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December 22, 2005

Via Electronic Filing

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

Re: In the Matter of ccAdvertising Petition for Expedited Declaratory Ruling
CG Docket No. 02-278; DA 05-1347; DA 04-3187

Dear Ms. Dortch:

FreeEats.com, Inc., d/b/a ccAdvertising (“ccAdvertising”), by its undersigned counsel, hereby responds to the recent submission by the Office of Attorney General of the State of North Dakota (“North Dakota”) in the above-referenced proceeding, dated December 15, 2005.

North Dakota’s submission includes copies of two recent cases which North Dakota asserts are pertinent to ccAdvertising’s pending Petition for Expedited Declaratory Ruling (the “Petition”). Both cases are readily distinguishable, however, and neither case is relevant to the Petition, which asks the Commission to declare that North Dakota’s statute prohibiting the use of automatic telephone dialing systems or prerecorded voice messages in connection with interstate political polling calls is preempted.

Fraternal Order of Police v. Stenehjem, 2005 WL 3299901 (8th Cir., December 7, 2005), involves a North Dakota statute prohibiting nonprofit organizations from utilizing professional charitable solicitors to make telephone solicitations to North Dakota residents who have registered with that state’s do-not-call list. *Id.* at *1. The statute permits such calls by nonprofit organizations utilizing their own volunteers or employees. The case was decided on First



Amendment grounds. *Id.* at *2.¹ The ccAdvertising Petition involves no First Amendment issues.

Although the court in *Utah Division of Consumer Protection v. Flagship Capital*, 2005 WL 2978929 (Utah, November 8, 2005) addressed preemption, its analysis was extremely broad – possibly because neither party in the case had raised the issue.² Consequently, the court did not distinguish between telemarketing calls of the type placed by the appellant in that case, and other calls. Nowhere did the court address issues pertinent to ccAdvertising’s Petition, including the Commission’s exemption of non-commercial calls from the prohibition on prerecorded messages to residences;³ the non-applicability of the prohibition on the use of automatic telephone dialing systems to numerous categories of calls, including interstate political polling calls;⁴ and the Commission’s warning that inconsistent state regulation of interstate calls “would conflict with and frustrate the federal scheme and almost certainly would be preempted.”⁵

Sincerely,

E. Ashton Johnston

*Counsel for FreeEats.com, Inc., d/b/a
ccAdvertising*

cc: James Patrick Thomas, Esq.
Assistant Attorney General, Consumer Protection & Antitrust Division
Office of Attorney General, State of North Dakota

¹ The federal U.S. District Court for the District of North Dakota found that the statutory provision at issue was a content-based regulation that failed strict scrutiny. The United States Court of Appeals for the 8th Circuit, by a 2-1 majority, reversed. *Id.* at *1, *2.

² *See id.* at **10. The “primary issue” before the Utah court was whether the lower state court erred in determining it did not have subject matter jurisdiction over the state’s enforcement proceeding against an out-of-state telemarketer, a determination the court stated was “premised on [the district court’s] underlying conclusion that” state law was preempted by the TCPA. *Id.* at **6, 9.

³ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, *Report and Order*, 18 FCC 14014 ¶ 136 (2003) (“2003 TCPA Order”).

⁴ 47 C.F.R. §1.1200(a)(1).

⁵ 2003 TCPA Order, ¶ 84.