**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| **In the Matter of:**<br><br>Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991<br><br>Joint Petition for Declaratory Ruling That the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing | **CG Docket No. 02-278**<br><br>**DA 05-1346** |

## COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. ("Charter" or the "Company"), by its attorneys, hereby submits these Comments in the above-referenced proceeding in support of the Joint Petition for Declaratory Ruling that the FCC has Exclusive Jurisdiction Over Interstate Telemarketing ("Joint Petition"), submitted to the Commission on April 29, 2005 by a wide-ranging coalition of 33 organizations.[1] Charter is a broadband communications company with over 6 million customers in 37 states. Through its broadband networks, Charter offers traditional cable video programming (both analog and digital), high-speed cable Internet access, advanced broadband cable services (such as video on demand ("VOD"), high definition television service, and interactive television) and, in some markets, telephony service, usually through voice over Internet Protocol ("VoIP") technology.

[1] *See Alliance Contact Services, et al. Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing, filed April 29, 2005. See also* FCC Public Notice DA-05-1346, rel. May 13, 2005.

## INTRODUCTION

As a provider of advanced broadband services, it is critical that Charter be able to market its broadband products and services to its existing cable customers throughout its multi-state service territory. Charter frequently conducts its telemarketing activities as part of specific, targeted regional or national campaigns. Many of these campaigns necessarily involve interstate calls. However, Charter's efforts to conduct such campaigns are complicated because in addition to the Commission's rules, a myriad of state requirements apply. The additional state requirements often impose significant compliance burdens on the Company that may render regional or national marketing campaigns infeasible. Charter believes that such telemarketing to existing customers can be accomplished while fully valuing and protecting its customer's privacy rights consistent with Commission rules.

For these reasons, Charter wholly endorses the Joint Petition. The Joint Petition cogently sets forth the basis for the Commission's exclusive regulatory jurisdiction over interstate telemarketing calls. Charter urges the Commission to recognize its authority over the inconsistent and unwieldy patchwork of state telemarketing laws applicable to interstate calls. These state laws subject Charter and others to "multiple, conflicting regulations" in the area of interstate telemarketing. The Commission should, under the authority provided it in the Communications Act generally, and the Telephone Consumer Protection Act of 1991 ("TCPA") specifically, declare its exclusive jurisdiction over interstate telemarketing calls and bar state regulation of such calls.

Charter welcomes the Commission's consideration of the Joint Petition, which serves as a vehicle for the Commission to determine whether to preempt all inconsistent state regulation of interstate telemarketing as opposed to addressing individual state law preemption petitions on a

case-by-case basis. The latter approach will lead to innumerable petitions seeking declaratory rulings regarding very specific state-law provisions – thereby overburdening the Commission and creating ongoing uncertainty for companies such as Charter.[2]

In February 2005, Charter submitted comments ("Charter WI Comments") and reply comments (Charter WI Reply Comments") in the pending declaratory ruling proceeding pertaining to whether certain sections of the Wisconsin Statutes and Wisconsin Administrative Code are preempted as applied to interstate telephone calls. While those comments specifically addressed conflicts between Wisconsin's telemarketing laws and the Commission's rules, their treatment of Commission preemption is germane to the current proceeding and reflective of Charter's position generally regarding state laws purportedly applicable to interstate telemarketing that are more restrictive than the Commission's rules. Accordingly, Charter hereby incorporates the Charter WI Comments as Exhibit 1 and the Charter WI Reply Comments as Exhibit 2 to these Comments to include them in full as part of its comments in this

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[2] For example, there are now six pending declaratory ruling petitions that seek Commission preemption under the TCPA of the application of specific state laws. *See American Teleservices Association Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code*, DA 04-3185, filed Aug. 24, 2004; *ccAdvertising (aka FreeEasts.com, Inc.) Petition for Expedited Declaratory Ruling*, DA 04-3187, filed Sept. 13, 2004 (involving North Dakota law); *Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code*, DA 04-3835, filed Nov. 19, 2004; *Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Administrative Code*, DA 04-3836, filed Nov. 19, 2004; *National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes*, DA 04-3837, filed Nov. 22, 2004; and *TSA Stores, Inc. (the Sports Authority) Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida Law*, DA 05-342, filed Feb. 1, 2005. Each one is the subject of its own notice and comment proceeding. The case-by-case petition approach could result in additional petitions not just pertaining to other states' laws but also in those states already the subject of petitions because different provisions of a state's law could be at issue.

proceeding. In support of the Joint Petition, the following summarizes Charter's earlier submissions.

## ARGUMENT

### I. THE STATES ARE WITHOUT JURISDICTION TO REGULATE INTERSTATE TELEMARKETING CALLS

The Joint Petition properly emphasizes the states' lack of jurisdiction over interstate calls.[3] As the Joint Petition and Charter WI Comments explain, Congress first established this principle in Section 2 of the Communications Act of 1934, which provided the Commission with jurisdiction over "all interstate ... communications by wire or radio" while leaving to the states "jurisdiction with respect to intrastate communications ...."[4] The Commission and the Courts have repeatedly acknowledged this division in authority.[5] Congress' intent in enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), which added Section 227 to the Communications Act, was to establish a federal regulatory regime over interstate telemarketing because of the states' lack of jurisdiction over such activities.[6] Congress also expressly expanded the Commission's authority to provide concurrent jurisdiction over intrastate calls by

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[3] Appendix 1 (Charter WI Comments) at 11-12; Appendix 2 (Charter WI Reply Comments) at 3-4; Joint Petition at 33-42.

[4] 47 U.S.C. § 152(a) and (b). *See also* Appendix 1 (Charter WI Comments) at 11; Appendix 2 (Charter WI Reply Comments) at 4.

[5] Joint Petition at 33-34.

[6] 47 U.S.C. § 227 note (Congressional Finding no. 10) ("Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices."). *See also TCPA Order*,¶ 82 ("Congress [enacted the TCPA] based upon the concern that states lack jurisdiction over interstate calls") (citing S. Rep. No. 102-178 at 5) ("Federal action is necessary because States do not have jurisdiction to protect their citizens against those who ... place interstate calls."); Cong. Rec. S16205 (Nov. 7, 1991) (remarks of Sen. Hollings) ("State law does not, and cannot, regulate interstate calls.); Appendix 2 (Charter WI Reply Comments) at 4-5.

amending Section 2(b) of the Communications Act. The amendment to Section 2(b) explicitly added Section 227 as an exception to the Commission's lack of jurisdiction over intrastate calls.

Consistent with Section 2(b) of the Communications Act, Congress included a savings clause in the TCPA to expressly allow more restrictive state regulation of intrastate calls.[7] At the same time, Congress did not alter the preexisting regime regarding interstate calls. Congress recognized that any state law regulation of interstate telemarketing was preempted by Section 2(a), and so, it did not include a broader savings clause in the TCPA to allow states to impose more restrictive regulations over interstate calls. In enacting the TCPA, Congress therefore affirmed the pre-existing regime of federal preemption of more restrictive state laws governing interstate calls.[8] For interstate calls, Congress was clearly comfortable that its new national statutory scheme would adequately protect customers and properly balance the interests of consumers and telemarketers. Because Congress' intent was not ambiguous, the Commission should recognize the preemptive effect of its rules.[9]

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[7] 47 U.S.C. § 227(e)(1).

[8] *See* Appendix 2 (Charter WI Reply Comments) at 5-7.

[9] To the extent there can be argued some ambiguity in section 227(e)(1), the Joint Petition appropriately points out the absurdity of an interpretation of that provision which would, as to intrastate calls, allow states to "either impose 'more restrictive' requirements or 'prohibit [certain practices] outright,' while as to interstate calls only a complete ban is authorized." Joint Petition at 36 n. 80. Such an interpretation does not fit with the overall text and structure of the TCPA and its legislative history. For example, in the TCPA, Congress expressed its concern with regulating in a manner that "protects the privacy of individuals [while] permit[ing] legitimate telemarketing practices." 47 U.S.C. § 227 note (Congressional Finding No. (9)). Allowing a complete prohibition on "the making of telephone solicitations" (section 227(e)(1)(D)) directly conflicts with Congress' desire to balance the various interests.

## II. EVEN IF THE STATES' LACK OF JURISDICTION IS NOT READILY APPARENT, ALLOWING MORE RESTRICTIVE STATE REGULATION OF INTERSTATE CALLS INTERFERES AND CONFLICTS WITH THE COMMISSION'S REGULATORY SCHEME

Even if the Commission does not find that the Communications Act, as amended by the TCPA, expressly preempts more restrictive state regulation of interstate telemarketing, the Commission should nonetheless determine that its rules have preemptive effect.[10] The Commission has enacted a comprehensive regulatory regime that carefully balances consumers' privacy interests with legitimate telemarketing activities, consistent with Congress' intent. It is well established that "[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with the regulations or frustrates the purposes thereof."[11] Moreover, it is not even imperative that Congress expressly stated that more restrictive interstate regulations should be preempted as "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law."[12] Indeed, even where Congress has preserved some role for the states (as it did in the TCPA for intrastate calls and for the enforcement of Commission rules governing interstate calls), the Supreme Court has found that "state law is nullified to the extent that it actually conflicts with federal law."[13] In addition, by holding this notice and comment proceeding and simultaneously reopening the six pending declaratory ruling

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[10] Appendix 1 (Charter WI Comments) at 12-13; Joint Petition at 42-44.

[11] *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

[12] *Id.* (quoting *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982)).

[13] *De la Cuesta*, 458 U.S. at 153.

proceedings, any decision by the Commission to preempt more restrictive state regulation of interstate telemarketing would be entitled to deference.[14]

More restrictive state laws applicable to interstate telemarketing are particularly onerous for cable and telecommunications companies attempting to market their broadband services to existing customers. In some instances, more restrictive state regulation of interstate telemarketing effectively prohibits Charter and its affiliates from making interstate calls to its customers about its broadband and advanced services offered over the very same facilities. Therefore, those laws interfere with Congressional and Commission policies to encourage competition in, and further deployment of, broadband services.[15] The fundamental purpose of the 1996 Telecommunications Act was to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and service to all Americans ..."[16] The Commission has repeatedly acted to prohibit or limit inappropriate regulation of broadband service to achieve the Congressionally-stated goal of encouraging broadband deployment.[17] That goal is consistent with barring more restrictive state telemarketing laws applicable to interstate calls, particularly because telemarketing calls from companies like Charter are frequently designed to promote the deployment of broadband service.

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[14] *See* Appendix 2 (Charter WI Reply Comments) at 15-16 (citing *Geier v. American Honda Motor Corp.*, 529 U.S. 861 (2000).

[15] *See* Appendix 1 (Charter WI Comments) at 7-10.

[16] H.R. CONF. REP. NO. 104-458, at 113 (1996).

[17] *See* Appendix 1 (Charter WI Comments) at 7-10.

## III. EVEN IF THE COMMISSION BARS MORE RESTRICTIVE STATE LAWS GOVERNING INTERSTATE TELEMARKETING, STATES RETAIN SIGNIFICANT AUTHORITY TO PROTECT THEIR RESIDENTS

The states are under the misguided impression that their consumers would be left unprotected if the Commission bars state regulation of interstate telemarketing. All consumers would still continue to enjoy the full benefit of the extensive protections contained in the Commission's rules. In fact, the widespread view is that the Commission's rules and the Federal Do Not Call program have been a resounding success.[18]

It is significant that federal preemption would only impact interstate calls. All laws governing intrastate calls would remain in full force and effect, consistent with the express intent of the TCPA. Charter will, of course, abide by state telemarketing laws for all intrastate telemarketing campaigns, even if the Commission preempts states' jurisdiction over interstate calls.

In addition, as pointed out in the Joint Petition, the TCPA gives state attorneys general the right to enforce all aspects of the TCPA, whether relating to an intrastate or interstate call, in federal court.[19] Moreover, the TCPA expressly allows state attorneys general to bring suits in state courts for "alleged violations of any *general* civil or criminal statute of such State."[20] The TCPA therefore preserves the authority of states to enforce general non-telemarketing statutes that govern both intrastate and interstate telemarketers' activities, such as fraud statutes.

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[18] *See, e.g.*, United States Government Accountability Office (GAO) Report to Congressional Committees, *Telemarketing, Implementation of the National Do-Not-Call Registry* at 5 (January 2005) (referring to survey results reflected a significant reduction in unwanted telemarketing calls). The GAO did state that the survey data was unscientific but the findings conform with anecdotal reports of consumer satisfaction.

[19] 47 U.S.C. § 227(f)(1) and (2). *See also* generally Joint Petition at 40-42.

[20] 47 U.S.C. § 227(f)(6) (emphasis added). *See also* Joint Petition at 40-42.

## CONCLUSION

States lack jurisdiction to regulate interstate telemarketing. Moreover, permitting more restrictive state regulation of interstate telemarketing creates an untenable situation for companies like Charter. Absent preemption of more restrictive laws governing interstate telemarketing, Charter will be subject to, and must comply with, a patchwork of state regulations. While Congress intended to protect consumers with the TCPA, it also recognized the need to "permit[ ] legitimate telemarketing practices."[21] More restrictive state rules governing interstate telemarketing not only directly conflict with the Commission's rules, they interfere with their underlying purpose – to establish a uniform national, regulatory scheme – specifically excepting only more stringent intrastate regulations.

Respectfully submitted,

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[21] *See* 47 U.S.C. § 227 note (Congressional Finding No. 9).