



STATE OF NEW JERSEY
DIVISION OF THE RATEPAYER ADVOCATE
31 CLINTON STREET, 11TH FL
P. O. BOX 46005
NEWARK, NEW JERSEY 07101

RICHARD J. CODEY
Acting Governor

SEEMA M. SINGH, Esq.
*Ratepayer Advocate
and Director*

November 17, 2004

VIA ELECTRONIC FILING

Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

**Re: Petition for Declaratory Ruling on Preemption of New Jersey
Telemarketing Rules filed by American Teleservices Association, Inc.
CG Docket No. 02-278**

Dear Secretary Dortch:

The New Jersey Division of the Ratepayer Advocate (Ratepayer Advocate) hereby submits this letter in lieu of more formal comments in the above-captioned proceeding.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to the Ratepayer Advocate's continued participation and interest in implementation of the Telecommunications Act of 1996.¹

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as the Act, and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

The Ratepayer Advocate submits these comments in response to the Petition for Declaratory Ruling on Preemption of New Jersey Telemarketing Rules filed by the American Teleservices Association, Inc. (“ATA”) on August 24, 2004.² ATA seeks Federal Communications Commission (“FCC”) preemption of provisions of the New Jersey Consumer Fraud Act and New Jersey Administrative Code (“NJ Rules”) that protect New Jersey residents from telemarketers. ATA contends the NJ Rules are inconsistent with the FCC rules in three respects: the established business relationship exemption is more restrictive than the federal rules, there is no personal relationship exemption in the NJ Rules and the NJ disclosure rules are stricter than the federal rules. ATA also argues that the NJ Rules apply to interstate calls, not simply intrastate telemarketing.

The Ratepayer Advocate submits that:

1. ATA lacks standing to raise these issues;
2. ATA’s concerns are not ripe;
3. There is no case or controversy; and
4. Section 227(e)(1) of the Act precludes ATA’s claim of preemption.

Accordingly, the Ratepayer Advocate submits that ATA’s petition should be dismissed.

In determining whether to respond to a request for a declaratory ruling, the FCC will look at whether the petitioner has standing as interpreted by the federal Appellate Courts. In *In the Matter of OmniPoint Communications, Inc. New York MTA Frequency Block A*, 11 FCC Rcd. 10785, 10788 (1996) (“*OmniPoint*”), the FCC identified the three-pronged test utilized by federal appellate courts to determine whether a petitioner has standing: the petitioner must “allege (1) a ‘distinct and palpable’ personal injury-in-fact that is (2) ‘fairly traceable’ to the respondent’s conduct and (3) redressable by the relief requested.”³ The only place in petitioner’s brief where standing is asserted can be found in its’ “Statement of Interest” where ATA asserts: “Many ATA member organizations initiate interstate telephone solicitations to existing and potential subscribers who are New Jersey residents. Enforcement of certain provisions of the New Jersey Act and the New Jersey Rules to the extent they are more restrictive than the Commission Rules will have a significant and material adverse impact on its member organizations.”⁴ Nowhere is there a claim of an injury, much less a “distinct and palpable” personal injury-in-fact.

² FCC Public Notice DA 04-3185, “Consumer & Governmental Affairs Bureau Seeks Comment on American Teleservices Association, Inc. Petition for Declaratory Ruling on Preemption of New Jersey Telemarketing Rules”, CG Docket No. 02-278, released October 4, 2004.

³ *Id.*

⁴ *Pet. brief* at 2.

Furthermore, the Petitioner has failed to demonstrate that it has the requisite associational standing to raise issues on behalf of its members. An Association has “standing to sue on behalf of its members only if (1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit.”⁵ It is clear from the first prong that if a member does not have standing to sue, then neither does the association. Here, as discussed in the preceding paragraph, no ATA member has alleged any injury from the NJ Rules and therefore does not have standing. If no ATA member has standing, then neither does the ATA.⁶

ATA’s concerns are also not ripe. In *OmniPoint*, the FCC noted that “concepts of ripeness can also provide a useful analogy in determining whether the Commission should exercise its discretion to issue declaratory rulings.”⁷ In that case, the FCC found the issue not ripe for consideration and no unusual and compelling circumstances were present. In the instant matter, although ATA apparently made comments and was represented by counsel during the New Jersey rule adoption process, ATA did not challenge the NJ Rules in the New Jersey court system when they were issued.⁸ Further, ATA does not claim that New Jersey enforcement proceedings are pending against any ATA member. No unusual or compelling circumstances are alleged as to why this matter is ripe; accordingly, the FCC should dismiss the petition. The Ratepayer Advocate submits that the issue of ripeness remains until such time as New Jersey enforcement proceedings are initiated and an enforcement action is final and non-appealable against an ATA member.

ATA also has not shown that a case or controversy exists at this time. In order to be justiciable, there must be an actual case or controversy before a party can be heard. No allegations are set forth claiming how ATA members are affected. ATA has not shown, through statements or affidavits, whether any member’s business has been affected. Since no enforcement action is pending against any telemarketer, there is simply no case or controversy to resolve. Therefore, there exists no standing at this time. As ATA has not met this threshold burden, its petition should be dismissed.

Finally, it is well settled that New Jersey has authority under § 227(e)(1) of the Act to impose more restrictive requirements on telephone solicitors. Section 227(e)(1) provides: “...Nothing in this section or in the regulations prescribed under this section

⁵ *Sierra Club v. EPA*, 292 F.3d 895, 898-901 (D.C. Cir. 2002).

⁶ *Accord: Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000). See also: *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25-26 (D.C. Cir. 2002); *Am. Legal Found. v. FCC*, 808 F.2d 84, 89-90 (D.C. Cir. 1987).

⁷ *OmniPoint* at 10789.

⁸ *Pet. Brief*, Appendix Tab 2, commenter number 23.

shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits... the making of telephone solicitations.”⁹ Indeed, the FCC Order also notes: “Nothing that we do in this order prohibits states from enforcing state regulations that are consistent with the TCPA (Telephone Consumer Protection Act of 1991) and the rules established under this order in state court.”¹⁰ On their face, the NJ Rules are intended to protect New Jersey residents from receiving telemarketing calls when they sign up on the New Jersey Do Not Call list. As such, the NJ Rules merely protect the interest of NJ residents who elect to sign-up for inclusion on the NJ Do Not Call list.

Despite ATA’s claims, ATA’s members are only precluded from calling NJ residents who either sign up for the NJ or the federal Do Not Call list. ATA is free to market to all other NJ residents. However, for NJ residents who sign up for NJ Do Not Call protection, those residents are entitled to the increased protection afforded by the NJ Rules. Section 227(e)(1) explicitly authorizes states to enact more restrictive rules. Therefore, NJ Rules are proper and ATA’s assertions are misplaced. If a NJ resident only signs up on the federal Do Not Call list, then that resident receives only the protection under the federal law. Notwithstanding the hardship claims of ATA, ATA’s members need only to consult two Do Not Call lists and limit telephone solicitations to the NJ residents identified on each list and conform their telephone solicitations so as to comply with the NJ Rules and the federal rules.

For all the foregoing reasons, the Ratepayer Advocate submits that ATA’s petition should be dismissed.

Respectfully Submitted,

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

By: Henry M. Ogden
Henry M. Ogden, Esq.
Assistant Deputy Ratepayer Advocate

Cc: Janice M. Myles (via electronic mail)
Qualex International, Portals II (via electronic mail)

⁹ 47 U.S.C. §227 (e)(1).

¹⁰ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, (July 3, 2003) at ¶85.