

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**AMERICAN TELESERVICES ASSOCIATION REPLY TO OPPOSITIONS AND
COMMENTS IN RESPONSE TO PETITIONS FOR RECONSIDERATION**

The American Teleservices Association (“ATA”) hereby submits its reply to the oppositions and comments on the petitions for reconsideration of the *Report and Order* in the captioned proceeding. 1/ The submissions that address issues raised by ATA’s opposition and comments confirm that the FCC must establish more definitively its jurisdiction over interstate telemarketing, clarify its rules with respect to telemarketing to wireless phones, and refrain from adopting rule changes that would make the new telemarketing rules overly restrictive. 2/

I. INTERSTATE TELEMARKETING

Oppositions filed by state regulatory advocates underscore the importance of the more definite statement of federal jurisdiction over interstate telemarketing sought by ATA and by the Direct Marketing Association (“DMA”) in its petition for reconsideration. These requests for greater clarity arose from state intransigence and uncertainty created by the FCC’s issuance of only a generic statement that “state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict

1/ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003) (“*Report and Order*”). See also *Petitions for Reconsideration and Clarification in Rulemaking Proceedings*, 68 Fed. Reg. 53740 (2003).

2/ American Teleservices Association Opposition And Comments in Response to Petitions For Reconsideration (“ATA Opp.”) at 2-11.

with ... the federal scheme and almost certainly would be preempted.” ATA Opp. at 2-4 (quoting *Report and Order*, ¶ 84); DMA Pet. at 3-5. It would in no way be “premature” for the FCC to grant the clarification the telemarketing industry seeks, notwithstanding claims by the National Association of State Utility Advocates (“NASUCA”) to the contrary. ^{3/} As a threshold matter, both NASUCA and Steve Carter, Indiana’s Attorney General (“Carter”), are wrong to suggest the federal telemarketing rules do not preempt state laws with respect to telemarketing calls across state lines. *Id.*; Carter Opp. at 2-4. The *Report and Order* is clear that in such cases state laws that differ from the FCC rules “would be preempted” if they “conflict” with the federal scheme. *Report and Order*, ¶ 84. Accordingly, there is no question whether state laws are supplanted with respect to interstate telemarketing – rather, the only issue is what it means for them to “differ” and/or “conflict” with respect to the federal rules, and whether the Commission will give more definitive guidance on that point.

Any suggestion that such guidance can wait for as long as three years is clearly misplaced. NASUCA Opp. at 3. This is not a question of federal/state harmonization of their respective “do-not-call” lists, as NASUCA apparently believes, but rather which of those lists, and their related regulations, apply to interstate telemarketing calls. The states’ continued intransigence, as reflected in the NASUCA and Carter oppositions and in DMA’s petition, speak volumes as to the need for stronger Commission action in this area. NASUCA at 3-4; Carter Opp. at 3 (claiming “FCC lacks authority to preempt”); DMA Pet. at 3-5. Carter’s opposition in particular makes clear that the states will continue to claim authority to regulate interstate telemarketing, whatever the conflicts between their laws and the federal rules may be, absent more definitive action pre-

^{3/} Opposition of the National Association of State Utility Consumer Advocates to Petitions for Reconsideration (“NASUCA Opp.”) at 3.

cluding them from doing so. Carter Opp. at 3 (“TCPA does not preempt state telephone privacy laws as applied to interstate calls”).

To support his position, Carter misquotes the TCPA, claiming it “expressly does not preempt ‘any state law ... which prohibits ... the making of telephone solicitations.’” *Id.* at 4 (quoting 47 U.S.C. § 227(e)(1)(D)) (ellipses added by Carter). What Section 227(e)(1)(D) actually says, however, is that “nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations.” 47 U.S.C. § 227(e)(1)(D) (emphasis added). To the extent the TCPA precludes the FCC from preempting *any* state requirements or regulations (which must be “more restrictive” than the FCC rules to survive), it preserves them only insofar as they regulate *intrastate* telemarketing, not interstate calls. See *Report and Order* ¶ 83 (“Congress enacted section 227 and amended section 2(b) ... based upon the concern that states lack jurisdiction over interstate calls [a]lthough section 227(e) gives states authority to impose more restrictive *intrastate* regulations”) (emphasis added). Consequently, while the TCPA may allow states to retain their “do-not-call” registries, see Carter Opp. at 4-6, NASUCA Opp. at 4, they may enforce their registry (and other) rules only with respect to intrastate calls. The Commission should clarify that point, as well as the complete reach of its jurisdiction over interstate telemarketing, in resolving the petitions for reconsideration here.

II. TELEMARKETING TO WIRELESS PHONES

The responses to petitions for reconsideration also confirm that the Commission must grant ATA’s request for clarification regarding the interplay between its finding that predictive dialers are autodialers and the decision not to prohibit live telephone solicitations to wireless phones. ATA Opp. at 4-6 (citing *Report and Order*, ¶¶ 131-33, 166). As with the request in DMA’s petition for a safe harbor for telemarketing calls that

inadvertently reach wireless phones, DMA Pet. at 10-11, both SBC Communications, Inc. (“SBC”) and WorldCom, Inc., d/b/a MCI (“MCI”), assume the rules bar all predictive dialer calls to wireless phones, though that is hardly clear from the *Report and Order*. ^{4/} As predictive dialers are utilized in virtually all telemarketing, including that conducted by live sales agents, and the Commission clearly did not mean to cut off such calls to wireless phones, clarification is in order.

Even with that clarification, however, ATA agrees that the Commission must adopt some kind of safe harbor to ensure telemarketers are not punished for inadvertent calls to wireless phones. See, e.g., SBC Com. at 2. SBC confirms “there is no one database that telemarketers can use to identify all wireless numbers,” and that there are particular difficulties with “wireline numbers ported to wireless” phones. *Id.* Telemarketers cannot be placed in a situation where they face liability because, due to regulatory changes such as the FCC wireless number portability rules and marketplace changes such as abandonment of traditional wireline service for wireless phones, even the most diligent compliance efforts are futile. ^{5/} Any other solution would create a strict liability system that should be rejected. Indeed, the Commission should not force

^{4/} Comments of SBC Communications, Inc. in Response to Petitions for Clarification (“SBC Com.”) at 1; Opposition of MCI to Petitions for Reconsideration (“MCI Opp.”) at 8. Compare ATA Opp. at 5-6.

^{5/} In this regard, MCI is correct that “[a]s a legal matter ... numbers ported from a wireline carrier to a wireless carriers remain ‘assigned’ to the wireline carrier” and thus “neither the TCPA nor the FC’s rules prohibit using” equipment such as predictive dialers “to call numbers ported from wireline to wireless carriers.” MCI Opp. at 9 (citing, *inter alia*, *Numbering Resource Optimization*, 15 FCC Rcd 7574, ¶ 18 (2000); 47 C.F.R. §§ 52.15(f)(2) & (f)(5)). ATA submits an even stronger case to the same effect can be made for calls to numbers assigned to a wireline carriers that reach wireless phones because the subscriber uses a service such as “call forwarding” to transfer the call.

telemarketers to simply “let the caller take the risk of violating the statute” when even their best efforts cannot avoid that outcome. 6/

III. PREDICTIVE DIALER AND DO-NOT-CALL RULES

The Commission must reject Dennis C. Brown’s effort to distort the record in his continuing crusade to stamp out the use of predictive dialers regardless of the consequences of such regulation. 7/ In support of his quest for a zero abandonment rate, Brown quotes DMA to claim they are in “agree[ment that] [c]onsumers will not realize an appreciable reduction in abandoned calls imposing the lower [three percent] limit.” Brown Opp. at 2 (quoting DMA Pet. at 16 n.9). This language from DMA was offered, however, to support the prospect of *raising* the abandonment rate – there is clearly no consensus between Brown and DMA. Brown also indicates he does not understand the parameters of the abandoned call issue. He claims that while telemarketers “may be correct that imposing [stricter] limit[s] on call abandonment will cause ... efficiency to decrease,” the “proposed response” of reducing employment “would not be reasonable,” but rather telemarketers should “hire additional personnel so that fewer calls are abandoned.” *Id.* at 3 (discussing Infocision Pet. at 4-5). But this misses the point. Use of predictive dialers necessarily entails some abandoned calls, and predictive dialers clearly aid telemarketer efficiency and benefit consumers. *See Report and Order*

6/ Dennis C. Brown Opposition to Petitions for Reconsideration (“Brown Opp.”) at 5. The simplistic solution that “the Commission should declare that no person may make any call using” predictive dialers to wireless phones, *id.*, must be rejected as being directly contrary to the decision “not to prohibit ... live telephone solicitations to wireless” phones. *Report and Order* ¶ 166.

7/ *Compare* Brown Opp. at 2-3 *with* ATA Opp. at 9-10 (FCC properly weighed data showing “importance of predictive dialers to telemarketers” and that “zero abandoned-call rate would eviscerate not only their value to the industry but also their role in benefiting consumers” to “properly f[i]nd that ‘a ban ... would not strike ... proper balance between ... abusive practice’” and telemarketer needs) (citing and quoting *Report and Order* ¶¶ 8, 148-49).

¶¶ 148-49. Reduced efficiency means increased costs and less ability to add personnel, thus it is Brown’s position that is “unreasonable.”

Finally, the Commission must dismiss Brown and his “no, not one” mantra calling for controls on telemarketing that are more restrictive than the stringent new rules already in effect. As noted, the changes Brown seeks are more reflective of his animus toward telemarketing than any factual or other basis for rule changes. 8/ Moreover, as one commenter put it, “the Brown Petition is legally infirm and factually mistaken.” Opposition of Voice-Mail Broadcasting Corp. to Petition for Reconsideration (“Voice-Mail Opp.”) at 4. Voice-Mail confirms, for example, with respect to Brown’s proposal to modify the abandoned call rule to calculate the three percent rate based on all calls answered rather than those answered by a person, that Brown’s “premise ... is simply incorrect as ... telemarketing machines can detect whether a call has been answered by a live person or a machine.” *Id.* at 5 (emphasis in original). *Accord* ATA Opp. at 11.

Similarly, MCI correctly notes that the “decision to impose a thirty-day deadline on [the] duty to honor company-specific requests was based on a reasoned evaluation of the evidence in the record,” 9/ so there is no justification for shortening the deadline to require instantaneous or 24-hour implementation of a company-specific request. As MCI points out, the decision “took into consideration ... the ‘largely automated’ process of adding numbers to the company-specific do-not-call lists; the ‘large databases’ of ... requests maintained by some entities; and the ‘limitations on certain small businesses’” before adopting the thirty-day standard. *Id.* (footnotes omitted). There fact that Brown

8/ See *supra* note 6 and accompanying text (opposing Brown suggestion that telemarketers should bear regulatory risks associated with wireless phones even where meticulous efforts cannot assure compliance). See *also* ATA Opp. at 7 (noting Brown’s “abiding antipathy to telemarketing”).

9/ MCI Opp. at 4-5 (citing *Report and Order* at ¶ 94 & nn.293-95).

wishes the Commission had balanced these factors differently is by itself no basis for reconsideration. See *id.* (“Brown has presented no evidence that calls into question [the Commission’s] conclusions”). The same careful balancing of factors went into the decision to require telemarketers to update their downloads of the national “do-not-call” registry on a quarterly basis. *Id.* at 7; ATA Opp. at 9. ATA concurs that were this period “shortened, progressively higher costs [would be] imposed on telemarketers and progressively marginal benefits [would] accrue to consumers,” MCI Opp. at 8, such that the 90-day requirement the Commission adopted should remain in place.

CONCLUSION

For the foregoing reasons, ATA respectfully submits that the Commission should reject the state advocates’ claims that the FCC may not or should not definitively preempt the application of state rules to interstate telemarketing, clarify the rules for telemarketing calls to wireless phones, and decline to adopt more stringent predictive dialer and “do-not-call” rules than those that have only recently taken effect.

Respectfully submitted,

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