

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
American Teleservices Association, Inc.) CG Docket No. 02-278
)
Petition for Declaratory Ruling with Respect to)
Certain Provisions of the New Jersey Consumer)
Fraud Act and the New Jersey Administrative Code)

COMMENTS OF SPRINT CORPORATION

Sprint Corporation, pursuant to the Public Notice released October 4, 2004 (DA 04-3185), hereby respectfully submits its comments in support of the Petition for Declaratory Ruling filed by the American Teleservices Association, Inc. (“ATA”) in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

In its Petition, ATA requests that the Commission issue a declaratory ruling preempting certain provisions of the New Jersey Consumer Fraud Act (“New Jersey Act”)¹ and Title 13, Section 45D of the New Jersey Administrative Code (“New Jersey Rules”) as they relate to interstate telemarketing, to the extent that they are more restrictive than Section 64.1200 of the Commission’s Rules. ATA explains (pp. 3-4) that the New Jersey Act and the New Jersey Rules are significantly more restrictive than the comparable Commission Rules in the following respects:

- The New Jersey Rules limit the “established business relationship” (EBR) exemption such that telemarketing calls cannot be placed to consumers on the do not call list who had completed transactions with the seller within 18 months from the date of the telemarketing call, or who had inquired into, or applied for, the

¹ N.J. Stat. Ann. Section 56:8-119, *et. seq.*

seller's products or services within 3 months of the date of the telemarketing call. Furthermore, the New Jersey Rules do not extend the EBR exemption to a seller's affiliates;

- The New Jersey Rules fail to exempt telephone solicitations to subscribers with whom the telemarketer has a personal relationship; and
- The New Jersey Act and the New Jersey Rules require that the telemarketer disclose the name of the telemarketing entity initiating the call, and apply entity-specific do-not-call requests to both sellers and telemarketers.

According to Section 13:45D-1.2 of the New Jersey Rules, and to the New Jersey Division of Consumer Affairs website, the state regulations at issue here apply to all telemarketing calls to New Jersey consumers, even if the call originates outside of New Jersey.

ATA's petition should be granted. Sprint has no interest in placing telemarketing calls to consumers who do not wish to receive such calls. However, the New Jersey Act and New Jersey Rules identified by ATA are overly restrictive, and prevent calls to New Jersey consumers who might in fact be interested in receiving telemarketing offers from companies -- and their affiliates -- with which they have an on-going or very recently terminated business relationship, or from companies about whose goods or services the consumer had recently (in the preceding 3 months) requested information. To prohibit such calls harms both consumers and businesses. Further, because the New Jersey requirements are so much more restrictive than the corresponding federal requirements, the state regulations effectively "negate valid FCC regulatory goals."² Thus, federal preemption of these regulations is justified.

² *People of the State of California, et al., v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994) ("*California IP*").

II. THE OVERLY RESTRICTIVE NEW JERSEY REGULATIONS HARM BOTH CONSUMERS AND BUSINESSES, AND THUS ARE CONTRARY TO THE PUBLIC INTEREST.

As ATA notes, the New Jersey rules relating to the established business relationship (EBR) exemption are much more restrictive than the FCC's. Furthermore, the New Jersey rule requiring telemarketing agent-specific do not call lists is excessive; there is no similar requirement under federal rules. As discussed below, these rules harm both consumers and businesses, and are therefore contrary to the public interest.

A. The EBR Exemption

The FCC has recognized that “an established business relationship exemption is necessary to allow companies to communicate with their existing customers.”³ Thus, Section 64.1200(f)(3) of the Commission's Rules allows a company to place telemarketing calls to consumers on the national do not call list who had a purchase or transaction with that company within the 18 months immediately preceding the date of the telephone call, or who had made an inquiry or application regarding products or services offered by the company within the 3 months immediately preceding the date of the call. Under FCC rules, the established business relationship also extends to a company's affiliated entities where the customer “would reasonably expect” the company and its affiliate to be related, “given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.”⁴

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14078 (para. 112) (2003) (“*FCC Report and Order*”). The EBR exemption does not apply where a consumer has asked to be placed on a company's individual do not call list.

⁴ Section 64.1200(f)(3)(ii); *see also*, *FCC Report and Order*, 18 FCC Rcd at 14082-3 (para. 118).

New Jersey, in contrast, takes a much narrower view of the “existing customer” relationship. New Jersey’s definition of an “existing customer” (Section 13:45D-1.3) encompasses only those persons who are currently obligated to make payments to the seller, or who have “entered into a written contract with a seller”; this definition does not extend to customers who have had a transaction with the company within the previous 18 months, or who have inquired or applied for service with the company within the previous 3 months. New Jersey rules further specify that companies may place telemarketing calls to existing customers (as defined by the New Jersey rules) only if the call relates to “the provision of continuing services, and does not relate to expanded services, upgrades, products or other services....”⁵ Finally, Section 13:45D-4.1(c)(1) of the New Jersey Rules prohibits outright telemarketing calls by a seller’s affiliate to existing customers on the do not call list.

Many sectors of the telecommunications market are fiercely competitive, and one prized segment is customers who purchase multiple products from the same company. Consumers who subscribe to both local and wireless service from the same telecommunications company, for example, obviously generate higher revenues than do single-service customers, tend to have lower churn rates, and can be the source of scope economies in terms of back office functions. To attract and retain such customers, companies may offer sharply discounted prices, upgraded service packages, and other promotions which the consumer might find extremely beneficial. If telecommunications service providers are restricted (with only very limited exceptions) from placing telemarketing calls to EBR customers, those consumers will inevitably miss out on

⁵ See Section 13:45D-4.4 of the New Jersey rules. The New Jersey rules assume that the customer is not on the company-specific do not call list.

certain offers which they might otherwise have accepted. And, the potential loss to consumers is real. Sprint, for example, currently does not place any telemarketing calls to any consumer on the New Jersey do not call list, even when we are the consumer's current service provider, because of the overly restrictive New Jersey regulations.

At least three categories of consumers are adversely affected by the excessively restrictive New Jersey EBR rules: existing customers who might be interested in a new service offering from their current service provider, or in an offer from an affiliate of their service provider; recently cancelled subscribers, to whom the service provider might otherwise extend a "winback" offer; and consumers who recently expressed an interest in the company's products or services, but have not yet made a purchase. Each of these is discussed below.

1. "Up-Sells" by the Current Service Provider, and Sales Offers from Affiliates

Under Section 13:45D-4.4 of the New Jersey regulations, a company may not place a telemarketing call to an established customer on the do not call list to offer "expanded services, upgrades, products or other services unless directly related to the particular service or services previously provided." This prohibition on "up-sells" forecloses a service provider from contacting a customer by telephone to offer him a new calling plan which might better meet the customer's calling needs, or which provides enhanced service quality or performance. For example, a common billing complaint among long distance customers involves subscribers to a domestic calling plan who also place international calls.⁶ Under the New Jersey law, Sprint Long Distance arguably is

⁶ Domestic calling plans generally do not offer discounted international rates; therefore, a domestic calling plan subscriber may incur very high rates on his 1+ international calls.

prohibited from calling such a customer who is on the do not call list to offer him an international calling plan, even though such an offer could substantially reduce the customer's long distance calling bill. Similarly, Sprint Local is apparently prohibited under New Jersey law from calling an existing subscriber of basic local service to offer DSL service (even though broadband deployment is one of the FCC's priorities). These results are clearly contrary to the interests of both the subscriber and the service provider.

The overly restrictive New Jersey rules also would prohibit telemarketing to consumers on the do not call list by an affiliate of the consumer's existing service provider. The current trend in telecommunications is to offer bundled and multiple service packages – for example, combined local/long distance/wireless calling plans offered at a fixed price, or discounted rates on an additional service offered to an existing subscriber. As noted above, bundled- and multiple-service subscribers are much valued, and many companies accordingly extend extremely attractive rates and terms to their existing customers as an inducement to select additional services offered by that provider. Because the very narrow EBR exemption in the New Jersey Rules does not extend to a service provider's affiliates, New Jersey consumers likely are not receiving information via telemarketing calls about attractive bundled service offerings. For example, under current New Jersey rules, Sprint Local (which provides local service in certain parts of New Jersey) cannot offer its existing local subscribers Sprint Long Distance or Sprint PCS service (stand-alone service, or as part of a bundled service offering) via a telemarketing call, even though such calls would be permitted under the FCC's EBR exemption. Both Sprint and New Jersey consumers are harmed by this restriction on telemarketing efforts.

2. “Winback” Offers

Under the FCC’s EBR exemption, companies are allowed to contact customers who cancelled their service within the preceding 18 months with winback offers. The New Jersey rules, in contrast, prohibit a company from placing a telemarketing call to any former customers who are on the do not call list; thus, under New Jersey rules, winback calls are prohibited.

Churn is a common phenomenon in the long distance and wireless markets, and to a lesser degree in the local service market, because of the availability of competitive alternatives, and the existence of number portability. It is not uncommon for the previous service provider to contact certain recently cancelled subscribers (to the extent allowed) with an improved offer in an attempt to regain their business. Such offers can be mutually beneficial to the consumer and to the service provider. However, because winback calls are prohibited to New Jersey do not call customers, none of those cancelled customers can be offered the winback proposal via a telemarketing call.

The potential volume of foregone winback sales in New Jersey is significant. For example, Sprint estimates that approximately 7225 New Jersey customers cancel their Sprint residential long distance service in an average month. Assuming that half of those customers are on the do not call list, Sprint is foreclosed from making telemarketing winback attempts to over 3600 consumers per month.

3. Offers to “Hot” Prospects

As noted above, the FCC’s EBR exemption allows telemarketing calls to consumers who have made an inquiry or application for the goods and services offered by an entity

within the 3 months preceding a telemarketing call from that entity. The New Jersey regulations, in contrast, include no such exemption.

It is not clear how many New Jersey consumers fall into the “recent inquiries” category and are thus affected by the overly restrictive New Jersey telemarketing restrictions. However, as the Commission found (*FCC Report and Order*, 18 FCC Rcd at 14081 (para. 114)), it is reasonable to assume that at least some of these consumers expect (or at least would not object to) a follow-up sales call from a company whose goods or services they have previously expressed an interest in. The federal 3-month limitation on this exemption ensures that consumers are not bombarded with telemarketing calls from companies whose products they have expressed no proximate interest in.

B. Telemarketing Agent-Specific Do Not Call Lists.

Section 13:45D-3.9 of the New Jersey Rules requires each telemarketer to maintain its own do not call list. This list is in addition to the do not call list which the seller must maintain. Thus, if telemarketing agent A places a call on behalf of company B to consumer X, and X asks to be placed on the do not call list, company C cannot use the services of telemarketing agent A to place calls to consumer X. As ATA states (p. 10), “a single such request by a consumer will prevent the telemarketer from calling the consumer again on behalf of any seller.” This would have a “devastating effect” (*id.*) on the telemarketer, and could make it difficult if not impossible for sellers to find a third party agent to place telemarketing calls on its behalf. In an age in which functions such as telemarketing are frequently out-sourced, the New Jersey rule is unreasonably burdensome. Sprint has for years maintained a company-specific do not call list, and

requires its outside telemarketing agents to record all consumer requests to be placed on this list. Between the national do not call list and the company-specific do not call lists, consumers are adequately protected from receiving commercial telemarketing calls without the need for yet a third, telemarketer-specific do not call list. Section 13:45D-3.9 of the New Jersey Rules is excessive, and should be preempted insofar as it affects interstate telemarketing calls.

III. FEDERAL PREEMPTION OF THE NEW JERSEY REGULATIONS AT ISSUE HERE IS JUSTIFIED.

The requirements for federal preemption of state regulations are strict. The Supreme Court has found that federal preemption may be allowed where it is “not possible to separate the interstate and intrastate components of the asserted FCC regulation,” and where state regulation would “negate” the federal regulation.⁷ Under the “impossibility” exception to Section 2(b)(1) of the Act, the FCC must demonstrate that the state regulation to be preempted “would negate valid FCC regulatory goals.”⁸

The New Jersey telemarketing rules at issue here meet this impossibility test. New Jersey has asserted that its telemarketing rules apply to all telemarketing calls to New Jersey consumers, including calls that originate in another state (*i.e.*, interstate calls). Because the New Jersey rules discussed above conflict with the FCC’s rules governing interstate telemarketing calls that terminate in New Jersey, the state rules cannot “feasibly coexist” with the federal regulations. Telecommunications companies cannot place telemarketing calls to New Jersey consumers on the do not call list under the federal EBR exemption without violating the New Jersey rules. Furthermore, the New Jersey

⁷ *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 1902, n. 4 (1986).

⁸ *People of the State of California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990) (“*California I*”); *see also, California II*, 39 F.3d at 931.

requirement that telemarketing agents maintain an agent-specific do not call list impedes telecommunications companies' interstate telemarketing efforts by limiting their choice of third party telemarketing agents.

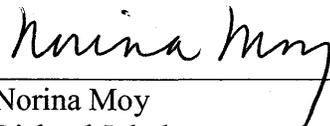
The Commission has expressed its belief that Congress intended "to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations,"⁹ and recognized that federal preemption of inconsistent state law might be required. It concluded (*id.*, para. 84) 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. 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 inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission. We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules.

The FCC's prescience here was well founded, and it is clear that the federal and New Jersey telemarketing rules cannot "feasibly coexist." The FCC should accordingly grant ATA's petition, and issue a declaratory ruling preempting the New Jersey rules.

Respectfully submitted,

SPRINT CORPORATION



Norina Moy
Richard Juhnke
401 9th St., NW, Suite 400
Washington, DC 20004
(202) 585-1915

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⁹ *FCC Report and Order*, 18 FCC Rcd at 14064 (para. 83).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMMENTS OF SPRINT CORPORATION** was filed by electronic mail and copy send by United States first-class mail, postage prepaid, on this the 17th day of November 2004 to the below-listed party.


Christine Jackson

November 17, 2004

SENT VIA E-MAIL

Dane Snowden, Esq.
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

SEND VIA U.S. MAIL

Mitchell Roth, Esq.
Counsel for ATA
Suite 700
Williams Muller, PC
8270 Greensboro Drive
McLean, VA 22102

SENT VIA E-MAIL

Kelli Farmer, Esq.
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

SENT VIA E-MAIL

Best Copy and Printing, Inc.
Room CY-B402
445 4th Street, SW
Washington, DC 20554