

STATE OF TENNESSEE

Office of the Attorney General



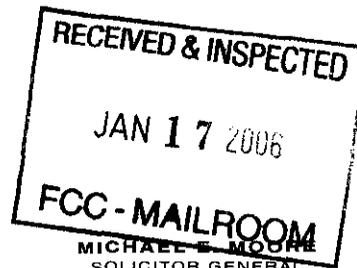
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January 12, 2006

Kelli Farmer  
Federal Communications Commission  
Consumer & Governmental Affairs Bureau  
Policy Division - Room 5-A866  
445 12th Street, SW  
Washington DC, 20554

**Re: CG Docket No. 02-278 / DA 05-2975; In the Matter of Rules & Regulations  
Implementing The Telephone Consumer Protection Act of 1991**

Dear Mrs. Farmer,

Enclosed is an electronic copy on a 3.5 inch diskette and three hard copies of the  
*Comments of the Tennessee Attorney General* in the matter referenced above.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Stephen R. Butler".

Stephen R. Butler  
Assistant Attorney General  
(615) 741-8722

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

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In the Matter of )  
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Rules and Regulations Implementing ) CG Docket No. 02-278  
The Telephone Consumer Protection Act of 1991 )  
 )  
Petition for Declaratory Ruling of ) DA 05-2975  
The Fax Ban Coalition )

**COMMENTS OF THE TENNESSEE ATTORNEY GENERAL**

Paul G. Summers  
Tennessee Attorney General

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

January 12, 2006

The Fax Ban Coalition's Petition for Declaratory Ruling challenges the validity of all state laws regulating interstate facsimiles, including Tennessee's statutes encoded as Tenn. Code Ann. §§ 65-4-501 through 65-4-506, on the basis of federal pre-emption.<sup>1</sup> The Tennessee Attorney General's Office opposes the petition and requests that the Commission dismiss it.

The federal law specifically states that it does *not* pre-empt "... *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[.]*"<sup>2</sup> Although the petitioners emphasize the word "intrastate" in the text, "intrastate" modifies "requirements or regulations." 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." Therefore, the relevant portion of the text, which is emphasized above, is not limited by the word "intrastate."<sup>3</sup> Giving the word "which" a grammatically correct reference, the relevant text says that the federal law does *not* pre-empt "any State law ... which prohibits ... the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements[.]"<sup>4</sup> Because Tennessee's law<sup>5</sup> is a state law which prohibits the use of telephone facsimile machines or other electronic devices to send unsolicited

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<sup>1</sup>Petition, p. 1; Petition, Appendix C, p. 3.

<sup>2</sup>47 U.S.C.A. § 227(e)(1)(A) (emphasis added).

<sup>3</sup>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.

<sup>4</sup>47 U.S.C.A. § 227(e)(1)(A).

<sup>5</sup>Tenn. Code Ann. §§ 65-4-501 through 65-4-506.

advertisements, the federal law specifically says that it is *not* pre-empted.

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.”<sup>6</sup> Tennessee’s law regarding unsolicited facsimiles is a general civil law. It was enacted pursuant to the general police powers inherent in all states. A violation of Tennessee’s law regarding unsolicited facsimiles constitutes a violation of the Tennessee Consumer Protection Act.<sup>7</sup> Therefore, Tennessee’s law regarding unsolicited facsimiles clearly is a general civil statute of Tennessee.

The petitioners’ claim that the Commission has exclusive jurisdiction over interstate facsimile advertisements is the sort of sweeping oversimplification that the Supreme Court already has rejected 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 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.”<sup>8</sup>

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<sup>6</sup>47 U.S.C.A. § 227(f)(6).

<sup>7</sup>Tenn. Code Ann. § 65-4-506(a).

<sup>8</sup>*Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 429-30 (1963).

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.<sup>9</sup> 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.”<sup>10</sup> Clearly, the petitioners’ argument about the Commission’s exclusive jurisdiction is not sufficient to justify the pre-emption of all state laws related to interstate facsimile advertising, and Tennessee has an obvious local concern regarding the use or abuse of facsimile machines located in Tennessee.

The fact that the petitioners **do not provide** interstate telecommunications services but instead **use** interstate telecommunications services distinguishes facsimile advertising from the 1991 operator services case on which the petitioners rely.<sup>11</sup> 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.”<sup>12</sup> Because facsimile advertising is not, however, the provision of an interstate telecommunications service, reliance on this case is misplaced.

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<sup>9</sup>*Id.* at 425.

<sup>10</sup>*Id.* at 431-32.

<sup>11</sup>Petition, p. 14.

<sup>12</sup>*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).

The petitioners argue that the Junk Fax Prevention Act of 2005<sup>13</sup> was intended by the Congress to pre-empt state law.<sup>14</sup> There is no language in the legislation that supports the petitioners' argument. The essence of the argument appears to be that the mere existence of federal legislation represents an intent by the Congress to pre-empt the states. That is an obviously incorrect interpretation of pre-emption jurisprudence.

The petitioners argue that the Commission has the power to pre-empt the states in this context.<sup>15</sup> Because the federal statute explicitly rejects pre-emption of "any State law ... which prohibits ... the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements[,]"<sup>16</sup> the Commission clearly does not have such power. Nonetheless, even if the Commission determines that it does have such power, it would be unwise to utilize it. Laws such as Tenn. Code Ann. §§ 65-4-501 through 65-4-506 restricting unsolicited facsimile advertising are the result of democracy. With all due respect to the Commission, it is not an elected body. It would be unfortunate and wrong for the Commission to utilize its power as a federal agency to nullify the will of the people of Tennessee as expressed through their democratically-elected legislators in the absence of a clear intent by the Congress to pre-empt the states in this context.

The Tennessee Attorney General's Office respectfully asks the Commission to deny and dismiss the November 7, 2005 petition filed by the Fax Ban Coalition.

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<sup>13</sup>P.L. 109-21, July 9, 2005, 119 Stat. 359.

<sup>14</sup>Petition, ps. 4-5.

<sup>15</sup>Petition, p. 15.

<sup>16</sup>47 U.S.C.A. § 227(e)(1)(A).

Respectfully Submitted,



Paul G. Summers  
Attorney General of Tennessee



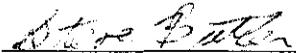
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January 12, 2006

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Stephen R. Butler  
Assistant Attorney General

DOCKET NO. 02-278

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