

December 8, 2005

EX PARTE – Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; In re Alliance Contact Services et al. Petition for Declaratory Ruling That the FCC Has Exclusive Jurisdiction Over Interstate Telemarketing*, CG Docket No. 02-278.

Dear Ms. Dortch:

MBNA submits this written *ex parte* presentation to supplement the record with respect to the above-captioned docket, which poses critical questions regarding the line between federal and state authority over telemarketing.

We write to emphasize three fundamental points. *First*, the right answer in this proceeding is dictated by considerations of jurisdiction rather than preemption. Federal authorities do not need to “preempt” state actions that the states have no authority to take in the first place. That is precisely the case here. There is no need to “preempt” state regulation of *interstate* telemarketing calls because the states have no authority to regulate interstate calls to begin with. Accordingly, MBNA – like the Joint Petitioners¹ – does not ask the Commission to “preempt” anything, but only to reiterate and defend the longstanding line between federal and state authority in the telecommunications context.

Second, we wish to place the interstate telemarketing issue presented here in the context of Section 2 issues that the Commission has confronted in the past and those that it will be obliged to address in the future. In that context, two things are clear:

¹ See Alliance Contact Services, *et. al.* Joint Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing, *Rules and Regulations Implementing The Telephone Consumer Protection Act*, CG Docket No. 02-278 (filed April 29, 2005) (“*Joint Petition*”), available at, http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517589090; Reply Comments of Joint Petitioners, CG Docket 02-278, DA 05-1346 (filed Aug. 18, 2005) http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518147969.

- *This is an easy case.* Difficult Section 2 issues arise when *both* federal and state regulators have authority to regulate in a certain area, and the merits of uniform federal policy must be weighed – either by Congress or an agency – against the restriction of states’ rights that would result from preemption. *In this case, there is no federalism question because Section 2(a) of the Communications Act gives the FCC exclusive authority over interstate calls.*
- *Muddling the critical line between Section 2(a) and Section 2(b) in this case will muddle it elsewhere as well.* The interstate/intrastate divide in Section 2 is among the fundamentals of telecommunications regulation. States have already begun to extend their do-not-call regulations to related areas like interstate faxes, business-to-business calls, and inbound calling. The states have not yet seriously suggested that they have authority to regulate, for example, interstate VOIP calls (including those made for telemarketing purposes), or other enhanced services of an interstate nature. But make no mistake – *a determination here that the states may, through the mere invocation of consumer protection, aggrandize their regulatory jurisdiction to include authority over interstate telecommunications will reverberate throughout telecommunications law.*

Third, we wish to emphasize that respecting the jurisdictional regime that Congress created will not leave the states unable to protect their consumers. While Congress delegated exclusive *regulatory* authority over interstate telemarketing to the FCC, there is no question that states have broad *enforcement* authority under the TCPA. Indeed, state attorneys general are expressly authorized to *enforce* the uniform set of federal telemarketing laws against interstate telemarketers. Moreover, state attorneys general are specifically empowered to continue to *enforce* state civil or criminal statutes of general applicability – including those barring fraud, false advertising, and so on – against interstate telemarketers. This substantial state role in enforcement makes perfect sense. What *would not* make sense would be allowing the states to promulgate 51 different sets of rules governing the primary conduct of telemarketers making interstate calls – which is why Congress has denied the states the authority to so.

* * * *

1. The States Lack Jurisdiction to Regulate Interstate Telemarketing: At the risk of redundancy, MBNA wants to ensure that its fundamental view of this proceeding is perfectly clear: Specifically, this proceeding is about *jurisdiction*, not preemption. Preemption issues arise only when the states *have authority to regulate* in a particular area, and either Congress or an agency must determine whether that authority should yield to federal policies.² There is no such question here.

² See *Operator Services Providers of America/Petition for Expedited Declaratory Ruling*, Memorandum Opinion and Order, 6 FCC Rcd. 4475, 4477 ¶ 10 n.19 (1991) (“*OSPA*”) (“Where Congress has given this Commission exclusive authority over interstate and foreign communications, we need not demonstrate that ‘state regulation of interstate communications would impose some burden upon interstate commerce or would frustrate some particular policy goal of the Congress or of this Commission.’”)

In 1934, when Congress enacted Section 2(a) of the Act, it granted to the Commission exclusive jurisdiction over “all interstate and foreign communication”³ and created a regime in which “[i]nterstate communications are totally entrusted to the FCC.”⁴ At the same time, the Act accorded states considerable authority over intrastate communications,⁵ although subsequent amendments to the Act permit the FCC to regulate intrastate communications as well.⁶ Both the courts and this Commission have repeatedly reaffirmed this basic jurisdictional dichotomy, making it crystal-clear that states have no regulatory authority over interstate telephone communications.⁷

In 1991, Congress enacted the TCPA against the backdrop of this universally acknowledged division of regulatory authority.⁸ As the Joint Petitioners pointed out, Congress’s principal objective in enacting the TCPA was also clear — to establish *uniform* national standards that *balance* the concerns of consumers against the need for a uniform framework for compliance by businesses acting in good faith.⁹ Indeed, Congress specifically found that “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”¹⁰

To ensure that the Commission would be able to establish a *uniform* set of national standards, Congress amended Section 2(b), *expanding* federal authority over intrastate telemarketing calls. Because that expansion of federal authority over intrastate calls could have been interpreted as implicitly preempting preexisting state authority over *intrastate* calls, Congress adopted a savings clause, the TCPA’s Section 227(e)(1), expressly providing that “nothing in this section or in the regulations prescribed under

³ 47 U.S.C. § 152(a).

⁴ *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

⁵ 47 U.S.C. § 152(b).

⁶ As further discussed directly below, Section 227 itself is such a provision.

⁷ *See, e.g., Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986); *AT&T Co.*, Memorandum Opinion and Order, 56 FCC 2d 14, 20 ¶ 21 (1975) (“[T]he States do not have jurisdiction over interstate communications.”).

⁸ The states pay no heed to this longstanding jurisdictional divide between interstate and intrastate calls. Tennessee, for example, argues in its comments that the TCPA is an isolated provision that has nothing to do with Section 2 or the underlying Act. *See* Comments of the Tennessee Regulatory Authority at 2-6 (July 29, 2005) (“Tennessee Comments”). But if that were true, Congress, in enacting the TCPA, would have had no reason to amend Section 2 to provide for federal authority over intrastate telemarketing. *See infra*. Contrary to the states’ view, the FCC’s plenary authority over interstate telemarketing is derived from Section 2 itself and the TCPA did nothing to change the allocation of authority over interstate calls.

⁹ *See* Joint Petition at 7-8; *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14017 (¶ 1) (2003) (“*Order*”) (adopting rules that “strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8754 (¶ 3) (1992) (explaining that Congress required the FCC to “implement the TCPA in a way that reasonably accommodates individuals’ rights to privacy as well as the legitimate business interests of telemarketers”).

¹⁰ Telephone Consumer Protection Act of 1991 § 2(9), Pub. L. No. 102-243 (1991).

this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits” certain telemarketing practices.¹¹ Congress routinely employs such savings clauses “to limit, or possibly to foreclose entirely, the possible pre-emptive effect of” a federal statute or an agency’s implementing regulations.¹² That is precisely the purpose of Section 227(e)(1) – Congress intended the savings clause to foreclose the preemption of states’ preexisting authority over *intrastate* telemarketing.

There is nothing ambiguous about Section 227(e)(1). Some commenters in this docket have claimed that the subtitle of that provision – “State Law Not Preempted” – means that the states may regulate *interstate* calls with impunity.¹³ That is incorrect. As discussed above, “preemption” comes into play when Congress or an agency decides that preexisting state authority must yield to federal goals and to federal law. In adopting the TCPA, in contrast, Congress determined that preexisting state authority over intrastate calls could continue to coexist with new federal authority over intrastate calls. Thus, as Congress said, “State Law” governing intrastate calls was “Not Preempted.” Once again, however, that determination offers absolutely no support for the states’ bizarre contention that Section 227(e)(1) effects a fundamental change in the division of regulatory authority established by Section 2.

Some states have also suggested that the word “intrastate” in Section 227(e)(1) modifies only state telemarketing “restrictions” and “regulations” but not state laws that would “prohibit” telemarketing. Under that reading, however, states could “prohibit” *interstate* telemarketing entirely but only “regulat[e]” *intrastate* telemarketing.¹⁴ This would, paradoxically, give the states greater power over interstate communications (which they may not otherwise regulate at all) than they have over intrastate communications (which they have always been permitted to regulate). In addition, this reading of the statute really *would* be at odds with the caption of the section, because it would implicitly *limit* the states’ authority over *intrastate* communications, giving them the authority to regulate but not to prohibit. A statute does not become “ambiguous” simply because someone gives it a tortured interpretation. Against the backdrop of Section 2 and more than 50 years of court and Commission decisions, it is clear that states have no authority to regulate interstate telemarketing. Accordingly, there was no such authority for Congress to either preserve or preempt in the TCPA.

¹¹ 47 U.S.C. § 227(e)(1) (emphasis added).

¹² *Geier v. American Honda Motor Co.*, 529 U.S. 861, 898 (2000).

¹³ *See, e.g.*, Tennessee Comments at 5; North Dakota’s Comment on FreeEats.com Inc.’s Petition for Expedited Declaratory Ruling at 17 (Nov. 8, 2004)

¹⁴ We note that the states’ unsustainable interpretation of section 227(e)(1) would, in fact, invalidate the morass of state laws and rules described in depth in the Joint Petition, which purport to *regulate* interstate telemarketing, not prohibit it. For this reason, it has always been unclear why the states even raise this argument because their regulation of interstate telemarketing is *ultra vires* either way.

2. This is an Easy Case, and Getting it Wrong Will Have Far-Reaching Effects.

This Section 2 case cannot be addressed in isolation. Viewed against the Commission’s past Section 2 rulings, regulation of interstate telemarketing falls plainly within the FCC’s plenary authority over interstate communications. And the Commission must defend that jurisdictional line here to prevent states from further eroding Commission authority over interstate communications.

a. *This is an easy case under Section 2.* This Commission and the federal courts have often confronted difficult issues regarding the extent of federal and state authority under Section 2. But none of those cases are like this one. Significantly, we could not find a single case in which the states attempted the kind of power grab they make here, claiming that Congress casually and abruptly re-wrote Section 2(a) in the TCPA by conferring upon the states the authority to regulate interstate calls that has been the exclusive province of the Commission for over fifty years. To the contrary, past court cases take for granted the *jurisdictional* point that the states cannot regulate interstate calls, and grapple with the *preemption* question whether – notwithstanding Section 2(b) – federal law requires preemption of state regulation of *intrastate* matters.¹⁵

Commission precedent does the same. Last year, for example, in the *Vonage Order*, the Commission not only found that Vonage’s DigitalVoice service – an interconnected VoIP service – is subject to the Commission’s interstate jurisdiction under section 2(a), but it also preempted any state authority under Section 2(b) to regulate intrastate calls made via such a service.¹⁶ Only the latter point was even contested – the states did not seriously suggest that they have any authority to regulate purely interstate

¹⁵ See, e.g., *Computer Communications Industry Ass’n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) (finding that “when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission’s jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme”); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1046 (4th Cir. 1977) (finding that notwithstanding state jurisdiction over intrastate calls under section 2(b), the FCC has “full statutory authority” to regulate terminal equipment used for both local and interstate calls”); *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 374-5 (upholding state authority to set depreciation rates for that part of telephone and plant equipment allocated to *intrastate* service through the jurisdictional separations process); *National Association of Regulatory Commissioners v. FCC*, 880 F.2d 422, 429 (finding the FCC entitled to preempt state regulation because “the interstate aspects” of the challenged state regulation could not be “unbundled” from the intrastate aspects and separate regulation of the interstate and intrastate components was not practical); *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1989) (rejecting the Commission’s effort to preempt *all* state regulation of enhanced services, including wholly intrastate services, in the absence of a showing that *any* state regulation of enhanced services would “necessarily thwart or impede” valid FCC goals); *California v. FCC*, 39 F.3d 919, 932 (upholding the FCC’s preemption of state structural separation requirements); *California v. FCC*, 75 F.3d 1350 (1996) (upholding preemption of a state regulation on grounds that it would have limited the utility or penetration of interstate communications services).

¹⁶ See *Vonage Holdings Corporation Petition for Declaratory Ruling*, Opinion and Order, 19 FCC Rcd. 22404, 22413-14 (¶ 18) (2004); see also *VoIP E911 Order*, 20 FCC Rcd 14853 (¶¶ 26-35) (2005) (indicating that the FCC’s authority to regulate VoIP is firmly grounded in Section 2(a)’s general jurisdictional grant over interstate communications).

VoIP calls in the name of “consumer protection.” In short, while difficult cases certainly arise under Section 2, the present proceeding is an easy one: Whether or not federal law may preempt state regulation of intrastate telephone communications under certain circumstances, it is unarguable that states have no regulatory authority over interstate communications.

b. *This case has broad implications.* The states’ overreaching in this proceeding is, we believe, a prelude to similarly novel and aggressive encroachments into federal regulatory jurisdiction in other realms. This is already happening in areas closely related to traditional telemarketing.

As addressed by the petition for a declaratory ruling filed by the Fax Ban Coalition earlier this month, for example, California recently enacted a statute purporting to regulate interstate faxes which conflicts directly with federal law. *Rules and Regulations Implementing the Telephone Consumer Protection Act; Fax Ban Coalition Petition for a Declaratory Ruling*, CG Docket No. 02-278 (filed Nov. 7, 2005). California is not alone in this respect. A number of states have moved toward extending their incompatible do-not-call regulations to fax solicitations.¹⁷ These state efforts to impose widely varying state-specific regulations on interstate facsimile solicitations ignore the distinction between interstate and intrastate regulation, further eroding the Commission’s plenary authority.

State regulation of interstate communications is also spreading to other telemarketing-related practices. Twenty-one states already restrict interstate not-for-profit telefunding calls, despite the fact that Congress and the FCC expressly exempted them from do-not-call regulations. A number of states have also proposed regulating business-to-business calls, while other states’ disclosure requirements would apply to calls that customers themselves place to businesses.¹⁸

Still more disturbing, however, is the distinct possibility that state efforts to aggrandize their role in regulating interstate telemarketing will set a precedent for state encroachment into other areas of FCC regulation under Section 2(a). After all, if the states can magically expand their jurisdiction over telemarketers through the mere invocation of “consumer protection,” it is difficult to see why similar incantations would not justify state regulation of interstate enhanced services, for example. The Commission should not, in other words, let this issue slide because telemarketing is a politically popular target for state regulators. Rather, the Commission should defend its exclusive jurisdiction over interstate telemarketing calls because that jurisdiction stems from the

¹⁷ The Governor of New Jersey signed into law a do-not-fax bill on June 29, 2005. *See* A.B. 669, 211th Leg. (N.J. 2005). And on May 20, 2005, Maine enacted a law that extended certain calling hour and autodialer prohibitions to fax machines. *See* L.D. 957, 122nd Leg. Reg. Sess. (Me. 2005). Legislative proposals purporting to regulate interstate faxes are also moving forward in other states. *See, e.g.*, A.B. 8047, State Assem., Reg. Sess. (N.Y. 2005)

¹⁸ *See Joint Petition* at 29-31, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517589090.

same source – Section 2(a) – as the FCC’s exclusive jurisdiction over interstate communications generally.

The FCC’s 2003 Order correctly recognized the jurisdictional divide between interstate and intrastate communications but, unfortunately, stopped short of declaring the Commission’s exclusive jurisdiction, stating only that inconsistent state regulation “almost certainly would be preempted.”¹⁹ As the Joint Petition has shown, however, this case-by-case approach is not only legally flawed but also inefficient, ineffective, and unfair. Thus, for reasons both legal and practical, the Commission should confirm its exclusive regulatory jurisdiction over interstate calls.

3. A Critical State Role -- Enforcement: In this docket, the states rely heavily on a “parade-of-horribles” argument that the Joint Petitioners’ straightforward reading of the TCPA will render the states powerless to protect their citizens from all manner of telephone “frauds” and “scams.”²⁰ Such rhetoric is utterly unfounded in reality. In fact, continuing to respect the division of *regulatory* authority over telecommunications that has existed in this country for over 70 years will in no way reduce the power of state authorities to *enforce* the law and protect their citizens. To the contrary, while Congress has delegated exclusive *regulatory* authority over interstate telemarketing to the FCC, there is no question that states have broad *enforcement* authority under the TCPA.

Specifically – in addition to unquestioned state *regulatory* authority over intrastate telemarketing – the TCPA expressly authorizes the states to enforce the uniform set of federal telemarketing laws as applied to interstate telemarketers.²¹ In addition, section 226(f)(6) preserves states’ authority to proceed against violations of “any general civil or criminal statute,” such as general laws prohibiting fraud, even when committed in the course of an interstate telemarketing call. And there is nothing novel about this regime – the Commission has, for example, proposed precisely this line in the truth-in-billing context.²² Moreover, “cooperative federalism” arrangements in which the federal government articulates standards via statutes or regulations and then allows state

¹⁹ See *Order*, 18 F.C.C. Rcd. at 14064 (¶¶ 83-84).

²⁰ See, e.g., State of Indiana Comments in Opposition to Joint Petition at 25-26 (July 29, 2005); National Association of Attorneys General Comments in Response to Joint Petition at 2-3, 5 (July 29, 2005).

²¹ 47 U.S.C. § 227(f)(1) (“Whenever the attorney general of a State . . . has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$ 500 in damages for each violation, or both such actions.”)

²² See *Truth-in-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6476 (¶ 53) (2005) (tentatively concluding “that the line between the Commission’s jurisdiction and states’ jurisdiction over carriers’ billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers’ billing practices.”)

authorities to enforce those standards are commonly and successfully employed throughout the law.²³ That is precisely the model that Congress adopted here.

In short, in seeking to adopt an onslaught of regulations of interstate telemarketing – an area over which states have no regulatory authority – the states ignore and disrupt the uniform, balanced regulatory scheme sought by Congress and implemented by the Commission. Absent Commission intervention, the states will continue to create state-specific rules governing interstate telemarketing that not only frustrate the balance intended by Congress, but threaten the fundamental division of authority between federal and state regulation of telecommunications. The Commission must not allow states to erode its plenary authority over interstate communications in this manner.

Respectfully submitted,

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²³ For example, under the Clean Air Act, 42 U.S.C. §§ 7401-7671c (2000), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (2000), the federal Environmental Protection Agency shares enforcement authority with state agencies. Similarly, state and local authorities have long shared enforcement responsibilities under federal immigration laws with federal officials. *See, e.g.*, 8 U.S.C. 1357(g) (2005). The examples could certainly be multiplied, but the point is simple: Congress frequently opts for joint federal and state enforcement of laws and regulations articulated by federal authorities.