

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)

REPLY OF THE AMERICAN RESORT DEVELOPMENT ASSOCIATION

The American Resort Development Association (“ARDA”), pursuant to 47 C.F.R. § 1.429(g), hereby submits its Reply to the three Oppositions filed in response to ARDA’s Petition for Reconsideration.¹ In its Reconsideration Petition, ARDA urged the Commission to permit certain “information only” prerecorded calls to numbers not on the Do-Not-Call List and explained that the First Amendment and the Administrative Procedures Act (“APA”) compel such a result. While three parties filed Oppositions that, in part, referenced ARDA’s Petition, none of these Oppositions addressed, let alone refuted, ARDA’s fundamental legal arguments. ARDA therefore respectfully urges the Federal Communications Commission (“Commission”) expeditiously to grant its Petition for Reconsideration.

I. BACKGROUND

ARDA’s Petition for Reconsideration demonstrated that the Commission should permit informational prerecorded calls to numbers *not* on the federal and state Do-Not-Call lists. In particular, ARDA seeks relief for “information only” prerecorded calls where: (1) no sales or advertisement occurs on the call; (2) the consumer receives any free promotion regardless of whether the consumer ever purchases a product; (3) money is not exchanged over the phone; (4)

¹ American Resort Development Association Petition for Reconsideration, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (Aug. 25, 2003) (“ARDA Petition for Reconsideration”).

calls are 45 seconds or less; and (5) consistent with Congressional intent, calls contain no more than an incidental reference to a sale, rental, or investment opportunity.

In reversing its original interpretation of the Telephone Consumer Protection Act (“TCPA”) and banning such informational calls, the Commission violated the APA by failing to address key record evidence submitted by ARDA.² Moreover, even the evidence that the Commission relied on to support the new, more restrictive treatment of such calls—which consisted largely of letters from consumers who were concerned about privacy and sought a means to opt-out of such calls—did not support extending the ban on prerecorded calls to numbers *not* on the Do-Not-Call lists. The adoption of the Do-Not-Call list, as well as other requirements, including mandatory unblocking of caller-ID, a message identifying the caller, and the predictive dialer and call abandonment rules, fully address the consumers’ concerns.³

ARDA also showed that the Commission’s Order violates the First Amendment by: (1) treating similarly situated speakers in a disparate manner; (2) arrogating to the government consumers’ right to determine the type of commercial speech they wish to hear; (3) regulating speech based on the speaker, not on the content of the speech; and (4) defying the governing *Central Hudson* standard.⁴ Likewise, the Commission did not properly examine the legislative history, wherein Congress indicated that prerecorded calls that contained an incidental reference

² ARDA Petition for Reconsideration, at 6-7.

³ *Id.*, at 8-9.

⁴ *Id.*, at 10-18. In the legislative history Congress directs the Commission to ensure that its regulations are consistent with the Constitution and, in particular, the *Central Hudson* standard. See S. Rep. No. 102-178 (1991); S. Rep. No. 102-178, at 1971 (noting that the bill “does not discriminate based on the content of the message”); S. Rep. No. 102-177, at 7 (1991) (explaining that “the legislation provides the FCC with sufficient guidelines and options so that it may adopt regulations that meet ... the *Central Hudson* test”).

to a potential sale, rental, or investment opportunity should not be banned.⁵ Finally, ARDA encouraged the Commission to adopt one uniform do-not-call registry, to make it easier for consumers to register and to ease compliance burdens and reduce confusion.⁶

As explained below, no one even attempted to challenge ARDA's fundamental legal arguments.⁷ Thus, the Commission promptly should grant ARDA's Reconsideration Petition.

II. THE OPPONENTS OF ARDA'S PETITION PROVIDE NO BASIS FOR RETAINING THE SWEEPING BAN ON INFORMATIONAL PRERECORDED CALLS TO NUMBERS NOT ON A DO-NOT CALL LIST.

Three parties filed Oppositions to ARDA's Reconsideration Petition. In particular, two consumers, Mr. Dennis C. Brown and Mr. Joe Shields, raised concerns about the proper classification of prerecorded calls under the TCPA,⁸ and the Office of the Indiana Attorney General urged the Commission not to preempt state do-not-call lists.⁹ None of these Oppositions discusses, let alone refutes, ARDA's showing that the Order's treatment of prerecord,

⁵ *Id.*, at 18-19. In the alternative, the Petition explained that the similarities between the radio and broadcasters prerecorded calls and ARDA's prerecorded calls support extending the broadcasters exemption to ARDA. *Id.*

⁶ *Id.*, at 19-21.

⁷ To the contrary, other petitions for reconsideration raised similar arguments and likewise urged the Commission to permit such prerecorded calls to numbers not on the do-not-call list. See Direct Marketing Association Petition for Reconsideration, at 21, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Aug. 25, 2003).

⁸ Opposition to the Petition of the American Resort Developers [sic] Association, Joe Shields, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Sept. 2, 2003) ("Shields Opposition"); Opposition to Petitions for Reconsideration, Dennis C. Brown, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Oct. 13, 2003) ("Brown Opposition").

⁹ Opposition to Petitions for Reconsideration, Office of the Attorney General of Indiana, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Oct. 7, 2003) ("Indiana Attorney General Opposition").

information-only calls violates the First Amendment and the APA. Rather, they attack ARDA's Reconsideration request on other grounds, which lack any merit.

Prerecorded, informational calls. The two consumers claim that information-only prerecorded calls are advertisements and, therefore, are banned by the TCPA.¹⁰ They are wrong. Under the TCPA, the Commission has the authority to exempt from the prerecorded ban calls that either (1) are not for a commercial purpose, *or* (2) will not adversely affect privacy rights and do not include the transmission of an unsolicited advertisement.¹¹ Congress explained that it created these exemptions because the “the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.”¹²

The Commission must be mindful of Congressional intent when applying these two exemptions. The legislative history details that Congress enacted the ban on prerecorded calls to address the following consumer concerns: (1) prerecorded calls were being placed to lines used for emergency purposes, such as hospitals; (2) the entity placing the automated calls was not identifying itself; (3) the automated calls filled the entire tape of an answering machine; and (4) the automated calls would not disconnect the line after the called party hangs up.¹³ Since the enactment of the TCPA, however, technological improvements and Commission regulations have addressed all of these concerns. Thus, the Commission must utilize the “flexibility”

¹⁰ Shields Opposition, at 2-3; Brown Opposition, at 3.

¹¹ 47 U.S.C. § 227(b)(2)(B).

¹² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2395 (1991).

¹³ S. Rep. No. 102-178, at 1969.

empowered by Congress and apply the statutory exemptions to permit prerecorded calls that “are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment.”¹⁴ With the adoption of a national do-not-call list, the Commission’s mandatory technology requirements and additional privacy protections, and in light of the grave First Amendment implications identified above, it is clear that permitting prerecorded calls to numbers *not* on the do-not-call list is consistent with Congressional intent.

Turning to the first statutory exemption, the Commission found in implementing the TCPA, that such “information only” calls do not fall within the definition of “commercial purpose.”¹⁵ While the Order reaches the opposite conclusion, that conclusion is neither supported by compelling logic nor consistent with the First Amendment, as demonstrated in ARDA’s Petition.

Moreover, even if informational calls of the type discussed in ARDA’s Petition were for a commercial purpose – which ARDA does not concede – the Commission has ample authority to exempt such calls from the prerecorded call ban under Section 227(b)(2)(B). First, there is no advertisement for any goods on these prerecorded calls. To the contrary, prerecorded calls from ARDA members do not advertise a product, but offer a promotional, free good or service, which is provided regardless of whether the consumer purchases anything from ARDA’s members. The purpose of these calls is to invite the caller to return the call to discuss a free promotion. No

¹⁴ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2395 (1991).

¹⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (1992); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, ¶ 31 (2002) (requesting comment as to whether the Commission should change its treatment of “information only” prerecorded calls).

money is ever exchanged on these calls; a consumer must affirmatively come to the ARDA member's location to consummate a transaction. Second, the Order already protects privacy interests by permitting all consumers the opportunity to opt-out of receiving such calls by placing their numbers on the national or state do-not-call lists or company-specific lists. ARDA's Reconsideration Petition preserves this right as well as the Order's additional privacy protections, including mandatory passage of caller-ID, an identification of the caller at the beginning of the call, and the predictive dialer and call abandonment rules.

In addition, the legislative history bolsters the Commission's original interpretation of the TCPA and the treatment recommended by ARDA: Congress did not intend to ban prerecorded calls when the purpose of the call is not to encourage a sale, and contain an incidental reference to an investment opportunity, rental or sale.¹⁶ In particular, the legislative history explained that "[a] call made principally for a purpose other than to encourage a sale *would not be covered merely because the message contained an incidental reference to a potential sale, rental, or investment opportunity.*"¹⁷ The Commission should grant ARDA's Petition to avoid frustrating Congress's intent.

Uniform do-not-call registry. The Office of the Indiana Attorney General urges the Commission to reject ARDA's argument that "the national registry should preempt all state DNC lists... ."¹⁸ The Indiana Attorney General appears to misunderstand ARDA's position. ARDA is *not* advocating that the Commission preempt state do-not-call lists or the states' ability to enforce such lists. Rather, ARDA encourages the Commission to create one *registry* for the federal list

¹⁶ ARDA Petition for Reconsideration, at 18-19.

¹⁷ ARDA Petition for Reconsideration, at 19 (citing H.R. Rep. No. 101-633, at 8 (emphasis added)).

¹⁸ Indiana Attorney General Opposition, at 3.

and all state do-not-call lists. Doing so would make it easier for consumers to register and would increase compliance, since companies would need to check only one registry.¹⁹

In any event, the Attorney General’s argument that the Commission lacks preemption authority is inapplicable to the adoption of a uniform registry. Contrary to the Attorney General’s claims, Congress specifically authorized the Commission to create a uniform database. In particular, Section 227(e)(2), under the subsection “effect on state law,” provides that “[i]f ...the Commission requires the establishment of a single national database of telephone numbers to subscribers who object to receiving telephone solicitations, a State or local authority *may not*, in its regulations of telephone solicitations, require the use of any database, list, or listing system that does not include the part of a single national database that relates to such State.”²⁰ In the TCPA, therefore, Congress not only found that the Commission has the authority to enact one uniform registry, but Congress actually envisioned that the Commission would create such a registry.

The Indiana Attorney General also asserts that any burdens on companies in obtaining registry information for the federal and a multitude of state do-not-call lists are “overstate[d]”²¹ because companies supposedly need only purchase and review the registries of 14 states in addition to the federal list.²² This argument not only understates the number of registries—the Commission found that there are approximately 30 different state registries²³—but it also ignores

¹⁹ ARDA Petition for Reconsideration, at 20-22.

²⁰ 47 U.S.C. § 227(e)(2) (emphasis added).

²¹ Indiana Attorney General Opposition, at 5.

²² Indiana Attorney General Opposition, at 5.

²³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 03-153, n. 44 (finding that 36 states currently have do-not-call laws, with

the real possibility, noted in the Order, that the remaining states and the District of Columbia also will adopt state lists.²⁴ If enacted, these additional state registries would almost double the burdens and costs on companies.

Finally, the Indiana Attorney General ignores the consumer benefits of a uniform national registry. Creating a single registry will eliminate the requirement that consumers register their number on multiple lists, making it easier for consumers to protect their privacy if they wish to do so. Accordingly, ARDA urges the Commission to adopt a uniform registry system covering the federal Do-Not-Call list and all existing and future state lists.

III. CONCLUSION

For the foregoing reasons, the Commission promptly should grant ARDA's Petition for Reconsideration.

Respectfully submitted,

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30 of the 36 states having separate state registries, and the remaining 6 states requiring telemarketers to use the DMA's Telephone Preference Services list) ("Do-Not-Call Order").

²⁴ See Do-Not-Call Order, n. 45 (noting that Delaware, the District of Columbia, Hawaii, Iowa, Maryland, Michigan, Nebraska, Nevada, North Carolina, Ohio, Rhode Island, South Carolina, Washington, and West Virginia have pending do-not-call legislation).

Certificate of Service

I, Christy Wright Hammond, do hereby certify that on this 3rd day of November 2003, I caused a true and accurate copy of the foregoing Reply of the American Resort Development Association to be served via first class mail upon the following:

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