

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION FOR
A DECLARATORY RULING TO
DETERMINE:

WHETHER PETITIONER IS A
TELEPHONE SOLICITOR MAKING
UNSOLICITED PHONE CALL PURSUANT
TO SDCL 49-31

Petition Filing Number: _____

PETITION FOR DECLARATORY RULING

Pursuant to ARSD ARSD 20:10:01:34, AF Pierre, Inc. d/b/a Anytime Fitness in Pierre, South Dakota (“Anytime”) petitions the Commission to issue a declaratory ruling to determine whether, according to the facts presented herein, it is a telephone solicitor as defined in SDCL 49-31-1 (30).

INTRODUCTION

Anytime Fitness is a national franchise that is in the health and fitness industry. Specifically, Anytime Fitness is a gym that offers 24 hour access to its members. The facility employs local residents and offers fitness equipment and wellness classes for member use. The Pierre Anytime is independently owned by AF Pierre, Inc. AF Pierre, Inc is a 100% family owned business that invested capital in the franchise to open a location in Pierre. The family saw opportunity in Pierre despite its small population. AF Pierre, Inc. rents a physical space in Pierre, SD. Since 2007 Anytime has offered services to Pierre residents and those traveling into the State’s capital city.

ARSD 20:10:01:34

1. The statute in question: SDCL 49-31-1(30)

"Telephone solicitation call," any call made to a South Dakota consumer by a telephone solicitor, originating from South Dakota or elsewhere, for the purpose of soliciting a sale of any consumer goods or services to the person called, for the purpose of soliciting an extension of credit for consumer goods or services to the person called, or for the purpose of obtaining information that may be used for the direct solicitation of a sale of consumer goods or services to the person called or an extension of credit for such purposes;

2. The facts and circumstances which give rise to the issue to be answered by the Commission:

At the corporate franchise level Anytime established a program whereby its members can gift friends and family a trial membership worth \$100. To participate in the program, a member provides to Anytime the names and phone numbers of up to 10 friends and/or family. Those 10 individuals are then contacted by Anytime via telephone and invited to make an appointment to redeem the gift trial membership worth \$100.

The friends and family gifting program was utilized by the Pierre, SD location until recently when the program was temporarily discontinued. The program was paused as a result of a complaint received by the South Dakota PUC Staff. Specifically, the PUC Staff received a complaint from a consumer whose phone number is on the SD Do Not Call Registry. Anytime admits it called this individual to offer a \$100 membership gift. The complainant's phone number had been given as a referral from a current member.

After receipt of the complaint, the SD PUC Staff investigated and believes Anytime violated the Do Not Call laws. Anytime denies that it makes "telephone solicitation calls" as is defined in the law. Anytime wants to avoid an adversarial complaint proceeding and voluntarily

presents this legal question to the Commission. Anytime seeks the Commissioners' guidance and desires to resolve this issue through this declaratory proceeding.

3. The precise issue to be answered by the Commission's declaratory ruling: Are the gift membership calls Anytime makes to consumers "telephone solicitation calls" as defined by SDCL 49-31-1(30).

Anytime calls South Dakota consumers that are referred to it by family or friends.

Anytime makes the calls to the referred consumers to schedule an appointment for the consumer to claim a \$100 gift trial membership.

Anytime does NOT:

- i) Solicit a sale from the consumer on the phone call. In fact, Anytime has never sold a membership over the phone. It is against company policy to do so.
- ii) Solicit an extension of credit for consumer goods on the phone call. Anytime does not extend credit.
- iii) Seek information from the consumer that may be used for the direct solicitation of a sale of consumer goods or services. Anytime does not collect information from consumers via telephone. Rather, any consumer who desires to accept the \$100 gift membership must physically go to the physical gym location in Pierre, SD. Only then is any information collected from the consumer that can be used to solicit a sale. Sale solicitations only occur in person in the physical store location.
- iv) Seek information from the consumer that may be used for an extension of credit for such purposes. Anytime does not extend credit to consumers.

As a result, Anytime argues the phone calls it makes to consumers are not "telephone solicitation calls" as defined by SDCL 49-31-1(30)


Anytime respectfully requests the Commission find the phone calls made by Anytime as described herein are not "telephone solicitation calls" as defined by SDCL 49-31-1(30).

CONCLUSION

Anytime prides itself on being a responsible member of the communities in which it does business. It is not common for the business to appear in front of any legal or regulatory authority. Therefore, it is very important to the Anytime owners to resolve this issue. Anytime looks forward to an opportunity to answer the Commissioners' questions. Anytime requests the opportunity to present information and argument to the Commission at a regularly scheduled Commission meeting.

Dated this 10 day of July, 2019.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 
KARA C. SEMMLER
Attorneys for Petitioner
503 South Pierre Street
PO Box 160
Pierre, SD 57501-0160
(605) 224-8803

CERTIFICATE OF SERVICE

10 Kara C. Semmler of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 10 day of July, 2019, she electronically filed a copy of the foregoing in the above captioned action through the SD PUC electronic filing system.


KARA C. SEMMLER