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

REPLY COMMENTS OF AMERICAN TELESERVICES ASSOCIATION

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December 1, 2004

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SUMMARY

The American Teleservices Association hereby replies to comments regarding its Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code which it filed with the Federal Communications Commission ("Commission") on August 24, 2004.

The legislative history of the Telephone Consumer Protection Act ("TCPA") clearly indicates that Congress intended that the TCPA preempt all state regulation of interstate telemarketing. At the very least, the Commission should – indeed, must – preempt the subject provisions of the New Jersey Consumer Fraud Act ("New Jersey Act") and the corresponding rules implemented by the New Jersey Division of Consumer Affairs on or about May 17, 2004 ("New Jersey Rules") which are inconsistent with the Commission's regulations.

Comments submitted by various parties in opposition to ATA's Petition reveal a fatal misunderstanding of the TCPA's plain meaning, of Congress' underlying purpose in implementing the TCPA, and of the federal supremacy doctrine.

ATA also agrees with those comments that urgently request the Commission to rule that states have no jurisdiction to regulate interstate telemarketing, as exclusive jurisdiction over this subject matter resides in the federal government, specifically the Commission.

The New Jersey Attorney General's claim that preemption of the New Jersey Act and New Jersey Rules would violate constitutional notions of sovereign immunity is legally flawed, and ignores recent relevant case law which holds that rulemaking proceedings are not adjudicative in nature and therefore do not implicate the doctrine of sovereign immunity.

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The American Teleservices Association ("ATA") hereby replies to public comments regarding the Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code which ATA filed with the Commission on August 24, 2004 ("Petition").

As the Petition and the majority of comments demonstrate, certain provisions of the New Jersey Act[1] and New Jersey Rules[2] are clearly more restrictive than the Commission's Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991 ("Commission Rules").[3] The Commission specifically invited any party to petition the Commission for a declaratory ruling preempting state laws or regulations applicable to interstate telemarketing that are inconsistent with, or more restrictive than, the Commission Rules.[4] The vast majority of commenters supports the Petition and urges the Commission to preempt the New Jersey Act and New Jersey Rules.

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1 N.J. STAT. ANN. § 56:8-119, *et seq.* (West 2003).

2 N.J. ADMIN. CODE tit. 13, § 45D (2004).

3 *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 18 FCC Rcd. 14,014 (July 25, 2003)

The few comments which urge the Commission not to do so argue that: a) Congress did not intend for the TCPA to preempt contradictory state laws governing interstate telemarketing; b) the Commission does not have authority to preempt the New Jersey Act and the New Jersey Rules; and c) preemption infringes upon the sovereign immunity granted to New Jersey by the Eleventh Amendment. As explained below, the reasoning behind each of these arguments is severely flawed.

I. THE COMMISSION HAS THE UNQUESTIONABLE AUTHORITY TO PREEMPT ANY STATE REGULATION OF INTERSTATE TELEMARKETING THAT IS MORE RESTRICTIVE THAN THE COMMISSION RULES.

Nearly all commenters agree that the subject provisions of the New Jersey Act and the New Jersey Rules expressly conflict with the Commission Rules and support ATA's position that the Commission has the unquestionable authority to preempt those provisions.[5]

Commenters who contest the Commission's authority ignore basic tenets of federalism and give little deference to the Supremacy Clause of Article VI of the Constitution.[6] Congress' power to preempt state laws pursuant to the Supremacy Clause is well settled;[7] this authority

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[4] 18 FCC Rcd. at 14,064-65 ("Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission.").

[5] *See* Comments submitted by MBNA, The Direct Marketing Association, Smart Reply, Inc., Optima Direct, Inc., Voice Mail Broadcasting Corporation, SoundBite Communications, The Broadcast Team, Inc., Teletech Holdings, Inc., The Consumer Bankers Association, Verizon Telephone Companies, Hypotenuse, Inc., The American Financial Services Association, The Heritage Company, Millennium Teleservices, Inc., Mutual of Omaha Insurance Company, American Council of Life Insurers, Sprint Corporation, BellSouth Corporation, MIC, Inc., The New Jersey Press Association, Progressive Business Publications, Nextel Communications, Inc., The Venetian Casino Resort, LLC, and Telelytics.

[6] U.S. CONST. art. VI, cl. 2.

[7] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986); *see also Pacific Gas & Electric Co., et al. v. State Energy Res. Conservation & Dev. Comm'n, et al.*, 461 U.S. 190, 203-04 (1983).

unquestionably extends to the Commission and other federal agencies acting within the scope of their congressionally delegated authority.[8]

The Supreme Court broadly considered the preemption doctrine and the ability of federal legislators and regulators to preempt inconsistent state laws in *Louisiana Pub. Serv. Comm'n v. FCC*.[9] The Court concluded that a federal regulatory agency may preempt inconsistent state laws in a variety of circumstances, including where: i) Congress, in enacting a federal statute, expresses a clear intent to preempt inconsistent state law; ii) state law stands as an obstacle to the accomplishment and execution of Congressional objectives; and iii) there is an actual conflict between federal and state law.[10]

A. Conflict Preemption Principles Dictate that the Commission Preempt the New Jersey Act and New Jersey Rules, as they impede Congress' Objective of Creating Uniform Standards Applicable to Interstate Telemarketing.

Federal regulators may preempt state laws that stand as an obstacle to the accomplishment of congressional objectives.[11] Congress enacted the TCPA to establish uniform national standards for the regulation of interstate telemarketing. The New Jersey Act and New Jersey Rules frustrate this objective.

The legislative history of the TCPA strongly supports this conclusion. For example, Senator Hollings noted in the session statements:

> Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standard under § 227(d) and subject to § 227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate

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8 *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

9 476 U.S. 355.

10 *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69.

11 *Pacific Gas*, 461 U.S. at 204 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

> communications, *including interstate communications initiated for telemarketing purposes*, is preempted.[12]

Congressman Rinaldo, co-sponsor of the TCPA and ranking member of the House Subcommittee, was in accord:

> To ensure a uniform approach to this nationwide problem, H.R. 1304 would preempt inconsistent State law. From the industry's perspective, preemption has the important benefit of *ensuring that telemarketers are not subject to two layers of regulation.*[13]

Senator Hollings' and Congressman Rinaldo's statements effectively refute the argument that the TCPA does not prevent states from regulating interstate telemarketing.

The Commission itself recognized Congress' objective:

> 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. We 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.
>
> We therefore believe 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.[14]

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[12] 137 CONG. REC. S18781-02, S18784-02 (Nov. 27, 1991) (emphasis added).

[13] 137 CONG. REC. H10339-01, H10342-01 (Nov. 18, 1991) (emphasis added).

Nonetheless, New Jersey (and other states) have pointedly ignored the Commission's admonishments and requests, and have enacted interstate telemarketing regulations that conflict markedly with Congress' stated objective. Based upon the teachings of *Louisiana Public Service Comm'n*, the Commission must preempt the subject provisions of the New Jersey Act and New Jersey Rules.

B. Conflict Preemption Principles Dictate that the Commission Preempt the New Jersey Act and New Jersey Rules, as they Expressly Conflict with the Commission Rules.

Federal regulators may preempt inconsistent state laws to the extent those laws actually conflict with federal law.[15] Such federal preemption is necessary here to eliminate the burdens and risks that inconsistent state regulations place on interstate sellers and telemarketers.

The express conflicts between the New Jersey Act and New Jersey Rules on the one hand and similar provisions of the TCPA on the other are both indisputable and of such nature that it is extremely difficult, if not impossible, for interstate telemarketers to comply simultaneously with both. It is no solution to say they should comply with more restrictive state rules where there is a conflict.

For example, the TCPA permits a telemarketer to initiate a call to a New Jersey subscriber who *completed* a transaction with a seller within eighteen (18) months of the date of the telephone call. The New Jersey Rules prohibit such a call.[16] Similarly, the TCPA permits a telemarketer to initiate an interstate call to a New Jersey subscriber who is an existing customer

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[14] 18 FCC Rcd. at 14,064-65 (emphasis added).

[15] *Pacific Gas*, 461 U.S. at 204.

[16] N.J. ADMIN. CODE tit. 13, § 45D-4.2(a)(2) (2004).

of the seller's affiliated company. Such a call is prohibited under the New Jersey Rules, regardless of the subscriber's reasonable expectations.[17]

Remarkably, a few commenters claim that the New Jersey Act and New Jersey Rules do not actually conflict with the Commission Rules. The Ratepayer Advocate of New Jersey claims the New Jersey restrictions protect New Jersey residents from receiving unwanted telemarketing calls and are thus *consistent* with the Commission's statement that it does not seek to prohibit states from enforcing state regulations that are consistent with the TCPA and the rules established thereunder.[18] This argument misses the point entirely: The New Jersey restrictions are not consistent with the TCPA and the Commission Rules. In fact, the New Jersey Rules are in indisputable conflict with the Commission Rules.

Another opponent of the Petition who attempts to reconcile the New Jersey Act and New Jersey Rules with the TCPA and Commission Rules goes so far as to state: "The New Jersey law is in harmony with the federal statute and merely places additional clarifications and restrictions on telephone solicitations directed to the forum state of New Jersey."[19] This, too, is off the mark: States may not place "additional clarifications and restrictions" on interstate telemarketing calls that conflict with the terms of the federal regulation or with Congress' intent in enacting the TCPA.

States' attempts to enact and enforce inconsistent state restrictions on interstate telemarketing interfere with the accomplishment and execution of Congress' clearly expressed intent and goal. Based upon the Supreme Court's holding in numerous cases, including *Louisiana Pub. Serv. Comm'n* and *Pacific Gas*, the Commission has the authority and the

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[17] N.J. ADMIN. CODE tit. 13, § 45D-4.1(c)(1) (2004).

[18] Comments submitted by the New Jersey Division of the Ratepayer Advocate at 4 (citations omitted).

[19] Comments submitted by Joe Shields at 1-2.

obligation to preempt those provisions of the New Jersey Act and New Jersey Rules which conflict with the TCPA and Commission Rules.

II. NEW JERSEY AND OTHER STATES HAVE NO JURISDICTION TO REGULATE INTERSTATE TELEMARKETING

Quite apart from preemption, ATA agrees with those commenters who submit that New Jersey had no jurisdiction to regulate interstate telemarketing in the first place.[20] Several commenters list the numerous other state rules governing interstate telemarketing that are more restrictive than the Commission Rules. These states, too, lack the requisite jurisdiction to regulate interstate telemarketing and the Commission should finally clarify that their laws and regulations are inapplicable to interstate telemarketing.

Congress enacted the Communications Act of 1934 ("Act") [21] to establish a dual regulatory regime governing telecommunications. Section 2(a) of the Act unambiguously vests the Commission with exclusive jurisdiction over all interstate and foreign communications.[22] Although Section 2(b) of the Act generally reserves for the states jurisdiction to regulate intrastate communications, [23] the TCPA also authorizes the Commission to regulate intrastate telemarketing calls, thus expanding its regulatory powers over intrastate communications.[24] The provisions combine to yield the undeniable conclusion that Congress contemplated that the federal government exclusively regulate all interstate telemarketing.

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[20] *See* Comments submitted by MBNA, Smart Reply, Inc., Voice Mail Broadcasting Corporation, SoundBite Communications, The Broadcast Team, Inc., Teletech Holdings, Inc., Consumer Bankers Association, Verizon Telephone Companies, Hypotenuse, Inc., The American Financial Services Association, Millennium Teleservices, Inc., BellSouth Corporation, Nextel Communications, Inc., and Telelytics.

[21] *See* 47 U.S.C. §§ 151, *et seq.*

[22] 47 U.S.C. § 152(a).

[23] 47 U.S.C. § 152(b).

[24] *See* 47 U.S.C. § 227, *et seq.*

Congress granted the Commission jurisdiction over all telemarketing calls because it clearly feared what has, in fact, come to pass: a maelstrom of state-imposed restrictions on interstate telemarketers. Although the Commission assumed that state legislators and regulators would respect its request not to implement more restrictive requirements, a plethora of conflicting regulations and mounting confusion has since emerged.

The New Jersey Rule that does not provide for calls in response to specific consumer inquiries is perhaps the most glaring example of state over-regulation. The Venetian Resort Casino, LLC commented that this restriction prohibits its casino hosts from returning telephone calls from some of its best customers who call to plan a trip to the Resort and specifically *request* a return telephone call.[25]

The most troublesome aspect of the litany of inconsistent state restrictions is the risk that attorneys' general will initiate enforcement proceedings based upon their over-restrictive regulations and force telemarketers to defend themselves one-by-one in various state courts. In fact, this is precisely the course of action state attorneys general – including the Attorneys General of North Dakota and Florida – are taking.

Many of the opposing commenters, including the New Jersey Attorney General, prefer that the Commission sanction this practice. Having virtually unlimited resources at their disposal, attorneys general disregard the costs and expenses which interstate sellers and telemarketers must incur to defend themselves against over-zealous state regulators. The threat of litigation by attorneys general ultimately translates into reverse preemption by the states.[26]

The record reflects the harsh manner in which several attorneys general utilize the enormous powers at their disposal. The anecdote contained in comments submitted by

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[25] Comments submitted by The Venetian Hotel Resort Casino, LLC at 4-5.

[26] Letter submitted by Telelytics , LLC to Chairman Michael K. Powell (November 8, 2004) at 4-5.

Telelytics, LLC ("Telelytics") regarding the tactics of the North Dakota Attorney General is the most disturbing, and unmistakably demonstrates that attorneys general do not intend to abide by the Commission's and Congress' direction.[27]

Telelytics evidently was strong-armed into "voluntarily" agreeing not to initiate calls to North Dakota residents, even though it was in full compliance with the TCPA and the Commission Rules.[28] The impracticality of a state-by-state approach is thus clear – telemarketers will ultimately have to defend themselves in fifty (50) state courts if they can afford to do so. If they cannot, they will be forced to cease initiating calls into states with restrictions that conflict with the Commission Rules. Either consequence is one that Congress sought to avoid. The Commission can end this debate and these tactics by affirming that states have no jurisdiction to regulate interstate telemarketing.[29, 30]

III. THE COMMISSION'S PREEMPTION OF THE NEW JERSEY ACT AND NEW JERSEY RULES DO NOT INFRINGE UPON NOTIONS OF SOVEREIGN IMMUNITY

The Eleventh Amendment precludes suits 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.[31] Notwithstanding the amendment's broad scope, the doctrine of sovereign immunity has no bearing on ATA's petition.[32] ATA has not sued the State of New Jersey, nor

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[27] *See* letter submitted by Telelytics at 2-4.

[28] *See* letter submitted by Telelytics at 3-4.

[29] The issue is currently before the Commission by way of the Direct Marketing Association's Request for Reconsideration.

[30] ATA acknowledges that their general police powers enable states to regulate against consumer fraud. A determination by the Commission that states have no jurisdiction to regulate interstate telemarketing is compatible with this recognition.

[31] *Tenn. Student Assistance Corp. v. Hood*, 124 S. Ct. 1905, 1909 (2004) (citing U.S. Const. amend. XI).

[32] The Commission need not even address this issue if it concludes that states lack jurisdiction to regulate interstate telemarketing.

has ATA filed a complaint with the Commission seeking relief from the state's actions. In short, ATA has taken no action that affects "the dignity and respect afforded a state, which the doctrine of sovereign immunity is designed to protect."[33] Rather, ATA merely petitioned the Commission to exercise the authority Congress granted to it and preempt New Jersey's conflicting regulation of interstate telephone calls.[34]

The New Jersey Attorney General relies upon *Fed. Maritime Comm'n v. South Carolina State Ports Auth.* [35] in support of its argument that the present proceeding is an adjudication, thus implicating the doctrine of sovereign immunity.[36] As pointed out by several commenters, this reliance is unquestionably misplaced.[37]

In *Fed. Maritime*, the Court analyzed the similarities between administrative proceedings and civil litigation conducted in federal courts.[38] In ruling that the South Carolina State Ports Authority was immune from the Federal Maritime Commission's proceeding, the Court noted the similarities between an Administrative Law Judge and a trial judge, the adversarial nature of the proceedings, and the similar rules governing the taking of evidence.[39]

The New Jersey Attorney General grossly mischaracterizes ATA's Petition as an administrative adjudication subject to immunity. Unlike *Fed. Maritime*, the Commission is <u>not</u> conducting an adjudication. Even the Attorney General admits that there is no Administrative Law Judge or "neutral trier of fact" who is functionally comparable to a trial judge in this

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[33] *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997).

[34] In fact, ATA was responding to the Commission's invitation to any party who believes a state's law is inconsistent with Commission Rules to petition for a declaratory ruling from the Commission. *See* 18 FCC Rcd. at 14,064-65.

[35] 535 U.S. 743 (2002).

[36] The New Jersey Attorney General raised similar arguments in a Motion to Dismiss. However, such motions are not provided for in rulemaking proceedings pursuant to §1.415 of the Commission's Rules, which the Commission cited in its Public Notice seeking comment on ATA's Petition. Accordingly, ATA declines to specifically respond to the motion, and instead addresses the Attorney General's arguments in this Reply.

[37] *See* ccAdvertising's Opposition to Motion to Dismiss Petition on Grounds of Sovereign Immunity or in the Alternative to Stay Proceedings at 2-6.

proceeding.[40] Furthermore, no parties engage in collecting evidence or discovery, and the Commission's notice and comment procedure bears no resemblance to the Rules of Civil Procedure.[41] Finally, the Supreme Court itself explicitly limited *Fed. Maritime*'s holding to bar an agency only from adjudicating a "dispute between a private party and a nonconsenting state," and made clear that "private parties remain perfectly free to complain to the Federal Government and the Federal Government remains free to take subsequent legal action."[42] Thus, on its own terms, *Fed. Maritime* is inapplicable here, where ATA's petition triggered the Commission's subsequent action in this administrative proceeding.

As other commenters mention, the judicial guidance contained in *Tenn. v. United States Dep't of Transp.* is significantly more applicable and appropriate.[43] In this case, the Sixth Circuit Court of Appeals found that a process used by the United States Department of Transportation ("USDOT") to respond to requests for preemption determinations under the Hazardous Material Transportation Act was not an "adjudication" that barred actions against states.[44] Rather, the court noted that it is 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.[45] In distinguishing USDOT's process from that described in *Fed. Maritime*'s, the court examined the distinction between the nature of the final determination in a preemption case and the procedure used in *Fed. Maritime*.

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38 *Fed. Maritime Comm'n*, 535 at 756-59.

39 *Id.*

40 New Jersey Motion to Dismiss at 3.

41 *Conn. Dep't of Envtl. Prot. v. OSHA*, 356 F.3d 226, 231-33 (2nd Cir. 2004) (citing *Fed. Mar. Comm'n*, 535 at 756-58) (finding that a state agency is not immune from an OSHA investigation).

42 *Fed. Maritime Comm'n*, 553 U.S. at 768 n. 19 (internal citation omitted).

43 *See* ccAdvertising's Opposition to Motion to Dismiss at 4 (citing *Tenn. V. U.S. Dep't of Transp.*, 326 F.3d 729 (6th Cir. 2002), *cert. denied*, *Tenn. v. U.S. Dep't of Transp.*, 124 S. Ct. 464 (Nov. 3, 2003).

44 326 F.3d at 734.

45 *Id.* (referencing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984)).

> 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 . . . does not direct the entry of relief against the State of Tennessee. Instead, it serves as an administrative interpretation of a federal statute. . . .
>
> [T]he 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.[46]

The Commission's procedures for addressing ATA's Petition are nearly identical to the procedures that were found to be non-adjudicative in *Tenn. v. United States Dep't of Transp.*[47] In light of the Sixth Circuit's instructive decision, the present rulemaking is non-adjudicative, *Fed. Maritime* is not controlling, and the doctrine of sovereign immunity is inapplicable.[48]

III. CONCLUSION

The provisions of the New Jersey Act and New Jersey Rules discussed above impose regulatory requirements on sellers and telemarketers that are far more restrictive than those imposed by the Commission Rules. More restrictive state laws and regulations contravene the clear intent of Congress to create uniform national rules, and thereby ensure that individual

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[46] 326 F.3d at 736 (emphasis added).

[47] It is important to note the Supreme Court denied Tennessee's request for certiorari. *Tenn. v. United States Dep't of Transp.*, 124 S. Ct. 464 (U.S. Nov. 3, 2003).

[48] The New Jersey Attorney General's objection to ATA's standing to initiate the petition is likewise not persuasive, as standing is not a factor to be examined in non-adjudicative proceedings. Furthermore, § 1.21(a) of the Commission Rules specifically invites *any party* to be heard by the Commission.

privacy rights and public safety interests are balanced with the legitimate interests of telemarketers to engage in commercial speech and trade. The New Jersey Act and New Jersey Rules disregard, and conflict with, the same legitimate interests of telemarketers that the Commission and Congress sought to preserve.

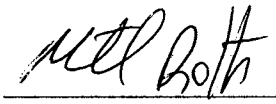
Furthermore, the TCPA establishes federal supremacy over the regulation of all interstate communications, including interstate telemarketing. Therefore, any state regulation that purports to apply to interstate telemarketing should be invalidated...

Finally, the ATA strictly adhered to the Commission's notice and comment procedures in filing its Petition. The Commission is not presiding over an adjudication, therefore the doctrine of sovereign immunity is inapplicable and cannot preclude ATA's Petition.

For the reasons cited herein, ATA and its members respectfully request that the Commission preempt those provisions of the New Jersey Act and New Jersey Rules which are more restrictive than the Commission Rules as they relate to interstate telemarketing.

Respectfully submitted,

AMERICAN TELESERVICES ASSOCIATION, INC.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2004, a copy of the foregoing was sent by first class mail, postage prepaid, on the following:

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