

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

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of)
1991.)

Mark Boling Petition for Declaratory) DA 05-1348
Ruling with Respect to Certain Provisions)
of the California Consumer Legal)
Remedies Act.)

Six Petitions (American Teleservices) DA 04-3185, 04-3187, 04-
Association, Inc.; ccAdvertising;) 3835, 04-3836, 04-3837,
Consumers Bankers Association; National) 05-342
City Mortgage Co.; TSA Stores, Inc.) for)
Declaratory Ruling that the TCPA)
Preempts Certain Provisions of New)
Jersey, North Dakota, Indiana, Wisconsin)
and Florida Law.)

Alliance Contract Services, *et al.* Petition) DA 05-1346
for Declaratory Ruling That the FCC Has)
Exclusive Jurisdiction Over Interstate)
Telemarketing.)

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

Paul G. Summers, Attorney General
Stephen R. Butler
Assistant Attorney General
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-8722

David C. Bergmann
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614-466-8574
Chair, NASUCA Telecommunications
Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301-589-6313

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. The Telemarketers Oversimplify the Commission’s Jurisdiction. | 1 |
| II. Congress Did Not Intend to Pre-empt State Telemarketing Laws..... | 4 |
| III. Both Congress and the States are Protecting the Same Right — the Right to Privacy. | 6 |
| IV. The Commission Cannot and Should Not Pre-empt State Telemarketing Laws..... | 9 |
| V. Telemarketers Do Not Have a First Amendment Right to Ignore Privacy Rights. | 12 |
| VI. The Commission Should Clarify that State Telemarketing Laws are Not Pre-empted. | 14 |

Pursuant to Section 1.4 of the Federal Communications Commission's (the Commission) Rules, 47 C.F.R. § 1.4, the National Association of State Utility Consumer Advocates (NASUCA)¹ respectfully submits these reply comments on the various petitions, including those of Alliance Contact Services, *et al.*, seeking a declaratory ruling that the Commission has exclusive jurisdiction over interstate telemarketing, the petitions requesting a declaratory ruling that the Telephone Consumer Protection Act pre-empts certain provisions of New Jersey, North Dakota, Indiana, Wisconsin, and Florida law, the petition for declaratory ruling with respect to certain provisions of the California Consumer Remedies Act, and the Rules and Regulations Implementing the Telephone Consumer Protection Act.²

I. THE TELEMARKETERS OVERSIMPLIFY THE COMMISSION'S JURISDICTION.

The telemarketers' claim that the Commission has exclusive jurisdiction over interstate telemarketing is the sort of sweeping oversimplification that has been rejected by the Supreme Court as a basis for pre-emption:

In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal

¹NASUCA is a voluntary association of 44 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Ch. 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

²NASUCA's position supports that of other organizations, such as the National Consumer Law Center, the AARP, the World Privacy Forum, the Indiana Attorney General's Office, and the Tennessee Regulatory Authority.

Communications Act. “(T)he ‘question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case.’ Statements concerning the ‘exclusive jurisdiction’ of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive.”³

In *Head*, a New Mexico radio station that broadcast into Texas argued that the Federal Communications Act pre-empted a New Mexico law restricting optometry advertising, including the advertising of Texas optometrists.⁴ The Supreme Court rejected the argument. “In the absence of positive evidence of legislative intent to the contrary, we cannot believe that Congress has ousted the States from an area of such fundamentally local concern.”⁵ Clearly, the telemarketers’ argument about the Commission’s exclusive jurisdiction is not sufficient to justify the pre-emption of all state laws related to interstate telemarketing.

Further, the argument that the Commission has exclusive regulatory jurisdiction over interstate telemarketing is inconsistent with the role of the Federal Trade Commission in the do-not-call registry. As noted by the Commission, “On March 11, 2003, President Bush signed the Do-Not-Call Implementation Act (Do-Not-Call Act), authorizing the Federal Trade Commission

³ *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 429-30 (1963).

⁴ *Id.* at 425.

⁵ *Id.* at 431-32.

(FTC) to collect fees for the implementation and enforcement of a national do-not-call registry.”⁶

The Commission acknowledged the applicability of the FTC’s rules where the FTC’s rules were more restrictive than the Commission’s rules.⁷ In order to grant the declaratory order requested here, the Commission would have to repudiate the role of the FTC in the Do-Not-Call Act.

The fact that telemarketers do not *provide* interstate telecommunications services but instead *use* interstate telecommunications services distinguishes telemarketing from the 1991 operator services case on which the telemarketers rely.⁸ In the 1991 case deciding that a Tennessee law regulating interstate operator services was pre-empted, the Commission said, “The Commission’s jurisdiction over interstate and foreign communications is exclusive of state authority, Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications *service* may be offered in a state.”⁹ Because telemarketing is not, however, an interstate telecommunications service, reliance on this case is misplaced.

The telemarketers’ petition is based on an incorrect oversimplification of the Commission’s jurisdiction.¹⁰ The Commission does not have exclusive jurisdiction over the right to live in peace and quiet in the privacy of one’s own home, which is the real issue in this

⁶*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report on Regulatory Coordination, DA-03-2855, 18 F.C.C.R. 18558 (2003) (“*Coordination Report*”), ¶ 1.

⁷ *Coordination Report*, ¶¶ 12 and 16.

⁸Comments of Verizon, p. 5.

⁹*In the Matter of Operator Services Providers of America Petition for Expedited Declaratory Ruling*, Docket No. 91-185, 6 F.C.C.R. 4475, ¶ 10 (emphasis added).

¹⁰Comments of Consumer Bankers Association, p. 1; Comments of MBNA America Bank, p. 2; Comments of Interstate Sellers and Teleservices Providers, p. 8; Comments of Verizon, p. 4; Comments of Venetian Casino Resort, part II; Comments of Charter Communications, p. 4.

docket.

II. CONGRESS DID NOT INTEND TO PRE-EMPT STATE TELEMARKETING LAWS.

Contrary to the petitioners' arguments, an analysis of pre-emption law shows that state telemarketing laws are not pre-empted by the federal telemarketing laws.

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, ... when there is outright or actual conflict between federal and state law, ... where compliance with state law is in effect physically impossible, ... where there is implicit in federal law a barrier to state regulation, ... where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, ... or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress....¹¹

As noted by the Supreme Court, “[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.”¹² Further, “[c]onsideration of issues arising under the Supremacy Clause ‘start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.’”¹³ And “[t]he question in each case is what the purpose of Congress was.”¹⁴

Congress did not intend to pre-empt state telemarketing laws. The statute enacted by

¹¹ *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-69, (1986) (internal citations omitted).

¹² *Id.* at 369.

¹³ *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992).

¹⁴ *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947).

Congress includes a specific provision entitled, “State law not preempted[.]”¹⁵ The text of this provision states as follows:

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, ***nothing in this section or in the regulations prescribed under this section shall preempt any State law*** that imposes more restrictive intrastate requirements or regulations on, or ***which prohibits*** —
(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
(B) the use of automatic telephone dialing systems;
(C) the use of artificial or prerecorded voice messages; or
(D) the making of telephone solicitations.¹⁶

Although the telemarketers emphasize the word “intrastate” in the text, “intrastate” modifies “requirements or regulations.”¹⁷ The word “which” from the phrase “or which prohibits” refers to the phrase “any State law.” The phrase “any State law” is the only grammatically correct reference for the word “which.”¹⁸ Thus, the relevant portion of the text, which is emphasized above, is not limited by the word “intrastate.” Giving “which” a grammatically correct reference, the relevant text says the following: “[N]othing in this section or in the regulations prescribed under this section shall preempt any State law ... which prohibits ... the making of telephone solicitations.”¹⁹ Congress explicitly legislated that state telemarketing laws are not pre-empted.

¹⁵ 47 U.S.C. § 227(e)(1).

¹⁶ *Id.* (emphasis added).

¹⁷ Comments of Charter Communications, p. 5; Comments of Verizon, p. 3; Comments of MBNA America Bank, p. 2.

¹⁸ See, e.g., *Glass v. Kemper Corporation*, 920 F. Supp. 928, 931 (N.D. Ill. 1996), in which the Court interpreted a statute specifically in its grammatically correct form.

¹⁹ 47 U.S.C. § 227(e)(1)(D).

Further, this interpretation is consistent with the subsequent provision of the statute, which states, “Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.”²⁰ State telemarketing laws are general civil or criminal statutes in the sense that they are enacted pursuant to the general police powers of the states. What is abundantly clear from both of these statutes is that Congress had contemplated the pre-emption issue, and that Congress *did not* pre-empt the states. If Congress had intended to pre-empt state telemarketing laws, it would not have included two separate provisions specifically *not* pre-empting the states, while not including a provision specifically pre-empting the states. Congress did not intend to pre-empt state telemarketing laws. The United States Court of Appeals for the Eighth Circuit has held that Congress did not intend to pre-empt state telemarketing laws and that such laws are not pre-empted.²¹

III. BOTH CONGRESS AND THE STATES ARE PROTECTING THE SAME RIGHT — THE RIGHT TO PRIVACY.

Congress instructed the Commission to initiate a rulemaking proceeding for the purpose of protecting consumers’ privacy rights. “Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding *concerning the need to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.*”²² Contrary to the telemarketers’ arguments, the statute does not express Congress’

²⁰ 47 U.S.C. § 227(f)(6).

²¹ *Van Bergen v. State of Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995).

²² 47 U.S.C. § 227(c)(1) (emphasis added).

concern about protecting the pecuniary interests of the telemarketers from consumers and their democratically-elected state legislatures. Very clearly, Congress was concerned about protecting people from the relentless onslaught of unwanted telemarketing calls intruding into their homes and disrupting their privacy.

The regulations that Congress instructed the Commission to adopt were for the specific purpose of protecting privacy rights:

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and ***shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph*** in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.²³

The Commission's regulations were not intended to protect the telemarketers from state-level democracy. Congress very clearly intended the regulations to protect consumers from the repeated invasions of privacy perpetrated by the telemarketers. To twist this law into a law that protects the telemarketers from state regulation would be unjust and would defeat the will of Congress.

When the real purpose of Congress is understood, it is readily apparent that there is no conflict between federal telemarketing laws and state telemarketing laws, and that state telemarketing laws are not an obstacle to the accomplishment and execution of the objectives of Congress. Some states want more privacy rights than the Commission directs in its regulations. There is nothing wrong with that. That is democracy in a federal system of government.

The telemarketers complain incessantly about the proliferation of state laws against

²³47 U.S.C. § 227(c)(2) (emphasis added).

telemarketing.²⁴ There is a reason for such laws: The people of the states demand them. People do not want the free time that they have in the privacy of their own homes to be devoted to answering and responding to unwanted telemarketing calls. This is a legitimate desire of a free people in a free nation, and the Commission would be wrong to limit these privacy rights in order to benefit the pecuniary interests of the telemarketers.

As the Supreme Court has stated, “the protection of a person’s general right to privacy — his right to be let alone by other people — is, like the protection of his property and his very life, left largely to the law of the individual States.”²⁵ Further, “[w]hen Congress legislates in a field traditionally occupied by the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”²⁶ And “[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law”²⁷

In support of its conclusion that Congress probably intended to pre-empt state telemarketing laws, the Commission cited a remark by Senator Pressler, who said, “The Federal Government needs to act now on uniform legislation to protect consumers.”²⁸ The focus of Senator Pressler’s remark was the protection of consumers. To extract the word “uniform” out

²⁴ Comments of Venetian Casino Resort, part I; Comments of MBNA America Bank, p. 3; Comments of Interstate Sellers and Teleservices Providers, p. 5.

²⁵ *Katz v. United States*, 389 U.S. 347, 350 (1967).

²⁶ *California v. ARC America*, 490 U.S. 93, 101 (1989).

²⁷ *Id.* at 105. See also *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 257-58 (1984) (holding that the imposition of punitive damages awarded pursuant to state law was not pre-empted by the federal regulation of nuclear power, even though Congress intended to promote nuclear power as part of the federal regulation).

²⁸ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 03-153, 18 F.C.C.R. 14014 (“*Do Not Call Order*”), ¶ 83, fn 268. See also Comments of Verizon, p. 7, fn. 15.

of this quote and characterize it as Congressional intent to pre-empt inconsistent state telemarketing laws is incorrect. The quote is entirely consistent with the adoption by Congress and the Commission of uniform *minimum* standards to protect the American people from unwanted telemarketing calls, while allowing individual states to adopt more stringent standards.

IV. THE COMMISSION CANNOT AND SHOULD NOT PRE-EMPT STATE TELEMARKETING LAWS.

Although the telemarketers allege that the Commission has the power to pre-empt the states, the Commission would be both incorrect and unwise to utilize its power in this context.²⁹

The power of a federal agency to pre-empt the states has significant limits:

While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, [citation omitted], it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.³⁰

The statute is analyzed in detail above. The Commission cannot pre-empt state telemarketing laws because the statute includes an explicit provision that says, “[N]othing in this section or in the regulations prescribed under this section shall preempt any State law ... which

²⁹ Comments of Verizon, p. 8.

³⁰ *Louisiana Public Service Commission*, 476 U.S. at 374.

prohibits ... the making of telephone solicitations.”³¹ Also, the Commission cannot pre-empt state telemarketing laws because the rulemaking proceeding required by Congress was explicitly “concerning the need to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.”³² Furthermore, the Commission cannot pre-empt state telemarketing laws because Congress explicitly decided that the Commission “shall prescribe regulations to implement methods and procedures for protecting the privacy rights ... in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.”³³

Congress clearly did not confer unlimited power on the Commission to pre-empt the states in the context of telemarketing regulations. The concern of the Congress was to protect the privacy rights of consumers, and there is no conflict with federal law if the people of a particular state adopt privacy rights greater than those determined by the Commission in its regulations implementing the federal statute. The real issue is not interstate telecommunications; the real issue is the right of consumers to live in peace and quiet in the privacy of their own homes. Congress did not give the Commission the power to limit that right in order to benefit the pecuniary interests of the telemarketers.

Even if the Commission decides that it has the power to pre-empt the states in this context, it would be unwise to utilize that power. Popular outrage against the unwanted interruptions of daily life caused by telemarketing calls is very real. The Commission has noted

³¹ 47 U.S.C. § 227(e)(1)(D).

³² 47 U.S.C. § 227(c)(1).

³³ 47 U.S.C. § 227(c)(2).

this popular outrage:

The record in this proceeding is replete with examples of consumers that receive numerous unwanted calls on a daily basis. The increase in the number of telemarketing calls over the last decade combined with the widespread use of such technologies as predictive dialers has encroached significantly on the privacy rights of consumers. For example, the effectiveness of the protections afforded by the company-specific do-not-call rules have been reduced significantly by dead air and hang up calls that result from predictive dialers. In these situations, consumers have no opportunity to invoke their do-not-call rights and the Commission cannot pursue enforcement actions. As detailed previously, such intrusions have led many consumers to disconnect their phones during portions of the day or avoid answering their telephones altogether.³⁴

With all due respect to the Commission, it is not an elected body. A right as important as the right to privacy in one's own home should not be limited by the unilateral action of an unelected body, even if that body has the technical power to so act. According to the Supreme Court,

As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.³⁵

Likewise, the Supreme Court, the Congress, the states, and the people should be able to expect the Commission to exercise its more limited power over the states only with great care and with due respect for the rights of the people as determined by their democratically-elected state legislatures.

³⁴ *Do Not Call Order*, ¶ 28.

³⁵ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

V. TELEMARKETERS DO NOT HAVE A FIRST AMENDMENT RIGHT TO IGNORE PRIVACY RIGHTS.

First, the Commission should note that the telemarketers' First Amendment argument is *not* an argument for pre-emption.³⁶ The First Amendment argument would apply just as much to the federal telemarketing laws and regulations as to state telemarketing laws and regulations. Thus, if the Commission accepts the telemarketers' First Amendment argument, there will be no protection whatsoever — federal or state — for the privacy of consumers in this context. The Commission previously has rejected the telemarketers' First Amendment argument.³⁷

According to the Supreme Court, “[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom.”³⁸ “The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”³⁹ The Supreme Court has stated the following:

We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even ‘good’ ideas on an unwilling recipient. That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. [Citation omitted]. The asserted right of a mailer, we repeat, stops at the outer boundary of every person’s

³⁶ Comments of Venetian Casino Resort, part II.

³⁷ *Do Not Call Order*, ¶ 63.

³⁸ *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

³⁹ *Id.* at 487.

domain.⁴⁰

To the extent that a commercial speech analysis might be necessary, laws restricting telemarketing are permissible under the First Amendment. According to the Supreme Court, “the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.”⁴¹

In commercial speech cases ..., a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁴²

The Supreme Court has decided that the right to privacy is a legitimate state interest sufficient to justify the regulation of commercial speech.

Likewise, the protection of potential clients’ privacy is a substantial state interest. Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In *Ohralik*, we made explicit that ‘protection of the public from these aspects of solicitation is a legitimate and important state interest.’⁴³

Clearly, telemarketing laws directly advance the asserted governmental interest in protecting the privacy rights of Americans.

The final prong of the commercial speech analysis, whether the regulation at issue is not more extensive than necessary to serve the governmental interest, has been clarified by the

⁴⁰ *Rowan v. United States Post Office Department*, 397 U.S. 728, 738 (1970).

⁴¹ *Bolger v. Youngs Drug Products*, 463 U.S. 60, 64-65 (1983).

⁴² *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

Supreme Court:

What our decisions require is a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends,” ... — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is “in proportion to the interest served,” ... that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.⁴⁴

State telemarketing laws and regulations clearly meet this clarified standard. The First Amendment does not prevent the Congress or the states from protecting the right of Americans to live in peace and quiet in the privacy of their own homes.

VI. THE COMMISSION SHOULD CLARIFY THAT STATE TELEMARKETING LAWS ARE NOT PRE-EMPTED.

NASUCA respectfully asks the Commission to dismiss the petition for declaratory ruling that the Commission has exclusive regulatory jurisdiction over interstate telemarketing and respectfully asks the Commission to clarify that state telemarketing laws are not pre-empted. Also, NASUCA respectfully asks the Commission to dismiss any petition for declaratory order that requests pre-emption of any telemarketing law of any state and respectfully asks the Commission to grant any petition for declaratory order that requests the conclusion that any state telemarketing law is not pre-empted.

⁴³ *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

⁴⁴ *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (internal citations omitted).

Respectfully submitted,

Paul G. Summers
Attorney General
Stephen R. Butler
Assistant Attorney General
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-8722

David C. Bergmann
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614-466-8574
Chair, NASUCA Telecommunications
Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301-589-6313

August 18, 2005