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November 8, 2004

Hon. Michael K. Powell, Chairman
Federal Communications Commission
445 Twelfth Street, N.W.
Washington, D.C. 20554

Dear Chairman Powell,

This letter is submitted on behalf of Teleytics, LLC, to respectfully request that the Commission grant the petitions that have sought preemption of certain state laws in North Dakota, Florida and New Jersey pursuant to the invitation in the Commission's Report and Order in *Implementation of the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, ¶ 84 (2003) ("*TCPA Order*"). Teleytics also respectfully requests that the Commission as a general matter issue a clearer, more affirmative statement of preemption than appears in the *TCPA Order*.

Founded two years ago, Teleytics conducts voice broadcast marketing on behalf of non-profit organizations and political campaigns. It is our policy to comply with the National Do-Not-Call Registry, all state "do-not-call" lists, and the Direct Marketing Association's Telephone Preference Service, regardless of any exemptions or exceptions that may apply. We also maintain an internal do-not-call list regardless of whether any federal or state rule requires that we do so on our own behalf or with respect to any call campaign that we conduct.

Since we have been in business, we have been contacted by approximately a half dozen states, including North Dakota, seeking to enforce state laws that these states claim prohibit one or more aspects of our voice broadcast marketing. We routinely advise them that all of our calls are interstate in nature, and that every call complies with the TCPA, the *TCPA Order*, and the federal rules at 47 C.F.R. § 64.1200.

To date, no state has been willing to give effect to the preemptive effect of your order and rules. Rather, in every case, after we note our compliance with the federal rules and cite the applicable exemptions under the TCPA and FCC rules, the states disclaim any preemptive effect of the federal rules. They base their position on the language in the *TCPA*

Order that the FCC “will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis.” The typical state position is that, unless and until this Commission or a court of competent jurisdiction issue an order specifically preempting the specific law in their specific state under which they claim to be proceeding, the *TCPA Order* is no bar to any enforcement action, even as against our interstate calls. Some states also cite language in the *TCPA Order* that they claim suggests the FCC leaves open the possibility that more restrictive state laws will not be preempted.

This clearly is not the way the Commission intended things to work when it issued the *TCPA Order*. Any fair reading of the relevant portion of the *TCPA Order* compels the conclusion that the language on which the states typically rely regarding permissibility of more restrictive state laws, while technically “leaving open the possibility” they might continue to apply to interstate calls, essentially forecloses that outcome where state law directly contravenes federal law, rules and policy.

The *TCPA Order* set forth what should have been a very clear paradigm. It established that “[b]ecause the TCPA applies to both intrastate and interstate communications, the minimum requirements are . . . uniform through the nation.” *TCPA Order* ¶ 81. Moving on to *intrastate* telemarketing, the *TCPA Order* established that “states may adopt more restrictive do-not-call laws governing intrastate telemarketing” but “caution[ed] that *more restrictive state efforts to regulate interstate calling would almost certainly conflict with [FCC] rules.*” *Id.* ¶ 82 (emphasis added). The *TCPA Order* goes on to “conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules,” and it accordingly established “that *any state regulation of interstate telemarketing that differs* from [the federal] rules *almost certainly would conflict* with and frustrate the federal scheme *and almost certainly would be preempted.*” *Id.* ¶¶ 83-84.

The clear import of this discussion in the *TCPA Order* should mean that any state rule or law that varies meaningfully from what federal law and rules allow and/or prohibit stands little chance of surviving if applied to calls between the states, notwithstanding the FCC’s pledge to examine them case-by-case rather than ordering wholesale preemption. This surely would be the case with any state law that is diametrically opposed to the federal rule, as would be a state requirement that prohibits calls the federal rules allow. It is instructive in this regard that the Commission “encourage[d] states to avoid subjecting telemarketers to inconsistent rules,” as it reflects the disfavor with which the FCC viewed divergent state rules – even those that are more restrictive – with respect to interstate telemarketing. *Id.* ¶ 84.

Yet the states, including North Dakota, have resisted the Commission’s “encouragement” to avoid imposing on interstate telemarketing state laws that differ from the federal rules. Rather, as noted, they take the position that the FCC left the door open for their rules by deciding to proceed on a case-by-case basis rather than issuing a blanket rule preempting the application of state telemarketing law to interstate calls. Now that there has been more than a year’s experience with that approach, however, it is clear it was a mistake for the Commission to adopt its case-by-case stance rather than preempting outright. States thumb their collective noses at the purported preemptive effect of the federal rules, and

all but dare telemarketers to pursue the case-by-case option. This effectively eliminates the federal rules from having *any* preemptive effect – or even applying at all – with respect to interstate calls in cases where a state prefers its rules to the federal regime.

This is so because, unfortunately, a “case-by-case” basis translates into litigation. While a large company can absorb the costs of litigation into their budget, we are not able to do so. The threat of litigation by a state Attorney General’s office, translates into *de facto* reverse preemption by the states. Due to the case-by-case approach set forth in the *TCPA Order*, we have few choices when confronted by a state that claims our calls violate their state laws or rules.

In most cases the states almost immediately insist that we sign some kind of “voluntary” assurance that we will comply with the state rules – which the *TCPA Order* clearly intended to relieve us of – and that we make a “voluntary” payment to the state in lieu of a fine. This amount is always less than it would cost to litigate the matter, but is by no means insubstantial. Our only other alternative is to spend more money litigating the matter than it would cost to settle. Of course, we could always stop making calls and go out of business. But that is not what the TCPA intended with respect to the non-profit and political calls we place.

The North Dakota laws that are the subject of the instant preemption petition, and that state’s effort to enforce them against interstate calls regardless of any conflict between the federal and state laws, is a perfect case in point. In September 2003, the Office of the Attorney General of North Dakota contacted us, asserting that we had violated N.D.C.C. ch. 51-28, the same statute that is the subject of ccAdvertising’s Petition for Expedited Declaratory Ruling. We informed them that we were in compliance with the TCPA. The state asserted that its law applied nevertheless. Of course, we could have pursued the matter in state court in a distant forum. The North Dakota Attorney General’s office made it clear how things would proceed if we had chosen that path:

If we receive this revised executed agreement by September 18, 2003, including payment, we will still settle this matter. In the meantime, we have decided to pursue our investigation and enclosed and served upon you is an Order to Produce Information. If we later require additional information, we will issue you a Civil Investigative Demand. If the matter is resolved by September 18, 2003, you will not have to respond to the Order to Produce Information no later than September 29.

The obvious implicit threat that followed all this was the prospect of an enforcement action in state court. Responding to both the Order to Produce Information and the Civil Investigative Demand would have cost us thousands of dollars. Pursuing the matter in state court in North Dakota, far removed from our base of operations, would have run into tens of thousands of dollars. Instead, we chose to enter into an Assurance of Voluntary Compliance, requiring us to stop dialing to phone numbers in North Dakota and make a “voluntary” payment. We are now barred from making calls into North Dakota that the TCPA and the federal rules should allow us to place.

We have had similar problems in other states. One rationalized its authority notwithstanding the TCPA by simply claiming that it “believe[s] our state Do Not Call Laws are not in conflict with the TCPA or promulgated regulations, they are simply broader. While Congress has direct the FCC to ‘consider whether there is a need for additional [FCC] authority to further restrict telephone solicitations, including those calls’ by tax-exempt non-profit organization, the FCC has not sought statutory authority to regulate telephone solicitations by tax-exempt nonprofit organization to date. See 47 U.S.C. § 227(c)(1)(D).” This, or course, is preposterous.

The FCC has stated that the application to interstate calls that “differ” from the federal rules should be preempted. It is ludicrous that a state could claim to avoid this preemptive effect by claiming its rules “are not in conflict with the TCPA ... they are simply broader.” If they are “broader,” they “differ” and should be preempted. Indeed, the *TCPA Order* even says that “more restrictive state efforts to regulate interstate calling would almost certainly conflict” and be preempted. “Broader” means “more restrictive” It should be clear from even a cursory reading that state rules in such circumstances should be preempted. But the approach taken in the *TCPA Order* allows precisely this kind of gamesmanship by the states, which they then use as leverage to enforce their laws, and/or to broker settlements under them, even though this Commission intended those laws not to apply.

It is thus clear the states are interpreting the lack of FCC action in this arena as implicit permission to ignore when convenient the TCPA and the subsequent rules implementing it. Given the resources available to the states’ AG offices, this translates into the ability to force our small company into conforming to state laws and to pay penalties.

The absence of more definitive FCC action to preempt application to interstate telemarketing or state laws that differ from the federal rules is not just allowing states like North Dakota to run rampant. The private cause of action provisions in the TCPA also allow crusading professional plaintiffs to take advantage of the discrepancy between state and federal laws as well by filing suits that invariably cost less to settle than to litigate – even when the telemarketer, as is the case with Telelytics, complies fully with all applicable federal rules. Litigating these cases in distant fora is too expensive a proposition to pursue, and state courts have been unwilling to recognize the preemptive effect of the TCPA and the FCC rules, or even to suspend proceedings to allow the Commission to consider whether to preempt under its “case-by-case” approach. We are left with no choice but to surrender to plaintiff demands for case settlements just to avoid the costs of litigation, even though we’ve done nothing wrong. The costs of these *seriatim* settlements quickly mount.

Telelytics is a small vendor. We have a single employee. It appears that legal costs and fines paid to states will wipe out any profit in 2004 and may force us out of business in 2005. We are committed to complying with all applicable laws, but it is not possible for us to comply with a multitude of disparate state laws. It was clearly the FCC’s intent to avoid this type of situation.

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It is imperative that the FCC act in order to provide clear guidance to the states and to the industry. It should preempt the North Dakota law at issue here as requested by ccAdvertising. It also should issue a much stronger statement definitively preempting as to interstate telemarketing all state laws that differ from the federal rules. At a bare minimum, in preempting the North Dakota, Florida and New Jersey rules at issue here, the Commission should issue a strong statement giving force to the *TCPA Order*'s discussion of the preemptive effect of the TCPA and the federal rules.

Respectfully submitted,

/s/ Scott Kaplan

Scott Kaplan

President

Telelytics, LLC