

**TESTIMONY OF LAWRENCE E. SARJEANT
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UNITED STATES TELECOM ASSOCIATION
BEFORE THE COMMITTEE ON COMMERCE, SCIENCE
AND TRANSPORTATION
UNITED STATES SENATE
JULY 17, 2002**

Thank you Mr. Chairman and members of the Committee for giving the United States Telecom Association (USTA) the opportunity to testify and present its views on the issue of whether the Federal Trade Commission (FTC) should be authorized by Congress to have concurrent jurisdiction with the Federal Communications Commission (FCC) over common carrier marketing and advertising practices. I am Lawrence E. Sarjeant and I serve as Vice President Law and General Counsel of USTA. I appear at the hearing today on behalf of the entire association. USTA is the nation's oldest trade organization for the local telephone industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

A. Telecommunications Common Carriers Are Already Subject to Regulation of Their Market and Advertising Practices by the FCC and the States

USTA would be strongly opposed to giving the FTC concurrent jurisdiction. USTA is not opposed to regulatory authorities both state and federal having the jurisdiction to police, enforce, remedy and regulate these practices. What USTA is opposed to is adding one more federal regulatory body resulting in potentially duplicative, conflicting and costly new regulatory requirements.

The FTC since its creation in 1914 has not had regulatory authority with respect to

common carriers. This exemption for common carriers has been recognized by the federal judiciary (*See, e.g., FTC v. Miller*, 549 F.2d. 452, 7th Cir, 1977), and it has been reaffirmed by Congress. The reason for this exemption is that there is no absence of regulation—there is no void to fill. Common carriers were regulated in 1914 by the Interstate Commerce Commission, and when the FCC was created by Congress in 1934, the regulatory authority over telephone common carriers was transferred to it. The exemption from FTC authority was continued. Incumbent local exchange carriers are still pervasively regulated by the FCC and the States.

B. The FCC Has Determined That Telecommunications Carrier Marketing Practices Is Subject to Section 201(b)

The FCC has determined that Section 201(b) of the Communications Act of 1934, as amended “requires that common carriers’ **practices**... for and in connection with... communication service, shall be just and reasonable and any such... **practice**... that is unjust or unreasonable is hereby declared to be unlawful...” (FCC FTC Joint Policy Statement, FCC 00-72, 2/29/2000, para. 4). The FCC has used this Section 201(b) authority to determine that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices. In February 2000, when the FCC and the FTC issued a Joint Policy Statement for Advertising of Dial-Around and other long distance services to consumers, the FCC indicated that its authority and actions pursuant to Section 201(b) of the Communications Act, as amended, would be guided by the “principles of truth in advertising developed by the FTC under Section 5 of the FTC Act.” Consequently, there is no existing lack of legal authority. The FCC has already fully occupied the field when it comes to interstate communications

carriers. With respect to intrastate communications, the states continue to have full authority, pursuant to existing state laws.

C. The FCC Has Taken Enforcement Actions Against Telecommunications Carriers' Marketing Practices

The FCC has not only recognized that it has statutory authority to take action against unfair and deceptive practices by common carriers, it has taken affirmative enforcement actions pursuant to that authority. The FCC has been very active from an enforcement perspective in a variety of areas that impact consumers such as telephone solicitation marketing, slamming, and unsolicited facsimiles. This enforcement is accomplished through the Telecommunications Consumers Division of the FCC Enforcement bureau. The following are marketing enforcement actions taken by the FCC as identified on its' website—

MARKETING ENFORCEMENT ACTIONS

04-01-2000	\$1,000,000 in total fines proposed in Notice of Apparent Liability against NOS Communications, Inc. (NOS) and affinity Network Incorporated (ANI) for apparent unfair and deceptive marketing practices
12-07-2000	Order on Reconsideration of 7/17/00 Order imposing a forfeiture against Business Discount Plan, Inc. (denied in part, granted in part). Forfeiture adjusted to \$1,800,000.
03-01-2000	\$100,000 Consent Decree with MCI WORLDCOM for marketing and advertising practices

As Chairman Powell has indicated in testimony before both the House and Senate, the FCC is dedicated to putting more resources into enforcement, including litigation resources.

Chairman Powell has also called upon the Congress to substantially raise the forfeiture amounts

for violations of the Communications Act. The House in H.R.1542, has responded to this request by means of the Upton Amendment added H.R. 1542 on the House floor. H.R.1542 as passed by the House, provides the FCC with cease and desist authority in common carrier matters, while also increasing the future amount to up to \$10,000,000. Violations of cease and desist orders will result in forfeitures of up to \$20,000,000.

USTA, therefore, believes that the FCC has taken steps to enhance enforcement efforts, and it has taken enforcement actions with respect to the marketing and advertising issues in question. There is, in USTA's judgment, no need to complicate the issue by adding still another independent regulatory commission to the mix. It would be one thing if the FCC did not have the requisite authority, or if it did have the authority, but failed to exercise it or exercise it properly. This is not the case. There is no regulatory failure that USTA has observed. Certainly, USTA members do not think so.

D. Adding Concurrent FTC Jurisdiction Over Marketing Practices of Telecommunications Carriers Would Be In Conflict with Congressionally Developed Regulatory Scheme

The FCC comprehensively regulates marketing, including telemarketing, by common carriers and their agents. To add concurrent FTC jurisdiction would be in conflict with the comprehensive regulatory scheme developed by Congress and enforced by the FCC.

Relevant cases in point are: first, under Section 227 of the Communications Act of 1934, as amended (Telephone Consumer Protection Act, TPCA), the FCC exercises general jurisdiction over telemarketing by common carriers as well as by their non-carrier affiliates. Significantly, the TPCA and the FCC's implementing regulations apply to both interstate and

intrastate telemarketing by all carriers, non-carriers and their agents; second, Section 222 of the Communications Act, as amended and the FCC's implementing regulations address how telecommunications carriers may use Customer Proprietary Network Information (CPNI) they obtain from their customers in marketing products and services, including in the course of inbound telemarketing; and third, Sections 272 through 276 of the Communications Act of 1934, as amended and the FCC's implementing regulations create an additional set of rules governing marketing activities by Bell Operating Companies and their non-carrier affiliates.

Extending concurrent jurisdiction to the FTC over telecommunications common carriers would be counterproductive, as it would lead to confusion. Common carriers would not know which agency to rely on for advice or which agency's compliance standards to follow. There being no compelling demonstration of a problem in need of a solution, USTA asks that you not authorize the FTC to assert concurrent jurisdiction with the FCC over telecommunications common carriers.

Thank you.