

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of:)
)
CONSUMER BANKERS ASSOCIATION) CG Docket No. 02-278
)
Petition for Expedited Declaratory ruling with)
Respect to Certain Provisions of the Indiana)
Revised Statutes and Indiana Administrative Code)

OPPOSITION TO MOTION TO DISMISS PETITION

The Consumer Bankers Association (“CBA”), by its attorneys and on behalf of its members, pursuant to sections 1.4 and 1.45(b) of the Commission’s rules, hereby submits its opposition to The State of Indiana’s Motion to Dismiss the Consumer Bankers Association’s Petition on grounds of Sovereign Immunity (“Motion to Dismiss” or “Motion”).¹ As discussed more fully herein, the Motion to Dismiss is without merit and must be denied.

I. The Commission Should Promptly Deny Indiana’s Motion and Grant the CDA’s Petition for Declaratory Ruling

As the Commission pointed out in its *Report and Order* of July 3, 2003, the Telephone Consumer Protection Act (“TCPA”) reflects Congress’s “clear intent . . . to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations.”² Consistent with that intent, the Commission has

¹ The State of Indiana’s Motion to Dismiss the Consumer Bankers Association’s Petition on Grounds of Sovereign Immunity, CG Docket No. 02-278 (Jan. 24, 2005). All filings in this proceeding will hereinafter be short cited.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064 (2003) (“*Report and Order*”) (citation omitted).

adopted implementing regulations that balance the legitimate interests of both businesses and consumers, and has announced its intention to preserve that balance by preempting more restrictive state regulation of interstate telemarketing.³

The member institutions of the CBA fully support the federal scheme of interstate telemarketing regulation, and have put in place procedures that ensure their compliance with those requirements. CBA members observe the federal restrictions on autodialers and artificial and prerecorded voices,⁴ maintain company-specific do-not-call lists,⁵ comply with the Commission's regulations concerning the national do-not-call registry,⁶ and otherwise implement the full range of consumer protections provided in federal law. To the extent the CBA's members place intrastate telemarketing calls, they also comply with the telemarketing laws and regulations of the states within which those calls are initiated and completed.

The CBA also has acted on this Commission's express invitation to "seek a declaratory ruling from the Commission" in the event that "a state law is inconsistent with section 227 or [the Commission's] rule"⁷ The CBA has filed two such petitions, requesting preemption of the Indiana and Wisconsin telemarketing statutes to the extent those statutes fail to recognize the "established business relationship"

³ *Id.* ("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.")

⁴ 47 C.F.R. § 64.1200(a)-(b).

⁵ *Id.* § 64.1200(d).

⁶ *Id.* § 64.1200(b)(2).

⁷ *Report and Order*, 18 FCC Rcd at 14064-65.

provisions of the Commission's rules when applied to interstate calls.⁸ As the CBA petitions point out, enforcement of the Indiana and Wisconsin restrictions would subject the CBA members to "multiple, conflicting regulations" in derogation of congressional intent.⁹

The State of Indiana has confirmed that the conflict between its statute and the controlling federal regulations is more than theoretical. Besides filing the pending "sovereign immunity" motion, the Indiana Attorney General has issued a press release urging citizen opposition to enforcement of the Commission's rules, and has mischaracterized the Commission's "established business relationship" provisions as giving businesses "unlimited access [to consumers] to make repeated sales calls."¹⁰ The Indiana Attorney General's press release fails to mention that under federal law, a consumer can avoid repeated calls from any company, regardless of the relationship between that company and the consumer, by asking to be placed on the telemarketer's company-specific do-not-call list. Instead, Indiana tells its citizens that this Commission

⁸ Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code (Nov. 19, 2004); Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code (Nov. 19, 2004).

⁹ *Report and Order*, 18 FCC Rcd at 14064.

¹⁰ Press Release, Office of the Indiana Attorney General, *Bankers Want Indiana's No-Call Law Watered Down* (Jan. 25, 2005) available at <http://www.in.gov/attorneygeneral/news/20050124.2.pdf> ("Indiana Press Release"). The Governor's Office of the State of Wisconsin has undertaken a similar campaign against the CBA's pending petition for declaratory ruling that Wisconsin's statute also is inconsistent with federal law. Press Release, Office of Wisconsin Governor Jim Doyle, *Governor Doyle Urges Federal Communications Commission to Leave No Call List Alone* (Jan. 28, 2005) available at <http://www.wisgov.state.wi.us/mediaroom.asp>. Wisconsin's effort, like Indiana's, has resulted in the filing of thousands of comments opposing preemption.

will subject them to “an additional 800 million more unwanted calls” unless federal jurisdiction over interstate telemarketing is defeated.¹¹ Apparently prompted by this publicity campaign, thousands of citizen comments have been filed in opposition to CBA’s petitions and large numbers of customer complaints have been made to CBA member institutions.

Although no one disputes the right of the State of Indiana and its citizens to make their views in this proceeding known, Indiana’s publicity campaign makes clear that the State fully intends to enforce its restrictive telemarketing statute without regard to the TCPA and the Commission’s jurisdiction. These facts underscore the importance of a prompt disposition of Indiana’s present motion and an equally prompt assertion of the Commission’s jurisdiction to regulate interstate telemarketing.

II. Preemption of Indiana’s Telemarketing Law Is not Barred by Sovereign Immunity

With its present Motion, Indiana joins New Jersey and North Dakota in raising the novel claim that this Commission is prevented from exercising its jurisdiction over interstate telecommunications by the doctrine of sovereign immunity.¹² Acceptance of this argument by the Commission would overturn decades of settled law and deprive the Commission of its ability to carry out its congressional mandate to regulate “all interstate and foreign communication by wire or radio”¹³ Fortunately, the authorities cited by the State of Indiana neither require nor permit this result.

¹¹ Indiana Press Release, *supra*.

¹² North Dakota’s 47 CFR § 1.41 Motion to Dismiss (Nov. 8, 2004); New Jersey Attorney General Reply Comments (Dec. 2, 2004).

¹³ 47 U.S.C. § 152(a).

The principal authority cited in Indiana’s Motion is the decision of the United States Supreme Court in *Federal Maritime Commission v. South Carolina Ports Authority* (“*FMC*”), in which the Court found that an administrative agency could not adjudicate a private party’s complaint that a state-run port violated the Shipping Act of 1984.¹⁴ In *FMC*, the Court was required to decide whether a Federal Maritime Commission proceeding impermissibly placed the State of North Carolina in the position of an involuntary defendant in a private lawsuit.¹⁵ The Court found that the Commission’s proceeding *was* adjudicatory, but on the specific grounds that the proceeding was adversarial, was heard by an Administrative Law Judge, and was governed by rules of procedure and evidence effectively equivalent to those used in federal civil litigation.¹⁶

None of these factors is present in this declaratory ruling proceeding. In fact, as other participants in this docket have pointed out, the better comparison is to the preemption decision reviewed by the Sixth Circuit Court of Appeals in *Tennessee v. United States Department of Transportation* (“*Tennessee v. DOT*”), which found that an agency’s consideration of a preemption request is not an adjudication and is not controlled by the rationale of *FMC*.¹⁷ As the court in that case pointed out, describing a

¹⁴ 535 U.S. 743, 760 (2002).

¹⁵ “States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government Nevertheless, the [Constitutional] Convention did not disturb States’ immunity from private suits, thus firmly enshrining this principle in our constitutional framework.” *Id.* at 752.

¹⁶ *Id.* at 758.

¹⁷ 326 F.3d 729 (6th Cir. 2002), *cert. denied*, 540 U.S. 981 (2003).

Department of Transportation preemption process that is identical in relevant respects to this Commission's preemption procedure:

[T]he administrative procedure addressed in this matter falls within the rulemaking 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.¹⁸

Like the agency decision at issue in *Tennessee v. DOT*, grant of the relief requested in the CBA's petition, pursuant to this Commission's notice-and-comment process, will serve "the valuable function of allowing an agency of the executive branch to interpret federal legislation that it is authorized to enforce," without forcing the State of Indiana "to adjudicate claims . . . as if it were sued in an Article III tribunal."¹⁹ Accordingly, there is no basis for dismissal of the CBA's petition on grounds of sovereign immunity, and the State of Indiana's Motion should be denied.

¹⁸ *Id.* at 736. See FreeEats.com d/b/a ccAdvertising's Opposition to Motion to Dismiss (Nov. 18, 2004); American Teleservices Association Reply Comments (Dec. 2, 2004).

¹⁹ *Tennessee v. DOT*, *supra*, 326 F.3d at 736. In fact, the declaratory ruling procedure under which the CBA requests preemption of the Indiana and Wisconsin telemarketing statutes has been applied by this Commission in a number of cases, and the State of Indiana cites no occasion on which that procedure has been challenged, much less rejected, on sovereign immunity grounds. See, e.g., *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004).

Conclusion

In July of 2003, this Commission correctly interpreted the intent of Congress when it confirmed the preemptive effect of federal regulation of interstate telemarketing, and urged the states to avoid inconsistent and burdensome requirements that would cause needless confusion to businesses and consumers. Unfortunately, Indiana and other states that are the subjects of pending preemption petitions have declared their intention to resist this Commission's lawful assertion of jurisdiction. In light of this consistent pattern of non-compliance, the Commission is well advised simply to declare its plenary jurisdiction over interstate telemarketing.²⁰ In the alternative, the Commission should grant the pending preemption petitions without additional delay, and should reject the motions of Indiana and other states to avoid the Commission's jurisdiction on the basis of a novel and unsupported theory of sovereign immunity.

Respectfully submitted,

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²⁰ See, e.g., MBNA America Bank Comments at 6-12 (Nov. 17, 2004).

CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 3rd day of February 2005, had copies of the foregoing **OPPOSITION TO MOTION TO DISMISS PETITION** delivered to the following via electronic mail or U.S. First Class mail, as indicated:

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