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October 8, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, Maryland 20743

Dear Ms Dortch:

Enclosed please find an original signed copy and nine copies of an Opposition to Petitions for Reconsideration in CG Docket No. 02-278, filed by Indiana Attorney General Steve Carter. In addition, please find the first page of the filing for stamped receipt. If you have any questions or comments, please do not hesitate to contact me, at (202) 326-6019.

Respectfully,

Dennis P. Cuevas

Dennis P. Cuevas
Consumer Protection
Project Manager and Counsel

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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OFFICE OF THE SECRETARY

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

OPPOSITION TO PETITIONS FOR RECONSIDERATION

As Attorney General for the State of Indiana, I respectfully oppose the petitions for reconsideration submitted by the Direct Marketing Association ("DMA") and the American Resort Development Association ("ARDA"). I oppose all aspects of the petitions, but particularly wish to provide additional comment upon the issues of preemption and use of state lists during transition to the national list.

I. The FCC Has Not And Should Not Preempt State Do-Not-Call Laws That Apply To Interstate Calls

In urging the Federal Communications Commission ("FCC") to preempt all state do-not-call ("DNC") laws as applied to interstate calls, both the DMA and ARDA present arguments already raised before the FCC prior to its promulgation of the revised rules and regulations implementing the Telephone Consumer Protection Act of 1991 ("TCPA").[1] Thus, the FCC has already had the opportunity to consider these same issues when they were previously raised by the DMA and ARDA and, in the absence of any new arguments supporting preemption, it is unnecessary for the FCC to reconsider its conclusions. *See* Petition for Reconsideration, filed

[1] *See* Reply Comments of the Direct Marketing Association, filed with the FCC, dated January 31, 2003, at 4-9; Comments of the American Resort Development Association, received by the FCC, November 15, 2002, at 14.

with the FCC by The Direct Marketing Association, August 25, 2003, at 2-5 (reasserting the DMA's arguments that the TCPA provides for complete preemption of any state law as applied to interstate calls, that state DNC laws are duplicative and burdensome and thus inherently inconsistent with the TCPA, and that differing state laws undermine the TCPA's purpose of creating a consistent and uniform national system); Petition for Reconsideration, filed with the FCC by the American Resort and Development Association, August 25, 2003, at 20-22 (reasserting ARDA's argument that the national registry should preempt all state DNC lists so that consumers may submit their request to one national contact point).

Moreover, for the reasons previously set forth in my Reply Comments and Recommendations and in the Comments and Recommendations of the National Association of Attorneys General, it would be inappropriate for the FCC to declare that the TCPA preempts—or provides the FCC with the authority to preempt—state DNC laws as applied to interstate calls.[2] As a preliminary matter, it is worth noting that at least two courts have already concluded that the TCPA does not preempt state law. *See Steve Martin & Associates v Carter*, No. 82C01-0201-PL-38 (Vanderburgh Circuit Court, 2002); *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995).

Even apart from these precedents, however, analysis of the TCPA under federal preemption doctrine leads to two important conclusions: (1) that the TCPA does not preempt state telephone privacy laws as applied to interstate calls, and (2) that the FCC lacks authority to preempt such applications. The FCC may preempt state law only where congressional authorization provides the authority for it to do so. *Louisiana Pub Serv. Comm'n v. FCC*, 476

[2] *See* Reply Comments and Recommendations of the Attorney General of Indiana, filed with the FCC, dated May 19, 2003; Comments and Recommendations of the National Association of Attorneys General, filed with the FCC, dated December 10, 2002.

U.S. 355, 374 (1986). Not only is there no explicit language in the TCPA stating that it preempts any state law in the field of telephone solicitations, but as the Indiana court held in *Martin & Assoc.*, the TCPA expressly does not preempt "any state law . . . which prohibits . . . the making of telephone solicitations." 47 U.S.C. § 227(e)(1)(D). This language both forecloses the possibility that the TCPA itself preempts state telephone privacy laws that prohibit interstate telephone solicitations and forecloses the ability of the FCC to undertake such preemption on its own.

In addition, other language of the TCPA confirms that the Act does not preempt state DNC laws and demonstrates that Congress did not intend to occupy the field of telephone solicitation regulation to the exclusion of the states. For example, the TCPA states that if the FCC establishes a "single national database of telephone numbers of subscribers who object to receiving telephone solicitations," then a state with a law regulating telephone solicitations must import the part of the national database relating to the state into *that state's privacy list*. 47 U S.C. § 227(e)(2) (emphasis added). Furthermore, the TCPA specifically states that any FCC database "*shall* . . be designed to enable States to use the [Commission's database] . . . *for purposes of administering* or *enforcing State law*." 47 U.S.C. § 227(c)(3)(J) (emphasis added). This language clearly indicates that state DNC laws would continue to be enforced unabated—even as to interstate calls—and that Congress did not intend to occupy the field of telephone solicitation regulation.

Finally, the Do-Not-Call Implementation Act, PL 108-10 (HR 395 ("DNCIA") confirms both that the TCPA does not preempt state DNC laws and that the FCC is not empowered to preempt those laws. The DNCIA specifically requires the FCC, once it promulgates its own DNC rule, to provide Congress with "an analysis of the progress of coordinating the operation

and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States." If the TCPA preempted state DNC laws, or if Congress believed that the FCC had the authority to preempt those laws, there would be no reason for Congress to have *enacted a law* requiring an analysis of state registry enforcement *after* the FCC's own rule was in force.

II. The FCC Should Reject The DMA's Suggestions Concerning The Integration Of State And National Lists

The FCC should also reject the DMA's and ARDA's demands concerning the integration of state and federal telephone privacy lists. First, at least some of their suggestions proceed from the erroneous proposition that the TCPA and the FCC somehow preempt, or should preempt, state enforcement of their own DNC laws with respect to interstate calls. *See* Petition for Reconsideration, filed with the FCC by The Direct Marketing Association, August 25, 2003, at 6 ("States must immediately cease any effort to require marketers to obtain state DNC lists in connection with interstate calls."); Petition for Reconsideration, filed with the FCC by the American Resort and Development Association, August 25, 2003, at 20 ("ARDA encourages the Commission to have *the national registry preempt all state lists*"). For the reasons already given, there is no basis for asserting such preemption, and the FCC should reject this request.

The FCC should also reject the remainder of the DMA's and ARDA's demands concerning list consolidation, including the demand that the FCC require immediate consolidation. The DMA and the ARDA dramatically overstate the burdens caused by multiple state and federal lists. Telemarketers successfully complied with the telephone privacy laws of 26 states before the FTC and FCC adopted their national DNC programs. Now that a federal list has been established, telemarketers are required to observe only fourteen other lists in addition to the federal list, and legislation is pending in three more states to eliminate the state list in favor

of sole reliance on the federal list. In addition, new technologies have emerged from the private sector that create affordable and effective methods for compliance with multiple lists. Because of list-scrubbing services and technology that automatically blocks prohibited numbers from being dialed, the number of state lists providing prohibited numbers is no longer a serious concern.

Conclusion

For the foregoing reasons, and for the reasons previously stated in my Reply Comments and Recommendations and in the Comments and Recommendations of the National Association of Attorneys General, I respectfully request that the Commission deny the petitions of the DMA and ARDA to reconsider its Report and Order.

Respectfully submitted,

STEVE CARTER
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be served upon the following counsel by United States First Class Mail, postage prepaid, on the 7th day of October, 2003:

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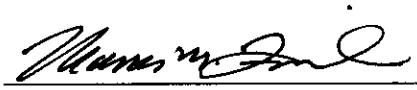

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