

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

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

REPLY COMMENTS OF VERIZON

The overwhelming majority of commenters support the petition of the American Teleservices Association, Inc. (“ATA”), and agree that the Commission should preempt portions of New Jersey law that are inconsistent with the federal do-not-call regime.¹ As many point out, the New Jersey law not only conflicts with federal law, but also prohibits businesses from making calls that many customers have come to expect and find useful.² The only commenters that oppose the ATA petition are New Jersey officials, who attempt to raise a number of procedural claims to prevent the Commission from deciding the petition. However, although these opponents throw in every procedural argument but the kitchen sink – ranging from standing, ripeness, subject-matter jurisdiction, and sovereign immunity – the challenges are all without merit. The Commission can reach the merits of the ATA petition, and it should do so. It

¹ See, e.g., Comments of MBNA America Bank, N.A., CG Docket No. 02-278 (filed Nov. 17, 2004) (“MBNA Comments”); Comments of the New Jersey Press Association, CG Docket No. 02-278 (filed Nov. 17, 2004); Comments of The Heritage Company, CG Docket No. 02-278 (filed Nov. 17, 2004) (“The Heritage Company Comments”); Comments of Sprint Corporation, CG Docket No. 02-278 (filed Nov. 17, 2004) (“Sprint Comments”).

² See, e.g., Comments of the American Council of Life Insurers, CG Docket No. 02-278, at 5-8 (filed Nov. 16, 2004) (“American Council of Life Insurers Comments”); Comments of Venetian Casino Resort, LLC, CG Docket No. 02-278, at 3 (filed Nov. 17, 2004); MCI, Inc. Comments, CG Docket No. 02-278, at 6 (filed Nov. 17, 2004) (“MCI Comments”); Sprint Comments, at 4-8.

should grant the petition, and declare that any state laws that purport to regulate interstate calls in a manner inconsistent with federal law will be preempted.

I. The ATA Petition Does Not Raise Ripeness or Standing Concerns

Citing the Commission decision in *OmniPoint*,³ the New Jersey Ratepayer Advocate argues that ATA lacks standing to raise the issues outlined in its petition, and that its concerns are not yet “ripe.”⁴ What the argument fails to note, however, is that *OmniPoint* specifically recognized that standing and ripeness concerns “do not apply to agency declaratory rulings.”⁵ While *OmniPoint* stated that considerations of standing and ripeness were useful in determining whether the Commission should exercise its discretionary authority to issue a declaratory ruling, there can be no serious question that here, those considerations mitigate in favor of granting the ATA petition.

Standing is the legal doctrine that requires a petitioner to show that it is injured by the conduct about which it is complaining.⁶ The Commission has stated that “the presence or absence of standing is a useful factor to consider in determining whether a ‘controversy’ or ‘uncertainty’ exists in a form sufficiently crystallized to warrant our consideration in the context of a declaratory ruling.” *OmniPoint*, ¶ 7. Unlike the petitioner in *OmniPoint*, ATA has “standing” to raise the claims, because it has specified a particular “injury” from the New Jersey regulations. In particular, ATA states that, “[m]any ATA member organizations initiate

³ *OmniPoint Communications, Inc. New York MTA Frequency Block A*, 11 FCC Rcd 10785 (1996) (“*OmniPoint*”).

⁴ Comments of the New Jersey Ratepayer Advocate, CG Docket No. 02-278, at 3 (filed Nov. 17, 2004) (“NJ Ratepayer Advocate Comments”).

⁵ See *OmniPoint*, ¶¶ 7, 9 (emphasis added).

⁶ “To establish standing in the context of federal appellate proceedings, a petitioner must satisfy a three-pronged test. That is, petitioner must allege (1) a ‘distinct and palpable’ personal injury-in-fact that is (2) ‘fairly traceable’ to the respondent’s conduct and (3) redressable by the relief requested.” *OmniPoint*, ¶ 8 (citations omitted).

interstate telephone solicitations to existing and potential subscribers who are New Jersey residents” and that there will be a “significant and material adverse impact” on ATA members if the New Jersey rules are enforced.⁷ Moreover, several other commenters have also identified particular harms that are resulting from their compliance with the New Jersey law.⁸ Therefore, even if the ATA did not itself establish “standing,” it is plain that the “controversy” or “uncertainty” resulting from whether the New Jersey rules are preempted is “in a form sufficiently crystallized” to warrant Commission review.

Likewise, the claim is “ripe” for ruling. Ripeness is again a legal principle that applies to adjudications by Article III judges; it essentially requires that a controversy be ready for review.⁹ Cases are denied review on ripeness grounds if the injuries alleged are too speculative or may never occur.¹⁰ Again, the Commission is not bound by the ripeness doctrine, but has looked at ripeness issues in order to determine whether it should exercise its discretion to issue a declaratory ruling. *OmniPoint*, ¶ 9. Here, there is no doubt that the current preemption claim is ripe for review. Petitioner and others already are being affected by the New Jersey rule, because they are being forced to comply with its regulations.¹¹ Moreover, the New Jersey rules also raise serious First Amendment concerns, and are already chilling speech.¹² The suggestion of the New Jersey Ratepayer Advocate – that the claim should not be treated as ripe “until such time as New

⁷ ATA Petition, at 2.

⁸ *See, e.g.*, Verizon Comments, at 3-5; MBNA Comments, at 12-14; American Council of Life Insurers Comments, at 6; Sprint Comments, at 4; MCI Comments, at 6-7; Comments of the Consumer Bankers Association, CG Docket No. 02-278, at 2-5 (filed Nov. 17, 2004) (“Consumer Bankers Association Comments”).

⁹ *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

¹⁰ *See e.g., Tex v. United States*, 523 U.S. 296, 300 (1998); *Thomas v. Union Carbide*, 473 U.S. 568, 581 (1985).

¹¹ *See, e.g.*, Consumer Bankers Association Comments, at 2-3; MCI Comments, at 6.

¹² *See Verizon Comments*, at 5-6; *see also The Heritage Company Comments*, at 1 .

Jersey enforcement proceedings are initiated and an enforcement action is final and non-appealable against an ATA member” – is absurd.¹³ Such a rule would create incentives for companies deliberately to violate the New Jersey law, in order to get the claim before the Commission. Even then, under this interpretation, petitioners’ ability to request a declaratory ruling from the Commission would be entirely dependent on the whim of New Jersey officials, who could permanently delay Commission ruling on New Jersey law if they decided not to pursue (or resolve) enforcement actions. The Commission should not allow uncertainty over the New Jersey rules indefinitely to inhibit implementation of the federal do-not-call regime in that state.

The New Jersey Ratepayer Advocate also argues that New Jersey customers seeking only “federal” but not state-rule protection, need only sign up for the federal do-not-call list, and, relatedly, that ATA members “need only to consult two Do Not Call lists and limit telephone solicitations to the” state or federal rules treatment. New Jersey Ratepayer Advocate Comments, at 4. This is factually incorrect. New Jersey has not implemented a list separate from the federal do-not-call list, and even New Jersey customers that wanted only the federal rules to apply have no way to give effect to that intent. *See* N.J.A.C. §§ 13:45D-2.2 and 5.1-5.2.

II. Opponents’ Claims of Sovereign Immunity Are Misplaced

Perhaps the most sweeping claim of a defense offered by opponents is the assertion that the Commission is barred from considering the ATA petition, because New Jersey has sovereign immunity from suit.¹⁴ Taken to its logical conclusion, this argument would *never* allow the

¹³ NJ Ratepayer Advocate Comments, at 3.

¹⁴ *See* Motion by the New Jersey Attorney General Pursuant to 47 C.F.R. § 1.41 to Dismiss Petition of the American Teleservices Association, Inc. on Grounds of Sovereign Immunity and Lack of Jurisdiction, CG Docket No. 02-278, at 3-7 (filed Nov. 10, 2004) (“NJ Attorney General Motion to Dismiss”); Comments of the Attorney General of the State of New Jersey, CG Docket No. 02-278, at 3-7 (filed Nov. 17, 2004) (“NJ Attorney General Comments”).

Commission to rule on a petition for declaratory ruling seeking to preempt inconsistent state law, unless the particular state(s) implicated by a preemption decision consented to allowing the Commission to decide the issue, or some other exception to the doctrine of sovereign immunity applied.¹⁵ Of course, that is not the case.

The sovereign immunity claim is based largely on a recent Supreme Court case, *Federal Maritime Commission v. South Carolina State Ports Authority*, which extended sovereign immunity from suits in federal court to also govern “adjudications” before a federal administrative agency.¹⁶ There, the Court was presented with a private party that filed a complaint before the Federal Maritime Commission, alleging that South Carolina violated the Shipping Act of 1984. The complaint sought a temporary restraining order and preliminary injunction against the state, as well as damages, and attorneys’ fees.¹⁷ The question presented was whether the Eleventh Amendment – which on its face only restricts the exercise of “judicial power” against the states – also grants sovereign immunity from administrative proceedings.¹⁸ The Supreme Court held that the *adjudicative* administrative proceeding at issue in that case – which the lower court had characterized as one that “walks, talks, and squawks very much like a lawsuit”¹⁹ – was barred by the doctrine of sovereign immunity.²⁰ In reaching that decision, the court relied heavily on the fact that there were “strong similarities between [Federal Maritime

¹⁵ See NJ Attorney General Comments, at 5 (enumerating limited exceptions to doctrine of sovereign immunity).

¹⁶ 535 U.S. 743 (2002).

¹⁷ *Federal Maritime Commission*, 535 U.S. at 747-49.

¹⁸ See *id.*, at 753-54. The Eleventh Amendment states that, “the judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” *Id.*, 535 U.S. at 752-53.

¹⁹ *Federal Maritime Commission*, 535 U.S. at 757 (quoting *South Carolina State Ports Authority v. Federal Maritime Commission*, 243 F.3d 165, 174 (4th Cir. 2001)).

²⁰ *Id.*, 535 U.S. at 753-69.

Commission] proceedings and civil litigation.” *Id.*, at 760. However, it clarified that while sovereign immunity would apply to *adjudicative* proceedings such as the one at issue there, the doctrine would not limit agencies’ abilities to undertake *rulemaking* functions: “Sovereign immunity concerns are not implicated, for example, when the Federal Government enacts a rule opposed by a State.”²¹

Following the *Federal Maritime Commission* decision, in a situation analogous to the one at issue here, one appellate court has specifically held that sovereign immunity did *not* bar the United States Department of Transportation from granting a petition for declaratory ruling concluding that a state law was preempted by federal law.²² There, the court determined that the proceeding at issue “quite plainly, does not mirror federal civil litigation” and did not “direct the entry of relief against the” state, but rather “serves as an administrative interpretation of a federal statute, prospective only in its application and warranting Chevron deference in subsequent litigation.”²³ The same is true of this case. ATA is not asking the Commission to enjoin the New Jersey officials from acting, or for monetary damages. Unlike an enforcement proceeding, ruling on the ATA petition does not involve the filing of a complaint, issuing discovery requests, or issuing a judgment against one party. Rather, it requests that the Commission interpret the scope of a federal statute and federal rules, which are standard rulemaking functions.²⁴

²¹ *Id.*, 535 U.S. at 764 n.16.

²² *See Tennessee v. United States Department of Transportation*, 326 F.3d 729, 732-37 (6th Cir. 2003).

²³ *Id.*, at 735-36 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

²⁴ Indeed, the fact that this is a rulemaking proceeding, rather than an adjudicative proceeding of the type at issue in *Federal Maritime Commission*, also is evidenced by the fact that the Commission in the prior rulemaking proceeding already declared that an inconsistent state law that purported to govern interstate telecommunications “almost certainly would be preempted.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, ¶ 84 (2003) (“*TCPA Order*”). Ruling on the ATA

Sovereign immunity principles simply are not applicable to a Commission preemption decision adopted pursuant to the Commission’s rulemaking authority.

III. The Commission Has Jurisdiction To Decide This Petition

The New Jersey Attorney General claims that the Commission does not have jurisdiction to decide this petition, because the Telephone Consumer Protection Act (“TCPA”) establishes a private right of action by parties aggrieved by telemarketers, but does not contain “a provision permitting the Commission to act as an adjudicative body to resolve disputes concerning the preemption of State laws by the TCPA or the Commission’s regulations.” NJ Attorney General Comments, at 7-8. Again, this argument is incorrect. As an initial matter, as explained above in Section II, in considering the ATA petition, the Commission is not acting in an “adjudicative” role, but in a rulemaking fashion, which Congress undoubtedly has authorized.²⁵ Indeed, Congress specifically directed the Commission to work with the Federal Trade Commission to “maximize consistency” in the federal rules implementing the TCPA.²⁶

Moreover, in the *TCPA Order*, the Commission already rejected the arguments of commenters who contend that the Commission does not have the authority to preempt inconsistent state laws. *See TCPA Order*, ¶¶ 78-85. The Commission recognized that “inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential customer confusion” and, for that reason, stated that “any state regulation of interstate telemarketing calls that differs from our

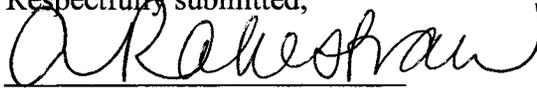
petition has no different effect than if the Commission had, in the *TCPA Order*, declared in that such laws *are* preempted.

²⁵ *See TCPA Order*, ¶¶ 5-7 (outlining the Act’s requirements for the Commission to prescribe regulations to implement the statute, and prior rulemaking proceedings).

²⁶ *See Do-Not-Call Implementation Act*, Section 3, P.L. 108-10, 117 Stat. 557 (2003) (requiring the Commission to “consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission”).

rules almost certainly would be preempted.” *TCPA Order*, ¶¶ 83-84. The Commission should make good on the promise of the *TCPA Order*, and declare that the New Jersey rules – and any other rules that impose restrictions on interstate calls that are inconsistent with the federal do-not-call regime – are preempted.

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