

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing The)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling of)	
The Fax Ban Coalition)	

**COMMENTS OF CONSUMER BANKERS ASSOCIATION IN SUPPORT OF
FAX BAN COALITION PETITION FOR DECLARATORY RULING**

It is now approaching three years since this Commission confirmed, in its *TCPA Order* of July 3, 2003, that the Telephone Consumer Protection Act (“TCPA”) deprives the states of authority to regulate interstate telemarketing communications in ways that conflict with federal law.¹ In response to that finding, and the Commission’s express invitation to affected parties to seek relief from inconsistent state requirements, the Consumer Bankers Association (“CBA”) and others have requested declaratory rulings that various state statutes and regulations are unenforceable as applied to interstate calls.² No decision on those petitions has been forthcoming.

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003). All filings in this proceeding will hereinafter be short cited.

² See Express Consolidation Petition for Declaratory Ruling (Jul. 13, 2004); FreeEats.com dba ccAdvertising Petition for Declaratory Ruling (Sep. 13, 2004); American Teleservices Ass’n Petition for Declaratory Ruling (Aug. 24, 2004); Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code (Nov. 19, 2004) (“Indiana Petition”); Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code (Nov. 19, 2004) (“Wisconsin Petition”); National

In an effort to consolidate the issues presented by the preemption petitions into a single request for relief, a group of Joint Petitioners asked, in April, 2005, that the Commission simply confirm its plenary jurisdiction over interstate telemarketing.³ That petition, which is amply supported in both constitutional and statutory law, would permit the Commission to resolve the pending controversies without making fact-intensive inquiries of the kind needed to establish “conflict preemption” as to each of the state telemarketing statutes that individual petitioners have challenged or may challenge in the future. The Joint Petition, like the individual petitions that preceded it, remains pending before the Commission.

In the meantime, the states have been emboldened to enforce their restrictive and contradictory telemarketing statutes with increasing aggressiveness. State officials not only have brought enforcement actions; they also have mounted publicity campaigns intended to bring public pressure on businesses, consumers and the congressional delegations of their states to oppose assertion of the Commission’s lawful jurisdiction over interstate telecommunications.⁴ These lobbying and publicity efforts, although certainly lawful, add to a contentious atmosphere that will persist as long as a final decision on this issue is deferred.

Now, the State of California has opened a new front in this lengthy conflict. On July 5, 2005, enactment of the federal Junk Fax Act of 2005 resolved a longstanding

City Mortgage Co. Petition for Declaratory Ruling (Nov. 22, 2004); TSA Stores Petition for Declaratory Ruling (Feb. 1, 2005).

³ Joint Petition for Declaratory Ruling that the FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing (Apr. 29, 2005)(“Joint Petition”).

⁴ See Office of the Indiana Attorney General, “Clock Is Ticking on Public Comment Period for Do Not Call” (Press Release dated July 26, 2005); CBA Indiana Petition Reply Comments at 2-4 (Feb. 17, 2005).

question concerning the continued vitality of the established business relationship (“EBR”) exception to the fax advertising prohibitions of the TCPA.⁵ With this legislation, Congress intended to assert a national standard for fax advertising sent to existing customers of the senders.⁶

California, perhaps encouraged by the continuing failure of federal authorities to enforce the TCPA’s preemption provisions in the case of telemarketing, moved promptly to nullify Congress’s handiwork. With a new statute enacted on October 7, 2005, California expressly provided that no facsimile advertisements originating or terminating in California – including messages consisting of purely interstate transmissions – would be lawful unless the sender had first received the recipient’s “prior express invitation or permission.”⁷ The prohibition of California’s new law applies, even where the sender and recipient have an established business relationship of the kind recognized in the federal Junk Fax Act of 2005.

As the nation’s largest market, California has, by a single stroke, nullified Congress’s effort to provide a uniform rule for interstate facsimile telemarketing in the United States. Marketers located in California lose their ability to avail themselves of the federal EBR exemption for any and all fax transmissions, including those sent to recipients in states that recognize the EBR exemption. Non-California marketers with a nationwide footprint must scrub their lists of “EBR” fax numbers to eliminate numbers assigned to California residents, or must simply decline to send fax advertisements to any persons from whom they have not obtained prior, written consent – a process the

⁵ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

⁶ See 151 Cong. Rec. H5264 (daily ed. Jun. 28, 2005) (Remarks of Rep. Upton) (“Upton Remarks”).

⁷ California Assembly SB 833, 2005-2006 Sess. § 1(a)(2)(Cal. 2005).

Congress expressly has found to be unnecessary and excessively burdensome.⁸ And, because many recipients' fax numbers may not be specific to a geographic area, even this "scrubbing" process might not eliminate all California facsimile numbers from senders' lists.

The Fax Ban Coalition's pending Petition for Declaratory Ruling ("FBC Petition") asks the Commission to confirm and uphold federal jurisdiction over interstate fax advertising.⁹ In support of that position, the FBC relies upon many of the same constitutional and statutory arguments that are set out in the pending petitions filed by the CBA requesting preemption of certain provisions of the telemarketing statutes and regulations of Indiana and Wisconsin.¹⁰ Accordingly, and for the reasons stated more fully below, the CBA supports the FBC Petition and urges the Commission to grant that Petition, along with the Joint Petition and all of the pending preemption requests concerning the telemarketing laws of various states, without further delay.

I. THE FCC HAS PLENARY JURISDICTION OVER INTERSTATE TELEPHONE AND FACSIMILE MARKETING

The jurisdictional arguments presented in the FBC Petition apply with equal force to the pending petitions of the CBA, and all of those petitions should be granted on purely jurisdictional grounds.

As the Fax Ban Coalition rightly points out, the starting point for any analysis of FCC jurisdiction is the Communications Act of 1934, as amended, which gives the Commission exclusive jurisdiction over "interstate and foreign communications" by wire

⁸ See *Upton Remarks*, *supra* note 6.

⁹ Fax Ban Coalition Petition for Declaratory Ruling (Nov. 7, 2005).

¹⁰ Indiana Petition; Wisconsin Petition.

or radio, and disclaims any intention to regulate purely intrastate communications.¹¹

Accordingly, if Congress had intended the TCPA -- which was enacted as an amendment to the Communications Act -- to give the states any jurisdiction over interstate communications, it was required by the Act's basic jurisdictional framework to say so.

Instead, Congress carefully delineated only those elements of the TCPA that would represent a *departure* from the Communications Act's basic interstate/intrastate allocation of regulatory power. Specifically, the TCPA asserts that it applies to intrastate calls, and preserves only those state telemarketing regulations that apply more restrictive *intrastate* prohibitions.¹² Having defined this limited exception to the states' usual authority over *intrastate* telecommunications, the TCPA made no reference to Congress's plenary jurisdiction over interstate telemarketing, thereby *leaving in effect, as to telemarketing regulation, the Communications Act's usual presumption that interstate communications are exclusively a federal concern.*

None of Congress's amendments to the TCPA, including the Junk Fax Act of 2005, in any way disturbs the jurisdictional decisions embodied in that statute as originally enacted. Accordingly, whether the issue is interstate marketing by telephone or interstate advertising by means of facsimile machines, the Communications Act and the TCPA give this Commission complete regulatory authority over those activities. Accordingly, both the FBC Petition and the pending CBA requests for declaratory ruling must be granted on the ground of exclusive federal jurisdiction.

¹¹ 47 U.S.C. § 152.

¹² *Id.* § 227(e)(1); S. Rep. No. 102-178 at 5 (1991) (“States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls.”).

II. IF ASSESSED ON “CONFLICT PREEMPTION” GROUNDS, THE CBA AND FBC PETITIONS MUST BE CONSIDERED SEPARATELY

As the foregoing discussion shows, Congress’s grant of exclusive jurisdiction over interstate telemarketing to this Commission applies equally to telephone and facsimile communications, and requires that both the CBA and FBC Petitions be granted. As the CBA also has pointed out in its past filings in this docket, the jurisdictional question should be decisive in these proceedings.¹³ No “conflict preemption” inquiry is necessary.¹⁴

If the Commission chooses to examine some or all of the pending petitions on grounds of “conflict preemption,” however, CBA wishes to emphasize that the various petitions now before the Commission will not stand or fall together. The CBA has offered a complete, fact-specific explanation of the conflict between the Indiana and Wisconsin telemarketing statutes and regulations and the rules of this Commission. As the CBA’s filings demonstrate, the Indiana and Wisconsin rules: (1) negate the Commission’s express regulatory goal of permitting businesses to make interstate marketing calls to their existing customers; and (2) negate the congressional and regulatory policy of creating a uniform system of interstate telemarketing regulation.¹⁵ More specifically, the CBA has established that it is “simply impossible, given those states’ present jurisdictional claims, for a telemarketer to make calls to all of the Indiana and Wisconsin residents with whom it has a federally-recognized EBR without running afoul of Indiana and

¹³ See, e.g., CBA Comments on its Wisconsin & Indian Petitions at 12-13 (Jul. 29, 2005); CBA Indiana Petition Reply Comments at 5-6 (Feb. 17, 2005); CBA Wisconsin Petition Reply Comments at 2-5 (Feb. 17, 2005).

¹⁴ As the Commission has pointed out, “[w]here Congress has given [the] Commission exclusive authority over interstate and foreign communications, [the FCC] 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 [the] Commission.’” *Operator Services Providers of America*, 6 FCC Rcd 4475, 4477 n.19.

¹⁵ See CBA Comments on its Wisconsin & Indiana Petitions at 3-8 (Jul. 29, 2005).

Wisconsin law.”¹⁶ Finally, the CBA has described in detail the practical burden of simultaneous compliance with federal, Indiana and Wisconsin requirements, and the extent to which that compliance burden frustrates the achievement of this Commission’s policies.¹⁷

Other petitioners, including the Fax Ban Coalition, also have made compelling cases for “conflict preemption” of the laws of various states. The CBA requests, however, that its own conflict preemption case be considered strictly on its individual merits.

CONCLUSION

The California statute that prompted the FBC Petition is a symptom of the erosion of federal credibility in the area of regulation of interstate telemarketing. During the years that have elapsed since the Commission confirmed its jurisdiction in this area, many states have become convinced that they can ignore that jurisdiction and nullify the carefully-crafted policies of Congress and this Commission. The Commission should act promptly to clear the backlog of preemption petitions, assert its authority, and end the contention and confusion that are harming business and consumers alike.

Respectfully submitted,

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¹⁶ *Id.* at 8.

¹⁷ *Id.* at 8-12.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2006, a copy of the foregoing **COMMENTS** was served by electronic mail, or U.S. First Class mail, as indicated, upon the following:

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