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

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|---------------------------------------|---|-----------------------|
| Rules and Regulations Implementing |) | |
| The Telephone Consumer Protection |) | |
| Act of 1991 |) | CG Docket No. 02-278 |
| |) | |
| National Association of State Utility |) | |
| Consumer Advocates' Petition for |) | |
| Declaratory Ruling Regarding |) | |
| Truth-in-Billing |) | DA Docket No. 05-1346 |
| |) | |

**REPLY COMMENTS OF THE
TEXAS OFFICE OF PUBLIC UTILITY COUNSEL**

The Texas Office of Public Utility Counsel, (“Texas OPC”), offers these reply comments, pursuant to the Federal Communications Commission’s (“Commission” or “FCC”) request for comment on the Petition for Declaratory Ruling related to the Commission’s jurisdiction over interstate telemarketing released in the above-referenced dockets on May 13, 2005. Texas OPC represents the interests of residential and small commercial telephone customers before the Public Utility Commission of Texas, state and federal courts and the FCC. These reply comments respond to certain issues of concern raised by various commenters to the petition and subsequent comments filed by the Joint Petitioners.¹

¹ On April 29, 2005, a coalition of 33 organizations, including trade associations, individual companies and non-profit entities (hereinafter known as “Joint Petitioners”) engaged in interstate telemarketing activities filed a joint petition with the Commission raising concerns about the scope of the Commission’s jurisdiction over interstate telemarketing calls under the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. 102-243 codified at 47 U.S.C. 227.

I. TEXAS OPC ARGUMENT

Texas OPC respectfully recommends that the Commission deny the Joint Petitioners request for declaratory relief preempting state anti-telemarketing laws. The Joint Petitioners have failed to demonstrate that the United States Congress expressly intended that the TCPA would preempt state anti-telemarketing laws. Such evidence of intent is essential before one could reasonably conclude that the TCPA would apply to the states in regard to telemarketing regulation rather than each individual state's own laws.

Texas OPC contends that in contrast to the petitioners' arguments, an analysis of pre-emption law shows that state telemarketing laws are not pre-empted by the federal telemarketing laws. The United States Supreme Court defined the legal criterion for preemption in its decision in *Louisiana Public Service Commission v. Federal Communications Commission*² as follows:

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt 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....³ (emphasis added)

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.”⁴ In the

² *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-69, (1986)

³ *Id.* at 368-69.

⁴ *Id.* at 369 and 1899.

instant case, it is evident that Congress did not manifest a clear intent that the TCPA preempt state law in regulating interstate telemarketing activities. Further, there is no credible evidence that the TCPA was enacted to act as a barrier to state regulation or that state law purposes are counter to the objectives of Congress in passing the TCPA. Texas OPC directs the Commission's attention to 47 U.S.C. 227(e)(1) as evidence of this premise. It should be noted that subsection (e)(1) of 47 U.S.C. 227 entitled "Effect on State Law" unequivocally recognizes that preemption was not a clear and manifest intent of the United States Congress. The statute enacted by Congress includes a specific provision entitled, "State law not preempted[.]"⁵ 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.*⁶

The Joint Petitioners note that this section refers to "intrastate" requirements or regulations and contends that this provision "intends" a preemption of state authority over "interstate" telemarketing. Texas OPC disagrees with that interpretation of this portion of the statute. Texas OPC agrees with the Comments of the National Association of State Utility Consumer Advocates (NASUCA) regarding the proper interpretation of

⁵ TCPA §227(e)(1).

⁶ *Id.* (emphasis added).

subsection (e)(1) of 47 U.S.C. 227. Moreover, Texas OPC argues that an equally reasonable interpretation of this statute and the intended use of the word “or” recognizes Congressional acknowledgment of state authority in the promulgation of state laws that impose more restrictive requirements or regulations on “intrastate telephone solicitations” and includes recognition of the passage of other state laws “which prohibit” or restrict the manner of “interstate telephone solicitations”.

Texas OPC further argues that at the time that the TCPA was passed, a significant number of states already had anti-telemarketing laws in place.⁷ If Congress had a “clear and manifest intent” to preempt state authority with the TCPA, it had ample opportunity to do so in the statutory text. Congress declined to do so. The TCPA, like most federal statutes, acts as a regulatory floor for the states, but it does not preclude a state from enacting more stringent measures as an appropriate exercise of its police powers as long as they do not explicitly or implicitly conflict with the federal intent or purpose in enacting the legislation. In this instance, one of the main purposes of the TCPA is to protect consumers’ privacy rights from unfettered intrusions.⁸ In like manner, the Texas Legislature passed the Telemarketing Disclosure and Privacy Act in 2001 to protect its consumers from improper intrusions by telemarketers.⁹

II. CONCLUSION

In closing, the TCPA is narrowly tailored and designed to protect consumer privacy and gave the Commission equally narrow rulemaking authority on the manner

⁷ See TCPA §2(7) of Congressional Statement of Findings; See also July 29, 2005 Initial Comments of Electronic Privacy Information Center, et. al. at page 10, fn 33.

⁸ TCPA §227(c)

⁹ See V.T.C.A. Bus. & C. Code, Chapter 44. See also Public Utility Regulatory Act, TEX. UTIL. CODE ANN., Chapter 55, Subchapter E (Vernon 1998 & Supp. 2005) (PURA) regarding regulations related to the use of automated dial announcing devices for solicitation purposes.

and procedures by which telemarketing and telephone solicitation could occur.¹⁰ However, the TCPA did not expressly prohibit the exercise of state police powers to further restrict and regulate telemarketing activity in regional efforts to preserve residential peace and privacy. As noted, many states have not hesitated to respond to citizens' calls for protection and salvation from such telemarketing calls by enacting more restrictive legislation to counter the ever-growing litany of commercial solicitation.

In the past, federal and state legislation has worked in concert on numerous issues with little hardship to various interests. In commercial situations where there is concurrent legislation, the prudent course for a business interest is to comply with the state regulation(s), as it would not only encompass the federal requirements but would also allow the entity to adhere to higher standards, if any, that are not present in the federal statute. However, there is ample legislative precedent in an assortment of areas where dual legislation can and does harmoniously co-exist for the benefit of business and consumers alike. There is no valid reason in this specific instance to treat the TCPA in a different manner. Thus, absent a clear and manifest intent from Congress, the Texas OPC respectfully prays that the Commission deny the Joint Petitioners request for preemption of state anti-telemarketing legislation by the TCPA.

¹⁰ 47 C.F.R. §64.1200

