

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

In the Matter of)	
)	CG Docket No. 02-278
Rules and Regulations Implementing the)	DA 05-2975
Telephone Consumer Protection Act)	
of 1991)	

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction.

The National Association of Broadcasters (“NAB”)¹ submits these reply comments in response to the Fax Ban Coalition’s Petition for Declaratory Ruling on the preemptive effects of the Telephone Consumer Protection Act (“TCPA”).² The *Petition* asks the Commission to declare that states lack jurisdiction to regulate interstate facsimile communications and to specify that a recent California law that purports to regulate interstate facsimile communications is preempted under the TCPA.³ As discussed in detail below, NAB supports the *Petition* and the numerous commenters that filed in

¹ NAB is a nonprofit, incorporated association of radio and television stations and networks that serves and represents the American broadcasting industry.

² In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Petition for Declaratory Ruling of the Fax Ban Coalition*, CG Docket No. 02-278 (Nov. 7, 2005) (“*Petition*”).

³ CAL. BUS. & PROF. CODE § 17538.43 (2005) (making it unlawful for a person or entity to send to California or receive from California unsolicited advertisements via facsimile).

support of the *Petition*. NAB therefore requests that the Commission reaffirm its exclusive federal jurisdiction over interstate communications, including telephone calls and facsimile transmissions, as consistent with both the statutory intent of Congress and the rules of the Commission.

II. The Commission Has Exclusive Statutory Jurisdiction Over All Interstate Communications And Should Discontinue Its Case-By-Case Evaluations.

As the Consumer Bank Association correctly states, the Communications Act of 1934 gives the Commission exclusive control over interstate communications.⁴ Moreover, NAB agrees that, “[I]f 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.”⁵ Congress, however, did not specify any interstate jurisdictional change. Rather, the TCPA “preserves only those state telemarketing regulations that apply more restrictive *intrastate* prohibitions.”⁶ The Commission therefore retains exclusive jurisdiction over interstate communications.⁷

⁴ See In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, *Comments of Consumer Bank Association*, CG Docket No. 02-278, Jan. 13, 2006 (citing 47 U.S.C § 152).

⁵ Comments of Consumer Bank Association at 4-5; see also In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, *Comments of the American Society of Travel Agents*, CG Docket No. 02-278, Jan. 13, 2006 at 8.

⁶ Comments of Consumer Bank Association at 5.

⁷ Because Congress had previously granted the Commission exclusive jurisdiction over interstate telephone calls, Congress was not required to restate this in enacting the TCPA, because such a provision would be redundant. See *Petition* at 11 (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (rejecting construction that would create redundancy in statute); *United States v. Johal*, 421 F.3d 955, 959 (9th

Indeed, the Commission itself has recognized Congress' intent to retain federal jurisdiction over interstate communications. In implementing the TCPA, the Commission discussed these jurisdictional and preemption issues in detail:

Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls ... we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules ... *We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules.*⁸

Despite this recognition, the Commission opted to consider state actions that plainly apply to interstate communications on a case-by-case basis.⁹ NAB respectfully submits that such an approach frustrates Congress' purpose by opening the door to inconsistent regulations.

Not only do inconsistent state rules frustrate the federal objective of uniformity, but also impose high compliance costs and increase consumer confusion, the concerns the Commission specifically requested interested parties to address when filing for declaratory relief.¹⁰ For example, as detailed by the National Association of Realtors, “the current patchwork of laws makes it nearly impossible for real estate professionals to

Cir. 2005) (rejecting reading of intent standard in criminal statute because statute “already provides” for convictions based on that standard).

⁸ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14014 (2003) at ¶¶ 83-84 (emphasis added)(footnotes omitted).

⁹ *Id.*

¹⁰ *Id.* at ¶ 83.

comply.”¹¹ Similarly, Bank of America states that it is currently “faced with many competing state laws . . . that significantly hamper its activities.”¹² Thus, businesses have already incurred substantial transactional costs in attempting to comply with disparate state regulations. And as Sprint Nextel notes, such costs were precisely what Congress meant to eliminate.¹³ “[F]ederal legislation is needed to . . . protect legitimate telemarketers from having to meet multiple legal standards.”¹⁴

The current case-by-case approach also creates an administrative burden on the FCC. The Commission has already entertained numerous separate Petitions addressing essentially the same issue – federal preemption of state laws that regulate interstate communications. This is entirely unnecessary in light of the clear federal scheme. For example, the Commission recently considered a Petition¹⁵ related to the California

¹¹ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Comments of National Association of Realtors*, CG Docket No. 02-278, Jan. 13, 2006 at 2-5.

¹² In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Comments of Bank of America*, CG Docket No. 02-278, Jan. 13, 2006 at 2; *see also* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Comments of the National Federation of Independent Business*, CG Docket No. 02-278, Jan. 11, 2006 at 2 (“the goals of adopting and implementing the TCPA and the [Junk Fax Prevention Act] was to create uniform standards of the regulation of interstate facsimile transmissions and to protect consumers’ privacy while not impeding the activities of legitimate business and organizations. These efforts have been made irrelevant by the efforts of States to limit commercial communications.”)

¹³ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Comments of Sprint Nextel*, CG Docket No. 02-278, Jan. 13, 2006 at 5.

¹⁴ S. REP. NO. 102-178, at 5 (1991)).

¹⁵ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Comments of NAB*, CG Docket No. 02-278, July 29, 2005

Consumer Legal Remedies Act,¹⁶ dealing with interstate telephone calls (which would include prerecorded messages sent by radio and television broadcasters). These same arguments were applicable there. Rather than continuing to handle Petitions on a case-by-case basis, NAB urges the Commission to fully recognize its exclusive authority over *all* interstate communications.

III. Conclusion.

For the above reasons, NAB supports the *Petition* and urges the Commission to make clear that states lack authority to regulate all interstate telephone and facsimile communications. Though the states no doubt have the best interests of their citizens in mind, their rules result in an economy burdened with unnecessary and in fact illegal rules. Congress, through the Communications Act and the TCPA, unambiguously has occupied this area of the law. NAB respectfully submits that local broadcast stations, and the

(responding to a *Petition for Declaratory Ruling*, filed on Aug. 11, 2003, that the TCPA does not preempt state regulation of interstate telephone calls).

¹⁶ CAL. CIV. CODE §§ 1750 et. seq.

thousands of businesses that exist because of interstate communications, would be able to operate in a more efficient manner if the Commission recognizes Congress' intent.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Marsha J. MacBride
Jane E. Mago
Jerianne Timmerman
Ann West Bobeck

Michael Saperstein
NAB Law Clerk

February 2, 2006

Certificate of Service

I certify that a true and correct copy of this document has been mailed to the following address by U.S. mail this 2nd day of February, 2006:



Ann West Bobeck

Gerald J. Waldron
Robert M. Sherman
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004