

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

In the Matter of:)
)
NATIONAL CITY MORTGAGE CO.) CG Docket No. 02-278
)
Petition for Expedited Declaratory Ruling)
with Respect to Certain Provisions of the)
Florida Statutes)

**RESPONSE OF NATIONAL CITY MORTGAGE CO.
TO STATE OF FLORIDA’S SECOND MOTION TO DISMISS
FOR LACK OF JURISDICTION AND OTHER GROUNDS**

The State of Florida (“Florida”) now has brought two motions (or, more accurately, has brought the same motion twice) seeking dismissal of the National City Mortgage Company (“NCMC”) Petition for Expedited Declaratory Ruling.¹ The first motion, styled “State of Florida’s Motion to Dismiss for Lack of Jurisdiction and Other Grounds” (“First Motion”), was filed on January 12, 2005.² The second motion, also styled “State of Florida’s Motion to Dismiss for Lack of Jurisdiction and Other Grounds” (“Second Motion”), was filed on June 3, 2005.³

The Second Motion merely repeats the arguments made in the First Motion, which contended that NCMC’s request for preemption of certain provisions of Florida’s telemarketing law must be dismissed because: (1) preemption is barred by sovereign

¹ National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes, CG Docket No. 02-278 (Nov. 22, 2004) (“Petition”).

² State of Florida’s Motion to Dismiss for Lack of Jurisdiction and Other Grounds, CG Docket No. 02-278 (Jan. 12, 2005) (“First Motion”).

³ State of Florida’s Motion to Dismiss for Lack of Jurisdiction and Other Grounds, CG Docket No. 02-278 (June 3, 2005) (“Second Motion”).

immunity; (2) the Telephone Consumer Protection Act (“TCPA”) specifically disclaims any preemptive effect upon state telemarketing statutes; and (3) Florida’s telemarketing statute is consistent with federal law because Florida regulates conduct that the TCPA does not reach. NCMC answered those arguments fully in its Reply Comments, and will not repeat its responses here.⁴

Florida’s Second Motion does, however, expand somewhat upon Florida’s previous claim that the challenged provisions of its telemarketing law are not in conflict with the TCPA and the Commission’s rules. Specifically, Florida argues that its statute is consistent with the TCPA because the TCPA permits, while Florida prohibits, the following activities:

- (1) causing calls to be made to persons whose names appear on the Florida do not call list, and knowingly allowing prerecorded messages to be played when these calls are answered;⁵ and
- (2) making recorded message calls to a person with whom the caller has an established business relationship (“EBR”).

Florida’s argument, which apparently assumes that federal and state law are only in conflict when they prohibit the same conduct, stands the doctrine of conflict preemption on its head. If Florida law imposes additional burdens and prohibitions on interstate telemarketing, going beyond the requirements of the TCPA and this Commission’s rules, the result is precisely the kind of “multiple, conflicting regulations”

⁴ NCMC Reply Comments, CG Docket No. 02-278 (Feb. 17, 2005).

⁵ Florida argues that the TCPA’s restrictions on initiating certain calls do not apply to the act of “causing” these calls to be made within the meaning of Florida’s statute. This argument is relevant only if, as Florida claims, preemption must be limited to cases in which state and federal law prohibit the same conduct. Because this premise is entirely wrong, the question of statutory interpretation need not be addressed here.

that the Commission has found to require preemption.⁶ Accordingly, Florida's argument, like the other claims upon which its motions to dismiss are based, must be rejected.

The State of Florida's duplicative motion also underscores the importance of prompt Commission action on NCMC's Petition, which was filed nearly seven (7) months ago and makes a compelling case for expedited relief. NCMC's Petition was prompted, not merely by the inconsistency between the provisions of Florida law and the Commission's rules, but by the State of Florida's demonstrated willingness to prevent NCMC from using prerecorded messages in interstate calls placed to Florida telephone subscribers with whom NCMC has an established business relationship of the kind recognized by federal law. Time has not improved this situation. By filing duplicative motions attacking NCMC's petition, Florida not only misuses this Commission's resources, but signals its continuing intransigence in the face of the Commission's assertion of jurisdiction over interstate telemarketing. Accordingly, the relief requested by NCMC should be granted without further delay.

Respectfully submitted,

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Date: June 13, 2005

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064-65 ¶ 84 (2003).

CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 13th day of June, 2005, had copies of the foregoing **RESPONSE** delivered to the following, via First Class U.S. mail and electronic mail, as indicated:

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