

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 03-N-184 (MJW)

MAINSTREAM MARKETING SERVICES, INC., et al.

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants.

---

**DEFENDANTS' REPLY IN SUPPORT OF  
THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

As recent events demonstrate, far from being “an exercise in regulatory imperialism,” see Plaintiffs’ Consolidated Reply and Opposition (“Reply”) at 1, the telemarketing do-not-call registry is an example of regulatory agencies coordinating their efforts under specific statutory authority to address a significant national problem. First, on June 26, 2003, the FCC recognized “consumer frustration and dissatisfaction” with the “significant growth in the number of telemarketing calls” and voted to modify its regulations under the Telephone Consumer Protection Act (“TCPA”) so that FCC’s regulations are consistent with the FTC’s Telemarketing Sales Rule.<sup>1</sup> As a result, all telemarketers subject to the jurisdiction of either the FTC or the FCC will be required to comply with a single, national do-not-call registry. Plaintiff’s asserted concerns with “patchwork” coverage of the FTC’s rule are therefore moot. (In addition, the FCC

---

<sup>1</sup> See FCC press release of June 26, 2003  
([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235841A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235841A1.pdf)).

also voted to prohibit telemarketers subject to its jurisdiction from abandoning calls, so that they, like telemarketers subject to the FTC's jurisdiction, will no longer be able to engage in one of the most abusive practices of the telemarketing industry. Id.)

Second, at 8:30 a.m. on June 27, 2003, following a joint news conference in the White House Rose Garden, the FTC's do-not-call registry opened to accept consumer sign-ups, and within 72 hours, more than 10 million consumers had enrolled, thereby expressing their desire to receive no further telemarketing calls. See FTC press release of June 30, 2003 (<http://www.ftc.gov/opa/2003/06/dncregistration.htm>). This overwhelming response validates a central premise of the FTC's amendments to the TSR: notwithstanding the protective measures previously available, consumers are still being abused by telemarketing calls they do not want to receive. Plaintiffs have failed to identify any constitutional or statutory infirmity in the FTC's actions. Accordingly, this Court should deny plaintiffs' motion for summary judgment and grant our cross-motion for summary judgment, thereby upholding the amendments to the Rule.

1. Plaintiffs' constitutional challenge to the Rule's do-not-call registry goes astray because it ignores how lightly the registry treads on First Amendment rights. See Reply at 7-37. Plaintiffs trumpet a scattered selection of recent Supreme Court decisions, see Reply at 9 n.6, but, unlike the registry, the regulations at issue in those cases involved direct government prohibitions of speech. See, e.g., 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) (state restricted price advertising of alcoholic beverages); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (city banned commercial newsracks). The provisions of the Rule that create the registry do not directly restrict any speech at all. Instead, they merely create an enforceable mechanism

that allows consumers to express their desire to limit the telemarketing calls they receive.<sup>2</sup> No consumer is required to sign up, and no telemarketer is restricted from calling a consumer unless that consumer does sign up. Thus, it is the consumer, not the government, that makes the decision that has an impact on the telemarketer's speech. To the extent that the registry restricts speech at all, any First Amendment analysis must take into account its minimal impact. Plaintiffs' ham-handed constitutional analysis simply fails to do this.<sup>3</sup>

Because the registry applies only to telemarketers who are selling goods and services, it only affects commercial speech and the First Amendment impact of the registry must be assessed using the three-part test of Central Hudson Gas & Electric Corp. v. Public Service Commission

---

<sup>2</sup> To the extent that the Supreme Court has addressed mechanisms of the sort created by the rule, it has done so favorably. See Rowan v. United States Post Office Department, 397 U.S. 728 (1970) (upholding regulatory regime that permits a consumer to remove his or her name from the mailing list of any mailer); Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (acknowledging the right of homeowners to decide whether distributors of literature may call at their homes); Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002) (acknowledging the right of the Village to make it illegal for a solicitor to solicit homes that post a "no solicitation" sign).

<sup>3</sup> Plaintiffs' contention that, because they have raised serious constitutional questions, this Court should reject the deferential standard of review of Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), Reply at 4-7, is irrelevant. In particular, plaintiffs urge this Court not to defer to the FTC's conclusion that it had authority under the Telemarketing Act to implement the registry. However, this Court need not defer to the FTC because, through passage of the Consolidated Appropriations Resolution, 2003, P.L. 108-7, and the Do-Not-Call Implementation Act, P.L. 108-10, Congress made clear that the FTC had authority to implement the registry. Thus, there is simply no need for Chevron step 2 deference. Further, plaintiffs are mistaken in claiming that the registry should be overturned because the FTC failed to comply with various regulatory requirements of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). See Reply at 8. The TCPA applies to the FCC, not the FTC. The FTC promulgated the Rule pursuant to authority in the Telemarketing Act, and it has no obligation to comply with the TCPA.

of New York, 447 U.S. 557 (1980).<sup>4</sup> First, the registry passes the first prong of that test because it furthers a substantial government interest -- protecting the privacy of the consumer's home from unwanted telemarketing calls. 68 Fed. Reg. 4635; see Defendants' Memorandum and Opposition ("FTC Memo") at 23-24. This interest is no more "abstract," see Reply at 18, than the dinnertime din of those calls. Even plaintiffs do not seriously dispute that many consumers find such calls to be "an intrusive nuisance" and "an invasion of privacy." See H.R. Rep. 108-8 (2003). Although they suggest that this privacy interest is not one the government may protect, see Reply at 16-19, they cite no case to support this suggestion. Plenty of cases show otherwise. See, e.g., Edenfield v. Fane, 507 U.S. 761, 769 (1993);<sup>5</sup> Anderson v. Treadwell, 294 F.3d 453, 461 (2d Cir. 2002); and cases cited in FTC Memo at 23. Nor are plaintiffs helped by U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999), see Reply at 17-18, because, in that case, the court recognized that, consistent with the First Amendment, the government could protect consumers

---

<sup>4</sup> Plaintiffs claim that, because some other provisions of the Rule apply to telemarketers who telemarket on behalf of charities, this Court should use strict scrutiny, not the Central Hudson test, to evaluate the do-not-call registry. Reply at 34-36. But by its terms the registry applies only to commercial speech. 16 C.F.R. § 310.4(b)(1)(iii)(B). Accordingly, although other provisions of the Rule may be judged according to other standards, the registry must be evaluated using the Central Hudson test. None of the cases cited by plaintiffs is to the contrary. In both 44 Liquormart, supra, and City of Cincinnati v. Discovery Network, supra, the Supreme Court applied the Central Hudson test. Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994), is irrelevant because, unlike the do-not-call registry, the regulation at issue restricted political speech.

<sup>5</sup> Plaintiffs question reliance on Edenfield because the Court overturned the restriction at issue. Reply at 18 n.16. However, the Court specifically recognized the government's interest in protecting consumers from abusive solicitations, 507 U.S. at 769, and it overturned the restriction only because it did not advance the government's interest, 507 U.S. at 771-73. Here, as explained infra, the registry advances the government's interest in protecting privacy.

from unwanted solicitations. 182 F.3d at 1235.<sup>6</sup> Plainly, the government may, consistent with the First Amendment, protect consumers from the intrusion caused by unwanted telemarketing.

Plaintiffs' analysis as to the second prong of the Central Hudson test also ignores the limited impact of the registry. The second prong requires that the regulation directly advance the government's interest and, as the defendants explained, the registry does so by providing a mechanism whereby consumers can limit unwanted telemarketing calls. Because the calls themselves constitute the invasion of privacy, the Rule works directly to further the government's interest. Nor is the registry in any way flawed merely because it does not apply to telemarketers who solicit on behalf of charities. See Reply at 21, 28-29. The FTC explained that the rulemaking record (including an industry comment) shows that such telemarketers are less likely to engage in abusive telemarketing practices that might alienate consumers. 68 Fed. Reg. 4637; see FTC Memo at 29. Accordingly, the FTC subjected such telemarketers only to the Rule's company-specific do-not-call provision. The FTC's reasoning is not undermined merely because it recognized that, had it applied the registry to fund raising calls, it could have "prompt[ed] some consumers to accept the blocking of charitable solicitation calls that they would not mind

---

<sup>6</sup> The privacy interest actually asserted by the government in U.S. West was very different from the privacy interest protected by the registry. See Reply at 17. The court was plainly troubled by the government's assertion that consumers had a privacy interest in information that phone companies possess about them, even where there was no showing that release of that information would cause any embarrassment or ridicule. 182 F.3d at 1234-35. As plaintiffs note, at argument the government also asserted that the regulation would protect consumers from unwanted telemarketing. 182 F.3d at 1236 n.8; see Reply at 17. The court rejected this interest, not because it was invalid or abstract, but because there was no showing that the government had relied on it during the rulemaking. 182 F.3d at 1236 n.8.

receiving, as an undesired but unavoidable side-effect resulting from signing up for the registry to stop sales solicitation calls.” 68 Fed. Reg. 4636; see Reply at 21, 28. Again, signing up is the consumer’s choice, and no consumer is required to block telemarketing calls if he or she would want to receive them. In any event, the FTC concluded, not that charitable telemarketing is somehow “good/wanted,” see Reply at 28, but that consumers would be sufficiently protected by the company-specific provision because calls from charitable solicitors are less likely to offend, and because the FTC has no evidence that such telemarketers will ignore the company-specific do-not-call provision.

Nor is the registry constitutionally undermined merely because it does not apply to all telemarketing, and nothing in City of Cincinnati v. Discovery Network, Inc., supra, or Pearson v. Edgar, 153 F.3d 397 (7th Cir. 1998), is to the contrary. See Reply at 12-15. In Discovery Network, the Court overturned a Cincinnati law that, to reduce litter, banned commercial newsracks but allowed non-commercial newsracks. However, only 4% of the newsracks were commercial and the city had no reason related to litter for distinguishing between noncommercial and commercial newsracks. 507 U.S. at 424. The jurisdictional limits of the do-not-call registry were determined primarily by Congress, and there were good reasons for those limits, reasons that were related to the privacy interest served by the registry. See FTC Memo at 28-29.<sup>7</sup>

---

<sup>7</sup> As defendants explained, entities and activities exempt from coverage under the FTC Act are also exempt from the Telemarketing Act because such entities and activities are subject to regulation by other federal regulatory authorities. See FTC Memo at 28. On June 26, 2003, the FCC voted to require all entities subject to its jurisdiction to comply with the do-not-call registry. See <http://www.fcc.gov/cgb/donotcall/>. Thus, entities outside the FTC’s jurisdiction that are engaged in telemarketing of goods and services (such as banks and credit unions and

Similarly, unlike the newsrack ban, the registry will make a substantial contribution to furthering the government's interest in protecting privacy. See 68 Fed. Reg. 4630-31. Indeed, it is hard to fathom how plaintiffs can question whether there is sufficient evidence that the registry will shield consumers from a substantial amount of telemarketing calls, see Reply at 23-27, when they also contend that, if the registry takes effect, it will lead to a 40% - 60% reduction in the number of telemarketers hired by the industry, see Reply at 27.

Pearson v. Edgar is also very different. In that case, the Seventh Circuit overturned an Illinois statute that, in order to prevent blockbusting, required real estate agents to honor consumers' requests to receive no further solicitations. However, by the time of the court's decision, blockbusting was no longer a problem and the state attempted to justify the law as a protection of consumer privacy. But the state was unable to produce any evidence that real estate solicitation harmed or even threatened residential privacy. 153 F.3d at 404. Accordingly, the court held that the statute was "severe[ly] underinclusive" and thus unconstitutional. More recently, a very similar statute that also allowed consumers to shield themselves from real estate solicitation was upheld by the Second Circuit in Anderson v. Treadwell, 294 F.3d 453 (2d Cir. 2002). In that case, the court held that the law was justified a means of protecting residential privacy because, unlike Pearson v. Edgar, there was sufficient evidence that, in the areas where the statute applied, real estate solicitation did infringe privacy. There is nothing about "current

---

common carriers engaged in common carrier activities) will be required to comply with the registry. Accordingly, plaintiffs' concern regarding the jurisdictional limitations of the FTC's authority, see Reply at 25-26, 44, has been rendered moot because the registry will, as a result of the FCC's action, apply to virtually all telemarketing of goods and services.

commercial speech jurisprudence” that would undermine the registry. See Reply at 8. Since Central Hudson, the Court has made clear that a restriction on commercial speech will not be upheld unless it materially advances the government’s interest.<sup>8</sup> In Discovery Network, the law would have made only a minuscule dent on litter, and in Pearson v. Edgar, there was no showing that the restriction on soliciting would provide any privacy protection at all. However, as in Anderson v. Treadwell, there is evidence that the do-not-call registry will materially protect privacy, see 68 Fed. Reg. 4631, and as a result, the registry passes the second prong of the Central Hudson test.

Plaintiffs’ analysis of the third prong of the Central Hudson test is as skewed as its analysis of the first two prongs. The registry is not more restrictive than necessary to achieve the government’s interest (limiting unwanted telemarketing calls) because it only limits telemarketing calls to those consumers who have indicated (by signing up for the registry) that they want such calls limited.<sup>9</sup> The beauty of the FTC’s approach is that the FTC need not “determine what types of calls consumers find most intrusive or annoying.” See Reply at 22.

---

<sup>8</sup> Although plaintiffs suggest that exemptions inherently undermine the registry, see Reply at 25, 36, the Court has made clear that exemptions do not automatically render a statute unconstitutional because there is no constitutional requirement that the government “make progress on every front before it can make progress on any front.” Edge, 509 U.S. at 434.

<sup>9</sup> It is irrelevant under the third prong of the Central Hudson test that, if many consumers sign up for the registry, telemarketers may lose their jobs. See Reply at 27. The focus of the third prong is whether the registry imposes restrictions on speech that do not further the government’s interest, not whether a large amount of speech is restricted. Here, even if many consumers sign up for the registry, all the speech that is restricted is unwanted and the restriction only acts to further the government’s interest.

Each consumer can make his or her own choice. If a consumer finds that a sufficient percentage of the calls subject to the registry are “intrusive or annoying,” that consumer will sign up. Another consumer might choose to bypass the list. The choice is the consumer’s, not the government’s. Moreover, the FTC’s approach is nuanced, see Reply at 29, because the registry is not the only tool that the Rule makes available to consumers: those who want to receive routine telemarketing calls simply forego the registry. Of course, such consumers may still use the company-specific provision and the Caller ID provision (which requires telemarketers to transmit Caller ID information) to eliminate calls from particular telemarketers.

Plaintiffs go particularly far afield in arguing that the registry is flawed simply because one can theoretically conceive of some calls that participating consumers might actually welcome.<sup>10</sup> See Reply at 20-21. Again, no consumer is required to sign up for the list, and any consumer who believes that such calls are sufficiently likely would simply bypass the list. Plaintiffs’ contention that the registry does “not focus on unwanted calls,” see Reply at 20, might have had some merit had the Rule directly prohibited commercial telemarketing. But it does not. It merely enforces the consumer’s desire to limit telemarketing calls. Consumers who sign up for the registry thereby indicate that they do not want to receive calls from the telemarketers to

---

<sup>10</sup> If this hypothetical exercise were able to derail the registry, virtually any law designed to protect privacy would be vulnerable. For example, the Fair Credit Reporting Act (“FCRA”) protects the privacy of information that credit bureaus maintain by sharply limiting who can get access to credit reports. See 15 U.S.C. §§ 1681, et seq. Undoubtedly, there are situations where a particular consumer would not object to having his or her report revealed to someone not otherwise entitled to get it under the FCRA. However, this does not render the FCRA unconstitutional.

whom the registry applies. A fortiori, the calls that are limited are unwanted because that is what consumers indicate when they sign up.<sup>11</sup>

Although plaintiffs continue to urge what they refer to as “less restrictive alternatives,” to the registry, see Reply at 31-34, they fail to show that there is any true alternative, i.e., an option that would provide consumers with the same level of protection from unwanted telemarketing calls.<sup>12</sup> The Rule’s Statement of Basis and Purpose discusses some of those options in detail, including the company-specific do-not-call provision and the industry’s do-not-call list. 68 Fed. Reg. 4629-31. Further, although there was no detailed discussion with respect to each of the 12 so-called “consumer electronics” options suggested in the attachment to plaintiffs’ summary judgment motion, no such discussion was necessary because there is no requirement that the Rule’s Statement of Basis and Purpose address “every possible alternative.” Vermont Yankee

---

<sup>11</sup> Plaintiffs contend that the FTC should have tailored its Rule even further. Reply at 30-31 & n.37. They note that in Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002), the village, which allowed consumers to register and thereby restrict visits from door-to-door solicitors, permitted consumers to select among 19 exemptions on the “no solicitation” form. 536 U.S. at 156 n.5. Of course, the sort of regulatory tailoring that is practical for a village ordinance that applies to 278 residents, see 536 U.S. at 156, is not possible for a regulation of nationwide application. In any event, it is clear that the First Amendment does not require the sort of least restrictive alternative tailoring suggested by plaintiffs. See Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 477-48 (1989).

<sup>12</sup> Unlike the alternatives to the registry that plaintiffs put forth, the alternatives discussed by the Court in Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 717 (1996), were obvious alternatives that would achieve the statute’s goal. See Reply at 33. In particular, the statute employed a different method of restricting access to pornographic material broadcast on some cable channels than it did on other channels. The agency failed to explain why the less restrictive method, which was applied to some channels, was not adequate for all channels. 518 U.S. at 756-57.

Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978).

Further, given the obvious inadequacy of these options<sup>13</sup> (indeed, plaintiffs do not attempt to explain how any of the options would achieve the level of protection provided by the registry), plaintiffs' suggestion that the FTC must disprove their adequacy, see Reply at 33, is absurd.<sup>14</sup>

2. As explained previously, the do-not-call registry is not arbitrary and capricious because the FTC "examined the relevant data and articulated a rational connection between the facts found and the decision made." Cliffs Synfuel Corp. v. Norton, 291 F.3d 1250, 1257 (10th Cir. 2002). See FTC Memo at 38-39. This Court will find the FTC's reasoning set forth in great

---

<sup>13</sup> A good example of an obviously inadequate alternative is the TeleZapper, which plaintiffs touted in their summary judgment motion. See Memorandum Supporting Plaintiffs' Motion for Summary Judgment at 47. The device emits a beeping noise that is supposed to fool telemarketers who use certain automated dialing devices by signaling those devices that the consumer's phone line has been disconnected. Of course, to the extent it works at all, it only has any effect on telemarketers who use certain automated dialing devices. It would not have any effect on telemarketing calls that do not use such devices. Moreover, it would eliminate non-telemarketing calls placed by such devices (some school systems use automated dialing systems to send emergency notices to parents). Further, the beeping noise emitted by the TeleZapper is heard not only by telemarketing calls but by anyone who calls the consumer. In addition, nothing prohibits telemarketers from developing devices that fool the TeleZapper. Finally, the TeleZapper is costly. Plaintiffs mistakenly contend that United States v. Playboy Entertainment Group, 529 U.S. 803 (2000), holds that the government may not reject an option merely because it is costly. See Reply at 33. In fact, in that case, the only alternative considered by the Court was cost-free.

<sup>14</sup> As explained, because the registry does not violate the First Amendment, it also does not violate the Equal Protection clause of the Constitution. FTC Memo at 37-38. Plaintiffs contend that Discovery Network and Pearson v. Edgar have "superseded" that analysis. Reply at 36-37. They are wrong. Discovery Network did not involve the Equal Protection clause, and Pearson v. Edgar specifically acknowledged that Equal Protection analysis remained unchanged after Discovery Network, 153 F.3d at 405 ("Discovery Network did not affect" Equal Protection analysis). See also Anderson v. Treadwell, 294 F.3d at 464-65.

detail in the Rule's Statement of Basis and Purpose. See 68 Fed. Reg. 4628-42. Nonetheless, plaintiffs raise three challenges: first, they contend that there is no need for the registry because the FTC cannot show any failure of the status quo; second, they claim that, even if there is a problem at present, there is inadequate evidence that the registry will solve it; and third, they claim that there is no support for the FTC's decision to create an 18-month established-business relationship exemption. They are wrong on all three points.

It is hard to imagine a problem more apparent (especially around dinnertime) than unfettered telemarketing. During the rulemaking, the FTC received tens of thousands of complaints from frustrated consumers, and Congress has expressly recognized the "increasing need to provide consumers with the ability to opt-out of telemarketing calls," H.R. Rep. 108-8 at 3 (2003). But this is not enough for plaintiffs. Maybe, they opine, the frustrated consumer commenters merely wanted the FTC to make more of an effort to publicize or enforce the company-specific do-not-call provision of the Rule. See Reply at 39-42. The FTC explained why the company-specific provision is not working. Not only do some telemarketers flout it, not only is it difficult to enforce, 68 Fed. Reg. 4629-31, but the provision is simply not sufficient to give consumers what they want -- a halt to undesired telemarketing. The evidence shows that there are approximately 7500 telemarketers subject to the registry. 68 Fed. Reg. 16242 (Telemarketing Sales Rule Fees Notice of Proposed Rulemaking). If only the company-specific provision were in effect (and every telemarketer promptly complied with it), a consumer could receive as many as 7500 telemarketing calls, and would have to repeat the do-not-call request 7500 times to receive the same level of protection as the consumer will get from one call to the

nationwide do-not-call registry.<sup>15</sup> Although, in plaintiffs' judgment, this may be an adequate solution to the problem of unwanted telemarketing, arbitrary and capricious review does not allow plaintiffs' judgment to be substituted for that of the FTC.<sup>16</sup> See Lamb v. Thompson, 265 F.3d 1038, 1046 (10th Cir. 2001).

There is no requirement that the FTC precisely quantify the number of calls that will be blocked by the registry. See Reply at 43-46. As explained above in connection with the second prong of the Central Hudson test, the registry will directly advance the government's interest in shielding consumers from unwanted telemarketing calls, and that is more than sufficient to show that the registry is not arbitrary and capricious. Moreover, given what plaintiffs refer to as "substantial evidence" that, if the registry takes effect, the telemarketing industry will need 40% to 60% fewer telemarketers, see Reply at 27, plaintiffs cannot logically argue that the registry will not shield consumers from a substantial number of calls.<sup>17</sup> See Reply at 44.

Plaintiffs do not dispute the FTC's decision to define an "established business

---

<sup>15</sup> Because, as explained above, the company-specific provision cannot provide the same level of protection as the do-not-call registry, consumer education regarding the company-specific provision, see Reply at 40 n.43, is no solution.

<sup>16</sup> The speedy pace of consumer sign-ups for the registry provides further evidence that consumers do not find the status quo satisfactory.

<sup>17</sup> Plaintiffs complain that the registry is somehow arbitrary and capricious because consumers will not understand that signing up will not shield them from all calls. See Reply at 44-45. However, the registry is not arbitrary and capricious merely because it does not solve the entire problem of unwanted telemarketing. Moreover, the FTC is already conducting consumer education so that consumers who sign up will be aware that the registry will not shield them from all calls. See <http://www.donotcall.gov/FAQ/FAQConsumers.aspx>.

relationship” and to permit businesses that have such a relationship with a consumer to telemarket to that consumer even if that consumer has signed up for the do-not-call registry. Indeed, plaintiff American Teleservices Association urged that the Rule contain such an exemption, and it argued that the exemption should last for 24 months after the last contact between the consumer and the business. See Supplemental Comment of ATA at 8 (<http://www.ftc.gov/os/comments/dncpapercomments/supplement/ata.pdf>). However, plaintiffs now claim that the Rule is arbitrary and capricious simply because it provides that the relationship terminates after 18 months instead of 24. See Reply at 46-48. As explained, the FTC examined thousands of comments and struck a balance based on industry’s needs, consumers’ privacy rights, reasonable expectations about who may call them and when, and on state laws.<sup>18</sup> 68 Fed. Reg. 4592. See FTC Memo at 42. The decision to limit the exemption to 18 months is clearly not “untethered” from reality,<sup>19</sup> see Reply at 47, but is the sort of quintessentially discretionary decision that this Court need not and should not second guess.<sup>20</sup>

---

<sup>18</sup> The FTC’s selection of the 18-month limit bears no relationship to the rule struck down in United States Telecomms. Ass’n v. FCC, 227 F.3d 450 (D.C. Cir. 2000), see Reply at 47, because in that case the agency simply failed to consider a factor that Congress had directed it to take into account. Nothing in the Telemarketing Act limited the FTC’s discretion to select the 18-month limit.

<sup>19</sup> The FCC has also amended its rules under the TCPA to provide for an 18-month established business relationship exemption. See FCC press release of June 26, 2003 ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235841A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235841A1.pdf)).

<sup>20</sup> Plaintiffs complain that some business transactions “have a longer life cycle than 18 months,” and that consumers would expect to be contacted by these business outside the 18-month period. See Reply at 47-48. Of course, a business involved in such transactions is free to telemarket to consumers outside the 18-month period if the business obtains authorization from

3. The Rule prohibits telemarketers from abandoning calls, 16 C.F.R. § 310.4(b)(1)(iv), a practice that the rulemaking record shows to be one of the most abusive practices of the telemarketing industry. 68 Fed. Reg. 4642. Because abandoned calls are caused by telemarketers' use of predictive dialers, see FTC Memo at 45, and because, in order to come into compliance with the Rule, telemarketers must govern their use of their predictive dialers, plaintiffs insist that the FTC has regulated predictive dialers. See Reply at 49-51. As explained, the Rule's prohibition of abandoned calls is a prohibition of abusive telemarketer conduct, not a regulation of predictive dialers. FTC Memo at 44-45. However, regardless of what the regulation is called, it is well within the FTC's authority under the Telemarketing Act.<sup>21</sup>

Plaintiffs do not dispute that the Telemarketing Act gives the FTC authority to prohibit abusive telemarketing practices, and they do not dispute that abandoning calls is an abusive telemarketing practice. Nonetheless, they argue that, because abandoned calls are frequently caused by predictive dialers, and because the FCC has jurisdiction to regulate those dialers, the FTC lacks authority to prohibit abandoned calls. See Reply at 51-54. They point to no statute or regulation that gives the FCC exclusive jurisdiction over abandoned calls, nor do they identify any FCC statute or regulation that is inconsistent with the Rule's prohibition of abandoned calls

---

the consumers. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i). If, as plaintiffs contend, consumers expect such contacts, obtaining authorizations should present no problem.

<sup>21</sup> Plaintiffs suggest that the prohibition of abandoned calls “intrude[s] upon \* \* \* the speech rights of regulated entities.” See Reply at 50 n.59. We are unaware of any case holding that the First Amendment protects the right of a telemarketer to call consumers and not speak to them.

(i.e., no statute or regulation requires telemarketers to abandon calls).<sup>22</sup> Instead, they cite a series of cases, see Reply at 51, but none of them even remotely suggests that the FTC lacks authority to prohibit telemarketers from abandoning calls. Three of those cases merely upheld that FCC's exclusive jurisdiction over the interconnection of equipment to the interstate phone network.

Telerent Leasing Corp., 45 F.C.C.2d 204 (1974); North Carolina Util. Comm. v. FCC, 537 F.2d 787 (4th Cir. 1976); North Carolina Util. Comm. v. FCC, 552 F.2d 1036 (4th Cir. 1977).

Another of the cases affirms the FCC's authority to assert its jurisdiction to preempt a state regulation that conflicted with the federal right of a user to connect to the phone network in a manner that was most beneficial to that user. Public Util. Comm. of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989). In a fifth case, the court conducted an in depth analysis and determined that the FCC's statutory authority did not preclude plaintiff's private antitrust action. Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979). Finally, in Macom Prods. Corp. v. AT&T, 359 F. Supp. 973 (C.D. Cal. 1973), the court merely held that issues raised in a

---

<sup>22</sup> Plaintiffs continue to contend that there is a conflict between FCC rules and § 310.4(b)(4)(iii), the safe harbor provision that requires a telemarketer to avoid "dead air" by playing a recorded greeting stating the seller's name and telephone number. See Reply at 54-56. Plaintiffs wrongly contend that this requirement conflicts with 47 C.F.R. § 64.1200(a)(2), (c). Although FCC rules prohibit the use of a "prerecorded voice to deliver a message," FCC rules also specifically provide that the sort of recorded greeting contemplated by the Rule's abandoned call safe harbor is exempt from that prohibition. In particular, § 64.1200(c)(2) exempts from the prohibition calls that do not include "unsolicited advertising," and § 64.1200(f)(5) provides that, for a message to constitute "unsolicited advertising" it must include "material advertising the commercial availability or quality of any property, goods, or services." The recorded greeting contemplated by the safe harbor provision merely requires a name and a telephone number, which does not constitute "unsolicited advertising." Nothing cited by plaintiffs indicates that a name and a number constitutes advertising.

private antitrust action, which was based on the defendants' compliance with an FCC tariff, should be addressed first by the FCC.

In all of these cases, the courts sought to determine whether there was any conflict with the FCC's authority. Where there was no conflict, there was no preemption; where there was a conflict, the court deferred to the FCC. There is no dispute that the FCC has sufficient authority to prohibit abandoned calls, and indeed, on June 26, 2003, it voted to do so. See <http://www.fcc.gov/cgb/donotcall/>. Thus, not only is there no conflict, in fact, the FTC's and the FCC's prohibitions of abandoned calls complement one another. In any event, the mere fact that the FCC also has authority to prohibit abandoned calls does not limit the FTC's authority. Accordingly, there is no jurisdictional impediment to the Rule's prohibition of abandoned calls.<sup>23</sup>

---

<sup>23</sup> Plaintiffs complain that the prohibition of abandoned calls is arbitrary and capricious with respect to the small number of telemarketers who hand dial calls. In particular, plaintiffs contend that such telemarketers cannot comply with the Rule's safe harbor and may not be able to avoid abandoning calls in those situations where the telemarketer terminates the call "just as the called party answers." Reply at 57. However, a call is not considered abandoned unless the telemarketer hangs up after the consumer answers, and a telemarketer who hand dials calls should be able to make sure that a call is not abandoned merely by continuing to listen for an answer until the call is terminated. Indeed, plaintiffs' concern appears to be hypothetical because it was not raised during the rulemaking. In any event, if there are some telemarketers who are unsure as to how to comply with the abandoned call provision, they may seek an advisory opinion from the FTC regarding compliance procedures. See §§ 1.1-1.4 of the FTC's Rules of Practice and Procedure, 16 C.F.R. §§ 1.1-1.4.

## CONCLUSION

For the reasons set forth above and in the FTC Memo, this Court should deny plaintiffs' motion for summary judgment, grant the defendants' motion, and dismiss plaintiffs' complaint.

Respectfully submitted,

WILLIAM E. KOVACIC  
General Counsel

JOHN D. GRAUBERT  
Principal Deputy General Counsel

JOHN F. DALY  
Deputy General Counsel for Litigation

---

LAWRENCE DeMILLE-WAGMAN  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.,  
Room H-582  
Washington, D.C. 20580  
(202) 326-2448  
Facsimile (202) 326-2477  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that on July 2, 2003, I served a copy of Defendants' Reply in Further Support of Its Cross-Motion for Summary Judgment on plaintiffs by mailing that copy by first-class mail to:

Robert Corn-Revere  
Ronald G. London  
Davis Wright Tremaine LLP  
1500 K Street, N.W., Suite 450  
Washington, D.C. 20005-1272

and to:

Sean R. Gallagher  
Marianne N. Hallinan  
Hogan & Hartson L.L.P.  
1200 17th Street, Suite 1500  
Denver, Colorado 80202.

---

Lawrence DeMille-Wagman