

calls. Both oppositions miss the point: the plain language of the TCPA, as well as the extensive legislative history of the statute, demonstrate that states have no authority to regulate interstate calls. We simply ask that the Commission make this point more definitively and unequivocally than it has in the Report and Order.²

Indiana essentially argues that the TCPA does not permit the Commission to preempt states' laws. The TCPA, however, leaves unchanged the language of section 2(a) of the Communications Act of 1934, as amended, which grants the FCC exclusive jurisdiction of "all interstate and foreign communication."³ The Commission may preempt conflicting DNC requirements under section 1 of the Communications Act, which gives the FCC plenary jurisdiction over interstate communications.⁴

Moreover, Congress authorized the Commission to "require the establishment and operation of *a single national database*" of DNC requests.⁵ A central reason Congress enacted the TCPA is that it concluded that states do not and should not have jurisdiction over interstate communications.⁶ As The DMA outlined in earlier stages of this proceeding, the legislative history of the TCPA repeatedly emphasizes that states do not have authority over interstate communications, including interstate telemarketing communications. Examples include:

- Regarding S. 1462, in the version that was enacted as the TCPA and containing language, in both subsection (c)(3)(J) and subsection (e), that is *identical* to current law:

² Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Reports and Order*, CG Docket No. 02-278 ("Report and Order").

³ 47 U.S.C. § 152(a).

⁴ *Id.* § 151.

⁵ *Id.* § 227(c)(3)(emphasis added).

⁶ *See, e.g.*, Sen. Rep. No. 102-178 at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1973 ("Federal action is necessary because States do not have jurisdiction to protect their citizens against [the use of automatic dialing devices] to place interstate telephone calls.").

Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standards under section 227(d) *and subject to 227(e)(2)*. Pursuant to the general preemptive effect of the Communications Act of 1934, *State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.*⁷

- Regarding an earlier version of S. 1462:

*The State law does not, and cannot, regulate interstate calls. Only Congress can protect citizens from telephone calls that cross State boundaries.*⁸

- In connection with the House of Representatives' consideration of S. 1462:

To ensure a uniform approach to this nationwide problem, this bill would *preempt the States from adopting a database approach*, if the FCC mandates a national database.⁹

- From the Committee Report on S. 1462:

. . . over 40 States have enacted legislation limiting the use of ADRMPS or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because *States do not have jurisdiction over interstate calls.*¹⁰

Indiana contends that references to “state law” that are embedded in the TCPA signal that the Commission may not preempt state laws.¹¹ Indiana points to the “savings clause” in subsection (e)(1) of the TCPA, and also suggests that a state’s obligation, under section 227(e)(2), to include in its DNC database the part of the national list that relates that state indicates Congress did not intend to preempt state laws. Indiana also points to subsection (c)(3)(J), which requires the Commission to design any national DNC database

⁷ 137 Cong. Rec. S 18,781, 18,784 (daily ed. Nov. 27, 1991) (remarks of Sen. Hollings) (emphasis added).

⁸ 137 Cong. Rec. S 16,204, 16,205 (daily ed. Nov. 7, 1991) (Remarks of Sen. Hollings) (emphasis added). His version of S. 1462 contained language similar, but not identical to that contained in subsection (e) of the TCPA; this version of S. 1462 did not include DNC provisions, which accounts for some of the difference in the language.

⁹ 137 Cong. Rec. H. 11,307, 11,311 (daily ed. Nov. 26, 1991) (remarks of Rep. Rinaldo) (emphasis added).

¹⁰ Sen. Rep. No. 102-178 at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. (emphasis added).

¹¹ Indiana Opp. at 4.

“to enable States to use the database for purposes of administering or enforcing State law.”¹² Indiana has misread these provisions.

The “savings” clause is made “subject to,” and, therefore, extinguished by the preemptive force of subsection (e)(2), which relates to the Commission’s determination to adopt a national DNC list.¹³ The TCPA does provide that it might not preempt a limited set of more restrictive *intrastate* requirements. But the savings clause does not permit states to regulate *interstate* calls, and they have no authority to do so in the first instance.

Indiana’s reliance on *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), and *Steve Martin & Associates v. Carter*, 82C01-0201-PL-38 (slip op.) (Vanderburgh Circuit Court 2002) is unavailing. Both courts’ analyses, one of which addressed autodialer limits not DNC rules, ignore the “except as” and “subject to” provisos, which begin subsection (e)(i) and limit all of the savings language that follows. In any event, it appears that Steve Martin & Associates’ challenge only involved *intrastate* calls, and Van Bergen intended to make political calls not subject to the TCPA rules in the first instance.

Although Indiana is correct that the Commission is required to enable states to *access* the national DNC list, the “state law” to which the TCPA refers in subsection (c)(3)(J) relates to state laws authorizing state officials and individual consumers to initiate actions to enforce the TCPA. The TCPA empowers state officials to enforce federal standards in application to interstate calls, but state law determines which official(s) within a state may do so and, subject to the TCPA limits, what criteria they must follow.¹⁴

¹² 47 U.S.C. § 227(c)(3)(J).

¹³ *Id.* § 227(e)(1).

¹⁴ *Id.* § 227 (f).

Similarly, the TCPA permits individuals to initiate a private cause of action to enforce the TCPA, but small claims suits or similar actions are creatures of state law.¹⁵

Indiana finally suggests that the Commission may not preempt state laws as applied to interstate calls because, pursuant to the Do Not Call Implementation Act,¹⁶ Congress directed the FCC to report on efforts to coordinate the operation and enforcement of the national list with state lists. This provision does no more than acknowledge that state and federal agencies will all retain authority to enforce DNC requirements and have a role in the implementation and enforcement of a national DNC database, and require the FCC and FTC to keep Congress apprised on developments and progress. States will be free to enforce their own laws in connection with *intrastate* calls, and enforce the federal rules in connection with interstate calls. The fact that Congress recognized there are inevitably going to be coordination issues involved in transitioning to a single database applicable to interstate calls is no indication that Congress intended to abandon the requirement.

NASUCA opposes our Petition on grounds that “Congress did not intend for a single national do-not-call database to replace state databases, nor did it impose any obligation on the states to share their information with the federal database.”¹⁷ The DMA does not contend that states must abolish their DNC lists or requirements entirely. We submit only that, as provided by the TCPA, the Commission should categorically preempt them from applying those requirements to *interstate* calls. States would remain free to apply their individual requirements to *intrastate* calls. Moreover, it appears that a fair reading of the Report and Order is that this Commission has directed states to load their

¹⁵ *Id.* § 227(c)(5) (providing that a person who has received more than one call in violation of the Commission’s DNC regulations may “if otherwise permitted by the law or rules of court of a State” file suit in state court). *See also, e.g.*, 137 Cong. Rec. S. 16,204, 16,205-6, (daily ed. Nov. 7, 1991) (Remarks of Sen. Hollings, regarding S. 1462, and states’ power to proscribe procedures for initiating actions in state court).

¹⁶ Pub.L. 108-10, 117 Stat. 557.

¹⁷ NASUCA Opp. At 3-4.

DNC data into the national database, as part of its preferred method for building the national database. Report and Order ¶ 77. And while the TCPA does not directly mandate that states do this, it plainly empowers the Commission to require them to do so.¹⁸

NASUCA also contends that preemption of state DNC requirements is premature, arguing that the Federal Trade Commission (“FTC”) decided not to preempt state laws because it could take as long as three years to complete a full “harmonization” of the state and federal DNC databases.¹⁹ The FTC’s authority to preempt states’ DNC laws is simply not at issue. The TCPA directs that *this* Commission ensure there is only one DNC list applicable to interstate calls. The FTC may or may not succeed in its informal efforts to secure state cooperation in the creation of a single national data base. But either way, that is no justification for this agency to fail to carry out the clear command of Congress.

NASUCA also ignores the fact that this Commission concluded that it should take no more than 18 months for states to load their state DNC data into the national DNC database.²⁰

This is not, however, a matter of “impatience,” as NASUCA suggests. To be sure, The DMA believes that a 3-year transition is unacceptably prolonged; the 18-month transition this Commission adopted is generous. Yet, as explained in our Petition for Reconsideration, a significant number of states have given indication that they do not *ever* intend to cooperate or voluntarily yield to the national list with respect to interstate calls. NASUCA seems to concede that the time may come when it, too, would agree that wholesale preemption of state DNC requirements as applied to interstate calls is necessary. In the face of states’ outright refusal to yield to the national list, there is utterly no reason

¹⁸ See, e.g., 227(c)(3)(D) (expressly authorizing the Commission to “specify the methods by which [DNC requests] shall be collected and added to the database”).

¹⁹ NASUCA Opp. at 3.

²⁰ Report and Order, ¶77.

to delay. The Commission must preempt states from applying their DNC requirements to interstate calls now.

The burden of complying with multiple DNC requirements can not be overstated. In any event, since a dominant goal of the TCPA was to ensure nationwide uniformity for interstate calls, even one state law purporting to impose duplicative requirements runs afoul of the mandate of the TCPA and the policies it embodies. State-mandated DNC lists and related substantive requirements are duplicative and burdensome and, therefore, inherently inconsistent with the TCPA if applied to interstate calls. The Commission must preempt them.

II. CALLS TO BUSINESSES

The DMA Petition asks the Commission to provide clearer delineation between calls to businesses and calls to residential subscribers, to ensure that calls made to businesses are exempt from the DNC rules. Messers. Joe Shields and Dennis C. Brown have opposed. Mr. Shields implies that The DMA seeks an exception not permitted by law. To the contrary, the TCPA only empowers the Commission to impose the DNC rules on calls to “residential” subscribers. The thrust of his argument, however, is that it is difficult to ascertain with precision what constitutes a “residential” line, which is precisely the point The DMA has stressed. There are countless situations when a person may register a home number on the national DNC list but also use that number for business purposes. Moreover, an individual may have multiple “residential” listings, but use one or more of the lines for business purposes.

Mr. Brown also seems to concede that the Commission may not subject business-to-business calls to the DNC requirements, and instead focuses on how the Commission should decide if a call is made to a “residential” number. Mr. Brown submits that the

appropriate “test” is whether a consumer pays the “residential rate” for service, or the number called “appear[s] at the subscriber’s residence.”²¹

A telephone bill – or directory listing – alone is not determinative. Many consumers may not be aware that they arguably should identify – and pay for – “business” listings differently than they do “residential” listings. Others may be aware there is a difference but ignore it. Even telephone carriers can not, as a practical matter, monitor or enforce proper classification for home-based business operations. Furthermore, neither “test” is tied to information available to callers, who are not privy to individuals’ telephone bills.

The only workable standard is if the caller is calling for a business purpose, and understands that the number dialed is used for business purposes, the caller should not have to scrub the number against the national DNC list. We would agree, however, that even for these calls, if the called party indicates to the caller that the number is in fact a line for residential use and asks to be placed on the calling party’s in-house DNC list, that DNC request should take precedence, as it would for calls to individuals with whom a marketer has an established business relationship. As a practical matter, that is what DMA members do now.

Both oppositions – as well as the “tests” they advocate – ignore the FTC’s ruling on the issue and the Congressional mandate that the two federal agencies seek to promote consistency in the regulations. As we noted, the FTC determined to exempt business-to-business calls from, *inter alia*, the DNC provisions of the Telemarketing Sales Rule, “calls to home businesses would not be subject to the amended Rule’s ‘do-not-call’

²¹ Brown Opp. at 4-5.

requirements.”²² This Commission should follow the same course, and expressly exempt calls between a telemarketer and any business, including home-based businesses.

III. WIRELESS NUMBERS

The DMA petitioned the Commission to amend the safe harbor, 47 C.F.R. § 64.1200(c)(2), to extend safe harbor protection to calls made to wireless numbers when the caller has used reasonable methods, such as The DMA’s Wireless Suppression Service, to prevent such calls. The TCPA, and the regulations adopted by both this Commission and the FTC all recognize that despite best efforts, errors may occur in handling DNC requests. Thus, callers may rely on safe harbors where they have implemented reasonable procedures to prevent violations.²³ The DMA’s wireless safe harbor proposal simply recognizes and applies the same principle to calls to wireless numbers.

The DMA also requested that the Commission reconsider its Report and Order to make provisions for the segregation of wireless numbers from other numbers contained in the national DNC database. It appears that parties opposing the request may have misunderstood our intent.²⁴ The DMA is not asking the Commission to revisit its decision to permit wireless subscribers to include their numbers on the database. Rather, we ask only that such numbers be segregated and that callers who must *already* purge them because of the limits on calling wireless numbers using autodialers be allowed to avoid the necessity of downloading them from the DNC list simply to “delete” those numbers twice. The duplicative burden this entails is *not* trivial. Every record on the DNC list must be processed and there are, according to agency estimates, over 50 million records in the database. Even comparatively sophisticated computer systems require manual oversight,

²² Statement of Basis and Purpose, 68 Fed. Reg 4580, 4632 (Jan. 29, 2003).

²³ 47 U.S.C. § 227(c)(5)(C); 47 C.F.R. § 64.1200(c)(2); 16 C.F.R. § 310.4(b)(3). The TCPA also provides for a private right of action for DNC violations only when a consumer receives *more than one* call allegedly in violation of the rules within a 12-month period.

²⁴ Brown Opp. at 6; Shields Opp. at 2.

and can be tied up for a full day or more processing data of this volume. Marketers who use autodialers are expected to purge their calling lists of wireless numbers without regard to whether or not the number also appears on the DNC list. There is utterly no reason to insist that marketers process the same data twice. And since marketers are expected to identify wireless numbers, the database administrator should be readily able to do so, too.

Finally, the Commission must also make clear that, contrary to Mr. Brown's suggestion,²⁵ a call to a wireline number that is forwarded, at the *subscriber's* sole discretion and request, to a wireless number or service does not violate the ban on calls to wireless numbers.²⁶ In such circumstances, the caller has only "made a call" to a wireline number; the subscriber alone elected to forward the call, a fact that the calling party could not know before initiating the call.

IV. CALLER ID REQUIREMENTS

The DMA has asked that the Commission further examine and perhaps revise its caller identification rules. Mr. Shields suggests that there are no issues to consider – caller identification "has always been available to the telemarketing industry," but marketers "choose not to transmit . . . in order to hide who was initiating the call." Mr. Shields ignores the reality: the technology to transmit caller identification information is *not* ubiquitous. For example, in just the last two weeks, MCI submitted information in this proceeding indicating that it is only now able to begin to upgrade its switches to devise a method to work around the fact that its customers can *not* transmit Calling Party Number ("CPN") on non-SS7 trunks.²⁷ We once again stress our support for the concept, but it is

²⁵ Brown Opp. at 5.

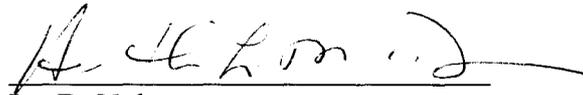
²⁶ 47 U.S.C. § 227(b)(1)(A)(iii).

²⁷ Letter to Marlene H. Dortch, Secretary, FCC from Karen Reidy, MCI (*Ex Parte* notice) October 22, 2003.

imperative that the technical feasibility of the rules be given more rigorous consideration before they take effect in January 2004.

Respectfully submitted,

H. Robert Wientzen
President & CEO
Jerry Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030



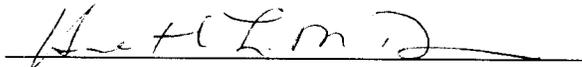
Ian D. Volner
Heather L. McDowell
Ronald M. Jacobs
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, N.W.
Suite 1000
Washington, DC 20005-3917
(202) 962-4800

Counsel for The DMA

November 3, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DMA Reply to Oppositions to Petition for Reconsideration was served by postage paid, first-class mail, to the parties identified below this 3rd day of November, 2003.



Dennis C. Brown
126/B North Bedford Street
Arlington, VA 22201

Steve Carter, Attorney General
Thomas M. Fisher, Special Counsel
Office of the Attorney General of Indiana
ICGS, 5th Floor
302 West Washington Street
Indianapolis, IN 46204

Joe Shields
16822 Stardale Lane
Friendswood, TX 77546

Robert S. Tongren, Ohio Consumers' Counsel/
President, National Association of State Utility
Consumer Advocates
Terry L. Etter, Assistant Consumers' Counsel
David C. Bergmann, Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street
Suite 1800
Columbus, OH 43215-3485