes no sense as a general matter, and is particularly illogical in light of the balance of interests Congress was seeking to achieve. The Indiana Reply Comments do not even attempt to explain why Congress would have passed such a statute.¹

None of the other arguments set forth in the Indiana Reply Comments can resurrect the Attorney General’s inadequate textual presentation. The Reply Comments emphasize, for example, the various provisions that allegedly confirm Congress’ understanding that States would continue to have a role in do-not-call restrictions. *See, e.g.*, § 227(e)(2) (referencing a State’s “regulation of telephone solicitations”); § 227(c)(3)(J) (referencing “administering or enforcing State law”); DNCIA, Pub. L. 108-10 (referencing state do-not-call registries). None of those statutes, however, mention state laws governing *interstate* calls. They are thus all consistent with MCI’s position that the Commission is the exclusive regulator of interstate calls, and that non-preemption is limited only to state laws governing intrastate calls.

The Reply Comments also argue that state do-not-call statutes “threaten no interference with Congress’ goal of providing efficient, reasonably priced national telecommunications service.” Indiana Reply Comments at 11. But giving each State the power to decide who may make interstate calls, and under what circumstances, creates exactly the type of interference with the “unified national communications service,” *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), that the Communications Act was designed to prevent.

The Indiana Reply Comments also dismiss the extensive legislative history discussed above. But even accepting that legislative history should be disregarded in the manner that the Reply Comments suggest – and MCI does not accept that view here – the Reply Comments ignore the fact that the congressional understanding of the absence of state jurisdiction was conveyed in *express findings* passed by Congress along with the TCPA. *See* TCPA § 2(7) (explicit congressional finding that “telemarketers can evade [state] prohibitions through interstate operations”). The Supreme Court routinely relies on such findings. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997). The Attorney General’s effort to convince the Commission to ignore the abundant evidence of congressional intent is thus to no avail.

Nor do any of the cases cited in the Indiana Reply Comments require a contrary result. In *Louisiana Public Service Commission*, for example, Respondents argued that the FCA preempted state regulation of depreciation rates in connection with intrastate telephone service.

¹ It is particularly odd for the Indiana Attorney General to draw a distinction between a state “restriction” and a state “prohibition,” since the Indiana statute, which is not an absolute bar to telephone solicitations but is instead a limit on the circumstances under which such calls can be made, would appear to constitute a restriction rather than a prohibition. Moreover, any difficulty in classifying the Indiana statute demonstrates that the distinction proposed by the Attorney General is unworkable.

Respondents argued that the grant of authority to the Commission to regulate depreciation, in conjunction with the broad power of § 151, confirmed that FCC authority over depreciation was exclusive. The Court noted that it might be inclined to accept that argument, “were it not for the express jurisdictional limitations of FCC power contained in § 152(b).” 476 U.S. at 370. Here, of course, § 152(b) has no application, both because *interstate* calls are at issue, and because (as noted above) § 152(b) expressly exempts § 227 from its coverage. There is thus no obstacle to assigning § 227 and § 151 the broad preemptive scope that they are due.

Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995), similarly offers the Attorney General little assistance, for *Van Bergen* involved calls by a candidate for office in Minnesota to other Minnesota residents – that is, calls that were *intrastate*. The Eighth Circuit thus had no reason to discuss, and did not discuss, the significance of the § 227(e)’s limitation of non-preemption to intrastate calls.²

Finally, although the Indiana Reply Comments tout the Indiana statute as a model of state legislation that is worthy of preservation, that statute illustrates vividly the dangers of state regulation of interstate calls. The Indiana statute is filled with exceptions, including those for newspapers and insurance agents, *see* Ind. Code § 24-4.7-1-1, that show a greater concern for protecting favored local industries than for protecting any alleged privacy concerns. As MCI has previously argued, allowing such state regulation not only risks discrimination against national businesses, it also risks creating “confusion for customers and companies, and needlessly increasing compliance costs for the industry.” Letter from Lisa B. Smith, MCI, to K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, CG Docket No. 02-278 (June 4, 2003).

III. Conclusion

The FCC should make clear in its eventual order that the Communications Act, as amended by the TCPA, and the Commission’s implementing regulations are intended to, and do in fact, preempt state do-not-call legislation regarding interstate calls.

² The Reply Comments also incorrectly suggest that the asserted state power to address fraudulent interstate telemarketing calls somehow gives States jurisdiction to enact do-not-call legislation with respect to such calls. But the TCPA governs only do-not-call legislation, and thus the preemption analysis for do-not-call legislation is substantially different than is preemption analysis for fraudulent interstate calls.