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

In the Matter of	)	
	)	
ccAdvertising	)	CG Docket No. 02-278
	)	DA 04-3187
Petition for Expedited	)	
Declaratory Ruling	)	

To: The Commission

OPPOSITION TO
MOTION TO DISMISS PETITION
ON GROUNDS OF SOVEREIGN IMMUNITY
OR IN THE ALTERNATIVE TO STAY PROCEEDINGS

FreeEats.com, Inc., d/b/a ccAdvertising ("ccAdvertising" or "Petitioner"), by and through its attorneys and pursuant to Sections 1.4 and 1.45(b) of the Commission's Rules, 47 C.F.R. §§ 1.4, 1.45(b), hereby submits its opposition to the "Motion to Dismiss Petition on Grounds of Sovereign Immunity or in the Alternative to Stay Proceedings" (the "Motion"), filed November 8, 2004 by the State of North Dakota ("North Dakota") in the above-captioned proceeding. The following is respectfully shown.

I. INTRODUCTION

On September 13, 2004, ccAdvertising submitted a Petition for Expedited Declaratory Ruling (the "Petition") asking the Commission to declare that the applicability of a North Dakota statute, N.D. Cent. Code § 51-28-02, to ccAdvertising's interstate political polling calls is preempted pursuant to the Communications Act of 1934, as amended (the "Act"), including Section 227 thereof, enacted by the Telephone Consumer Protection Act ("TCPA"). The

Petition informed the Commission that the office of the attorney general of North Dakota had notified ccAdvertising of its intention to take enforcement action to recover monetary remedies and to prevent ccAdvertising from making interstate political polling calls into North Dakota during the weeks leading to the November 2004 elections, and thereafter. On September 17, 2004, North Dakota filed a complaint against the Petitioner in District Court in the South Central Judicial District, County of Burleigh, North Dakota. The suit remains pending, with cross-motions for summary judgment currently before the Court for consideration.

II. ARGUMENT

A. The Doctrine of Sovereign Immunity Does Not Shield the State from the Commission's Preemption Authority

The Eleventh Amendment to the Constitution presupposes "that each State is a sovereign entity in our federal system," *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54 (1996) and that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). But neither of these presuppositions, nor the doctrine of sovereign immunity which they support, has any bearing on the Petition. ccAdvertising has not sued North Dakota, nor has ccAdvertising filed a complaint with the Commission seeking relief from the state's actions. In short, ccAdvertising has taken no action that affects "the dignity and respect afforded a State, which the immunity is designed to protect," *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997). Rather, ccAdvertising has asked the Commission to exercise authority granted to it by Congress and to declare preempted a North Dakota statute that is inconsistent with federal law.

North Dakota relies principally on *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002), which it asserts "is procedurally and factually on all fours with

the instant case." Motion at 16-17. As will be shown below, that case is readily distinguished from this proceeding – indeed, less than one year after Federal Maritime Commission was decided, a federal appellate court held that the sovereign immunity was inapplicable to an executive agency preemption proceeding strikingly similar to the one raised by the Petition.

In *Federal Maritime Commission*, the South Carolina State Ports Authority ("SCSPA") denied requests by South Carolina Maritime Services, Inc. ("Maritime Services") for permission to berth a cruise ship, on which passengers would be permitted to participate in gambling activities while on board, at the SCSPA's port facilities in Charleston, South Carolina. *Federal Maritime Comm'n*, 535 U.S. at 747. Maritime Services filed a complaint with the Federal Maritime Commission ("FMC"), arguing that the SCSPA's denials, which were based on its policy of denying berths in the Port of Charleston to vessels whose primary purpose was gambling, were discriminatory because the SCSPA had allowed other ships that offered gambling to receive berths. *Id.* at 748. Maritime Services sought injunctive relief and damages. *See id.* at 748-49.

The Administrative Law Judge presiding over the proceeding granted the SPSCA's motion to dismiss the complaint on grounds of sovereign immunity. *Id.* at 749. On its own motion the FMC reviewed the ALJ's ruling and concluded that sovereign immunity did not cover executive branch administrative agency complaint proceedings. *Id.* at 750. On appeal by the SPSCA, the U.S. Court of Appeals for the Fourth Circuit reversed. *Id.* The Supreme Court affirmed, holding that South Carolina's sovereign immunity precluded the FMC from adjudicating a private party's complaint that a state-run port violated the Shipping Act of 1984. *Id.* at 760.

According to North Dakota, *Federal Maritime Commission* "extends the sovereign immunity doctrine to administrative proceedings, preventing federal agencies like the FCC from using adjudicative procedures to determine the merits of a private party action against a non-consenting state." However, North Dakota overlooks the critical distinction between in *Federal Maritime Commission* and this matter: ccAdvertising's request for preemption is not an administrative *adjudication* subject to immunity. In this regard, the case that more appropriately may be described as being "on all fours" with the instant matter is *Tennessee v. United States Department of Transportation*, 326 F.3d 729 (6th Cir. 2002), *cert. denied, Tennessee v. United States Department of Transportation*, 2003 U.S. LEXIS 8009 (U.S. Nov. 3, 2003).

The issue in *Tennessee v. USDOT* was, fully taking into consideration the Supreme Court's *Federal Maritime Commission* opinion, "whether the nature of the procedure used by the USDOT to respond to requests for preemption determinations under the Hazardous Materials Transportation Act is sufficiently 'adjudicative' to fall under the rubric of the majority opinion in *Federal Maritime Commission*." 326 F.3d at 734. The Court noted that "in doing so we must be mindful that it is also the duty and prerogative of administrative agencies in the executive branch of our constitutionally tripartite form of government to enforce federal law and to enact regulations necessary to that enforcement. *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." *Id.*

The Sixth Circuit found *Federal Maritime Comm'n* to be "clearly distinguish[able]," "because the process used by the USDOT simply is not an 'adjudication'". *Tennessee*, 326 F.3d at 734. That process – specifically, the process used by the federal Department of Transportation to address preemption requests, and described at length by the Court, *see id.* at 734-35 – is almost identical to the process followed by this Commission in considering preemption requests,

including ccAdvertising's.[1] The Court found that this process "differs dramatically from the one scrutinized by the Supreme Court in *Federal Maritime Commission*, and, quite plainly, does not mirror federal civil litigation." *Id.* at 735. *See also id.* at 733-34 (comparing the adjudicative procedures held to be dispositive in *Federal Maritime Commission*).

Among the factors the Sixth Circuit found dispositive was the distinction between the nature of the final determination in a preemption case, compared to the procedure used in *Federal Maritime Commission*.

> Rather than an adjudication of the rights and responsibilities of different parties leading to injunctive relief and an award of monetary damages, the preemption decision in 49 U.S.C. § 5125 does not direct the entry of relief against the State of Tennessee. Instead, it serves as an administrative interpretation of a federal statute, prospective only in its application and warranting *Chevron* deference in subsequent litigation. *See Chevron, 467 U.S. at 843-44.* The action of the Associate Administrator does not result in an order of enforcement against a state, nor does it leave a state defenseless in later litigation if the state chooses not to participate in the administrative proceeding. *See Fed. Mar. Comm'n*, 535 U.S. at 743, 122 S. Ct. at 1876 (explaining that procedures effectively coercing states into participating in Federal Maritime Commission proceedings influenced the Court's decision that sovereign immunity barred suit against the State of South Carolina). Further, in contrast to the powers of the Federal Maritime Commission under provisions of the Shipping Act, *see* 122 S. Ct. at 1877-78, the USDOT Administrator does not possess the power to assess a civil penalty for non-compliance because the agency is without authority to issue an order against the state. Instead, the Administrator is merely providing an agency interpretation of the federal law in question, and that interpretation is strictly prospective in nature.

326 F.3d at 736.

The Court also noted that DOT procedures provided "an opportunity for a person aggrieved by a determination to file a petition for reconsideration," and concluded that "the

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[1] North Dakota's assertion that this proceeding "is an 'adjudicative' proceeding under section 5(d) of the Administrative Procedure Act," Motion at 2, thus is wholly contrary to precedent.

existence of an opportunity to petition for reconsideration does not alter the nature of the decision reached by the" agency. *Id.* at 736. The Court thus rejected the State's argument that the reconsideration process "functions as the equivalent of a legal appeal, [thereby] differentiating this procedure from the standard rule-making process." *Id.*

The Sixth Circuit concluded

> that the administrative procedure addressed in this matter falls within the rule-making process lying at the center of the responsibilities of federal executive agencies. *Rather than an adjudicative procedure, the process utilized to reach a preemption determination serves the valuable function of allowing an agency of the executive branch to interpret federal legislation that it is authorized to enforce.* This procedure, employing a notice-and-comment process and the expertise of the USDOT, does not offend the dignity of the states, nor does it force a state to adjudicate claims brought by private citizens against the state as if it were sued in an Article III tribunal. We hold that it is, instead, an appropriate – and constitutionally valid – method designed to permit enforcement of federal legislation implementing the Commerce Clause of the United States Constitution.

Id. at 736 (emphasis added). It is noteworthy that although the State of Tennessee sought *certiorari*, in November 2003 the Supreme Court denied its request. *Tennessee v. United States Department of Transportation*, 2003 U.S. LEXIS 8009 (U.S. Nov. 3, 2003).

The Commission's procedures for addressing preemption requests under the Telephone Consumer Protection Act are nearly identical to the procedures found dispositive in *Tennessee v. USDOT*. Consequently, just as in that case, the sovereign immunity doctrine does not apply to ccAdvertising's request, and North Dakota's motion must be denied.

B. <u>There Is No Basis to Stay the Proceedings</u>

As an alternative to its dismissal, North Dakota has moved to stay additional comment and action by the Commission on the Petition "until a decision by the North Dakota courts on the merits of the preemption argument." Motion at 3. The request is unjustified. That the

preemption issue is before any court is attributable entirely to North Dakota – it chose to bring suit four days after ccAdvertising filed its Petition with the Commission. That the preemption issue remains pending before a state court also is attributable entirely to North Dakota – despite being fully apprised of ccAdvertising's filing with the Commission, North Dakota artfully pled its complaint in state court to omit references to interstate non-commercial calls, and then argued that the absence of these facts precluded dismissal of its suit.[2] In short, North Dakota's conduct in bringing a suit in state court and then delaying consideration of the suit's merits does not compel the Commission to stay its consideration of ccAdvertising's earlier-filed Petition. ccAdvertising properly submitted its request pursuant to express invitation of the Commission to "any party that believes a state law is inconsistent with section 227 of our rules [to] seek a declaratory ruling." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, *Report and Order*, 18 FCC Rcd 14014, ¶84 (2003) ("*TCPA Order*"). The Commission must reject North Dakota's transparent attempts to evade a ruling by the Commission, first by filing suit in State court, and now by seeking dismissal or stay of the Petition.

North Dakota also claims that "[t]here is no pressing need for th[e] Petition to go forward" – presumably because the 2004 election is over. But that fact is irrelevant. The State's inconsistent law remains in effect and ccAdvertising remains subject to penalty by North Dakota for violating it. Consequently, ccAdvertising will continue to face prosecution for its conduct of lawful activity in connection with any future election contested in North Dakota.

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[2] The state court identified two reasons why it was unable to grant ccAdvertising's motion. First, the court concluded that "[i]t is possible that calls were placed in North Dakota." Slip op. at 3 (attached as Exhibit 2 to North Dakota's Motion). Second, the court concluded that "[i]t is possible that [ccAdvertising's calls] were commercial in nature." *Id.*

Finally, North Dakota posits the danger of the "risk of inconsistent results." That danger will be markedly greater, however, if the Commission does not proceed. Congress intended that the Commission exercise its authority under the TCPA in a manner that would "promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations." *TCPA Order*, ¶83. Clarifying the limits of North Dakota to enact laws affecting interstate calls that are inconsistent with federal law will effectuate the Congressional goal of creating uniform national rules, and promote judicial and administrative economy by "avoid[ing] burdensome compliance costs for telemarketers and potential customer confusion," *TCPA Order*, ¶83, created by conflicting and inconsistent laws of fifty-one jurisdictions.

III. CONCLUSION

WHEREFORE, the foregoing premises duly considered, the Commission should deny the State's Motion and move expeditiously to grant ccAdvertising's Petition for Declaratory Ruling.

Respectfully submitted,

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November 18, 2004

CERTIFICATE OF SERVICE

I, Jennifer Short, hereby certify that on this 18th day of November 2004, a true and correct copy of the foregoing Opposition to Motion to Dismiss Petition on Grounds of Sovereign Immunity or in the Alternative to Stay Proceedings was sent via U.S. first class mail, postage prepaid, or by hand, to the following:

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