

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

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

BELLSOUTH'S COMMENTS

BellSouth Corporation, on behalf of its wholly owned subsidiaries (collectively "BellSouth"), files these comments concerning three petitions seeking declaratory rulings preempting state laws that are interfering with the Commission's rules regarding interstate telemarketing ("petitions").¹

The petitions that are the subject of the proceeding all relate to state rules that regulate how a company may conduct telemarketing to consumers in the state. The petitions claim that the state rules affect interstate as well as intrastate telemarketing calls.² The Commission should grant these petitions but, more importantly, the Commission should use this proceeding to

¹ Consumer & Governmental Affairs Bureau Seeks Comment on American Teleservices Association, Inc. Petition for Declaratory Ruling on Preemption of New Jersey Telemarketing Rules, CG Docket No. 02-278, DA 04-3185, Public Notice (rel. Oct. 4, 2004); Consumer & Governmental Affairs Bureau Seeks Comment on Express Consolidation, Inc. Petition for Declaratory Ruling on Preemption of Florida Telemarketing Rules, CG Docket No. 02-278, Public Notice, DA 04-3186 (rel. Oct. 4, 2004); Consumer & Governmental Affairs Bureau Seeks Comment on ccAdvertising Petition for Declaratory Ruling on Preemption of North Dakota Telemarketing Rules, CG Docket No. 02-278, Public Notice, DA 04-3187 (rel. Oct. 4, 2004).

² The petitions were filed by ccAdvertising, Inc. regarding North Dakota's laws affecting the use of prerecorded messages and autodialers over interstate and intrastate telemarketing calls; American Teleservices Association, Inc. regarding the New Jersey law's definition of the established business exemption, which applies to both interstate and intrastate telemarketing calls; and Express Consolidation, Inc. regarding Florida's laws related to both interstate and intrastate calls made by a tax exempt nonprofit organization. Each of the petitions claims that the state laws in question conflict with the Commission's rules over telemarketing.

exercise its preemption power and declare that states may not implement any rules that affect interstate telemarketing calls.

In 2003, the Commission amended its rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”).³ While the TCPA has many rules governing telephone solicitations, at its core, the act prohibited commercial entities from making sales solicitation calls to residential consumers who had requested not to receive such calls. The Commission had little discretion in implementing rules consistent with the specific requirements of the TCPA. Congress, however, did grant the Commission discretion over some elements such as what exemptions may apply to unsolicited telephone calls and how to administer a list of residential consumers who had requested not to receive solicitations.⁴ Another important aspect of the TCPA was that Congress clearly ceded jurisdiction over both interstate and intrastate telephone solicitations to the Commission while reserving only limited jurisdiction for intrastate telemarketing calls to the states. It therefore was clear from the statute, and legislative history, that Congress intended for the Commission to exercise its exclusive jurisdiction over all

³ 47 U.S.C. § 227.

⁴ Indeed, when the Commission first established its implementing rules, it chose to require company-specific do-not-call lists, i.e., companies were required to set up and maintain their own lists of consumers who had requested not to be called. In 2003, the Commission changed this approach and, consistent with the Federal Trade Commission’s rules, established a national registry for all consumers.

telemarketing matters.⁵ Thus, the only authority Congress left to the states was the ability to enact laws or rules related exclusively to intrastate telemarketing calls.⁶

While the Commission recognized that Congress had given it jurisdiction over all interstate and intrastate telemarketing calls,⁷ it chose not to proactively preempt all state laws related to interstate telemarketing. Instead, it found “that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.” The Commission then stated, “We will consider any alleged conflicts between state and federal requirements and *the need for* *preemption on a case-by-case basis. Accordingly, any party that believes a state law is*

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14014, 14064, ¶ 83 (2003) (“*Report and Order*”). (“Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations.”)

⁶ See 47 U.S.C. § 227(e):

(e) Effect on State Law. –

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, 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 on, or which prohibits—

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

⁷ *Report and Order*, 18 FCC Rcd at 14064, ¶ 83. (“Here, Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. Congress did so based upon the concern that states lack jurisdiction over interstate calls.”)

inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission.”⁸

Thus, under the Commission’s current rules, a state may enact any laws that it desires over interstate telemarketing calls, no matter the impact on the federal rules, and the only recourse for a company attempting to conduct interstate telemarketing calls within that state is to file an action with the Commission seeking to have the law preempted. Unfortunately, the states do not suspend their enforcement proceedings while the declaratory ruling is being sought. And, it is likely that the state enforcement proceeding would conclude prior to the Commission declaratory ruling proceeding. Thus, companies seeking to engage in telemarketing practices that are perfectly legal under the federal rules but conflict with states’ rules face an untenable position of either not conducting telemarketing in that state or conducting the telemarketing and facing state penalties.⁹

The ccAdvertising petition provides a very good example of this exact scenario. ccAdvertising conducted interstate telemarketing activities that it claims are within the Commission’s rules. The activities, however, were in violation of the North Dakota telemarketing rules. The Attorney General for the state of North Dakota is now seeking an enforcement action against ccAdvertising for violation of the North Dakota rules. Unless the Commission acts and preempts the North Dakota law, ccAdvertising will be subject to fines and forfeitures to the state of North Dakota. Based on the timing of the action in North Dakota, it is likely that the state action will be complete before the Commission rules in this proceeding.

⁸ *Id.* at 14064-65, ¶ 84 (emphasis added).

⁹ Some of these penalties are substantial. For example, Florida’s penalty is \$10,000 per violation or call, and North Dakota’s penalty is \$2,000 per violation or call. Accordingly, it would take very few calls within a state to accrete to very a significant financial fine.

Accordingly, ccAdvertising is facing serious, and possibly irreparable,¹⁰ harm from the North Dakota proceeding.

Clearly, this form of conflicting regulation – and the remedies available to a company caught in such a conflict – is unnecessarily burdensome and should be eliminated. The very reason behind the Commission’s finding that conflicting state and federal rules over interstate telemarketing calls “would conflict with and frustrate the federal scheme and almost certainly would be preempted” was the burden that multiple rules placed on telemarketers.¹¹ Indeed, in support of this finding, the Commission specifically stated “[w]e conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.”¹²

The Commission should therefore grant the three petitions that are the subject of this proceeding. Moreover, having correctly determined that the existence of conflicting rules over interstate telemarketing is unacceptable, the Commission should, based on the record evidence these petitions present, now make a proactive finding of preemption over all state regulation and declare that states may not implement any laws affecting interstate telemarketing calls. It is not good enough for the Commission to agree that conflicting regulation should be preempted but

¹⁰ BellSouth is not familiar with ccAdvertising’s financial stability. If it is a small company with limited available capital, however, a significant number of calls, at a fine of \$2,000 per call, could have a serious financial impact on the company and could potentially cause it to be unable to recover financially.

¹¹ *Report and Order*, 18 FCC Rcd at 14064, ¶ 84.

¹² *Id.*, ¶ 83.

then allow a company to be subject to fines and penalties within a state while the Commission contemplates a declaratory ruling petition. The wheels of administration move slowly and the Commission has an infinite number of matters that are in need of the Commission's limited resources. Thus, the Commission should not be bogged down with case-by-case declaratory ruling petitions on matters that should be simply a matter of law. A pronouncement by the Commission of its exclusive jurisdiction over all interstate telemarketing matters would simply require the states to examine and amend any laws or rules that extend to interstate telemarketing calls. Unless the Commission sends this clear message to the states, companies, and state officials, will spend countless resources in state proceedings fighting over state regulation related to interstate calls. Moreover, the Commission and its staff will spend significant resources in declaratory ruling proceedings. The three petitions that are the subject of this proceeding prove that point. A declaration by the Commission prohibiting state regulation over interstate telemarketing calls is therefore needed.

CONCLUSION

For the reasons stated herein, the Commission should grant the petitions that are the

subject of this proceeding and should exercise its preemption power and declare that states may not implement any rules that affect interstate telemarketing calls.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 17th day of November 2004 served the parties of record to this action with a copy of the foregoing **BELLSOUTH'S COMMENTS** by electronic mail addressed to the parties listed as follows:

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