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

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

COMMENTS OF FREEEATS.COM, INC.

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FreeEats.com, Inc., which does business as ccAdvertising, ("FreeEats") submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM") in which it proposes to revise several of its rules under the Telephone Consumer Protection Act ("TCPA") in order to harmonize them with the Federal Trade Commission's ("FTC") Telemarketing Sales Rule.[1] FreeEats fully supports the Commission's efforts to seek greater symmetry between the two agencies' regulations, which in turn benefits both consumers and industry.

FreeEats urges the Commission to go further and harmonize state law with the TCPA by preempting inconsistent state telemarketing laws, as the Commission suggested it would do several years ago. Finally, FreeEats agrees with the Commission that the proposed revisions to the TCPA rules would not—and should not—make any changes to the categories of prerecorded message calls that are permitted by the current rules, such as political polling calls and other calls made by politicians, political campaigns, and other tax-exempt nonprofit organizations.

DISCUSSION

I. Background

FreeEats' Activities: FreeEats.com is a survey and database company that relies upon Artificial Intelligence Call ("AIC") technology on outbound calls using prerecorded messages to query households through survey polls, identify supporters, and later encourage those supporters to turn out to vote. FreeEats does this by asking questions and recording the response electronically. FreeEats' technology allows it to select questions based on the previous responses, so that the survey is truly in-

[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd. 1501 (Jan. 22, 2010).

teractive and tailored to the individual taking the survey. Further, the AIC technology respects the privacy of those called by accepting a request not to receive future calls. Most of FreeEats political polling involves interstate calls.

The company has been active in many political campaigns and initiatives over the years. Members of Congress use FreeEats' technology, paid for with Franking funds, to reach out to constituents, learn their views on important issues, and provide constituents with information about the Member's positions. In addition to providing a mechanism for citizens to interact with elected officials and candidates, the interactive features FreeEats offers allow the company to ask permission to proceed with the message and to accept a do-not-call request from the individual.

The AIC process, when coupled with an accurate database, is the most effective form of political speech available in many circumstances. It has been FreeEats' experience that of all homes called, 30 percent will result in a live person listening to at least 10 seconds of the message played. Moreover, 10 percent of all homes answer the *entire* survey. As such, these calls are an incredibly important channel of communication.[2]

Applicability of the TCPA to FreeEats' Activities: FreeEats' use of AIC technology to conduct interstate political polling calls is lawful under the TCPA and the Commission's telemarketing rules. The Commission's rules specifically exempt non-commercial calls, including calls conducting research, market surveys, and political polling from its prohibition against certain prerecorded calls.[3] FreeEats' interstate political polling calls fall squarely within the scope of this non-commercial exemp-

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[2] Indeed, over 40 Members of Congress have used FreeEats to conduct survey calls using the Congressional Franking privilege.

[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 84 (2003) ("2003 Report and Order").

tion. Moreover, many of its clients are tax-exempt nonprofit organizations, which are categorically excluded from the TCPA's prohibition on prerecorded calls.

State Telemarketing Law: Several states have enacted laws that purport to prohibit prerecorded *interstate* telephone calls for political polling, and at least two state Supreme Courts have held that their state laws trump the TCPA, even as applied to interstate calls.[4] As applied to the calls made by FreeEats, these state laws conflict with the FCC's rule that permits prerecorded, noncommercial interstate calls and impairs the FCC's authority to establish uniform, nationwide standards in this networked industry and, as such, should be preempted by the TCPA.

II. The Need for Preemption of Inconsistent State Telemarketing Laws

A. Political Calls are Protected Political Speech

These inconsistent state telemarketing statutes frustrate explicit decisions made by Congress and the FCC about the appropriate balancing of consumer privacy interests and the important First Amendment rights that attach to noncommercial speech communicated through these interstate calls. In adopting the TCPA, Congress made the following finding:

> While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for these types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.[5]

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[4] *Utah Div. of Consumer Prot. v. Flagship Capital*, 125 P.3d 894 (Utah 2005); *State of North Dakota v. FreeEats.com, Inc.*, 712 N.W.2d 828 (2006). On the other hand, at least one federal court has held that the TCPA preempts state law. *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. 2006).
[5] Pub. L. 102-243 § 2(13).

Such political speech considerations are especially acute after the recent Supreme Court decision, *Citizens United v. Federal Election Commission*,[6] in which the Court reaffirmed corporate rights related to political speech.

B. Preemption of State Telemarketing Laws

Since 1934, the FCC generally has exercised exclusive regulatory authority over interstate telephone calls, and the states generally have regulated intrastate calls.[7] This division of authority is reflected in the jurisdictional provisions of the Communications Act. Section 152(a) provides that the FCC's authority "shall apply to all interstate and foreign communications by wire or radio . . . ." Section 152(b) further provides that "[e]xcept as provided in sections 223 through 227 . . .," the FCC shall not have "jurisdiction with respect to . . . intrastate communication service." The TCPA did not amend Section 152(a) governing FCC authority over interstate calls. Rather, Congress amended Section 152(b) in a manner that expanded federal power and limited the previously existing State authority over intrastate calls. The FCC correctly notes this expansion of its authority in the NPRM.[8]

The TCPA's "savings clause" preserves the ability of states to impose more restrictive *intrastate* requirements upon telemarketing, or upon the use of automatic telephone dialing systems or prerecorded voice messages.[9] The Commission has explained, however, that more restrictive state efforts to regulate *interstate* calling would "almost certainly" be preempted. In the 2003 Report and Order, the Commission made clear that it believed "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate

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[6] No. 08-205 (U.S. Jan. 21, 2010).
[7] *See, e.g.*, *City of New York v. FCC*, 486 U.S. 57 (1988).
[8] NPRM, 75 FCC Rcd. at 1503 ¶ 4, n.10.
[9] 47 U.S.C. § 227(e)(1).

the federal scheme and almost certainly would be preempted."[10] The Commission suggested that it would do so on a case-by-case basis.[11]

In September 2004, FreeEats filed a petition for declaratory ruling with the FCC asking that the Commission make clear that the TCPA preempts state laws as applied to interstate calls. The Commission has yet to act on this petition. As a result, callers are left with a complicated framework of conflicting mandates that should not exist under the TCPA's clear preemptive authority to create a uniform national regulation of calls.

These conflicting and overlapping state laws threaten the existence of the uniform, national standards for interstate calls that Congress and the FCC believe are essential in this networked industry. These laws also impose substantial burdens on callers that are clearly authorized by the FCC's regulations. Even when acting in compliance with federal law, telemarketers may face substantial *in terrorem* threats, such as hundreds of millions of dollars in civil penalties. The FCC needs to act to resolve this issue.

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[10] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 84 (2003)
[11] *Id.*

CONCLUSION

FreeEats fully supports the FCC's effort to harmonize its rules under the TCPA with those of the FTC. At the same time, it is essential for the Commission to pre-empt inconsistent state telemarketing laws in order to create a truly comprehensive and consistent framework for calling across state lines.

Respectfully submitted,

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