

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: TC19-041

AF PIERRE, INC. REPLY TO
COMMISSION STAFF'S FILING

AF Pierre, Inc. d/b/a Anytime Fitness in Pierre, South Dakota ("Anytime") now responds to the Commission Staff's comments filed regarding its Petition for Declaratory Ruling.

Anytime argues it is a not telephone solicitor as defined in SDCL 49-31-1 (31) because it does not make "telephone solicitation calls" as defined in SDCL 49-31-1 (30). As a result, Anytime is not in violation of any Do Not Call statute.

Anytime requests the Commission answer the following question of law: Are the calls Anytime makes to consumers to offer gift membership considered "telephone solicitation calls" as defined by SDCL 49-31-1(30)?

As the Commission knows, Anytime argues the answer should be, "no." Commission Staff argue the answer should be, "yes." Anytime now replies to Staff's response as follows:

1. Staff is correct, Anytime is not registered as a "telephone solicitor." It argues that is not operating in that capacity as it does not make "telephone solicitation calls."
2. The Anytime physical store in Pierre is not owned by a Minnesota entity. Rather, it is owned by AF Pierre, Inc. a North Dakota Corporation.
3. Anytime does not take issue with the purpose, background or importance of the Do Not Call Registry. However, it maintains the purpose of its calls do not fall within the

purpose of the Do Not Call Registry. Anytime does not make calls to sell a service or thing. The South Dakota Do Not Call Registry protects consumers from unwanted phone calls made to solicit a sale. Anytime does not solicit sales over the phone.

4. Anytime is not “seeking to take advantage of a loophole” as Commission Staff characterized it. Anytime does not make phone calls to consumers out of any ill intent and has no desire to take advantage of anyone. Commission Staff mischaracterized the facts.

Staff also mischaracterized Anytime’s calls as “willful violations of the law.” Anytime believes the calls it made are within the law as they are not sales calls. It is unnecessary to portray Anytime as a bad-actor. Anytime is a family owned business glad to be offering its services in a small community. Anytime brought this docket itself and desires to learn the answer to the question presented. Anytime is not a criminal company and its owners intend to do good honest business.

5. Anytime does not contact consumers to “get them to become members” as Staff wrote. Rather, Anytime calls consumers to offer them a \$100 free gift. Certainly, Anytime hopes that its facilities and services are impressive and those that accept the gift sign up for membership later. However, the point of the calls is to offer the gift, not make a sale. It seems Commission Staff misunderstands the \$100 gift program. No person who accepts the gift needs to buy anything. Staff’s examples given in its reply suggest that a purchase must be made for any consumer to accept the \$100 gift. That is simply not the case for Anytime. Consumers can accept the \$100 gift no strings attached. There is no required purchase.
6. The \$100 free gift can be used in one of 2 ways:
 - a. The recipient of the gift has the option to use the gift card as a free 14 days membership. This includes a key card, a 60 minute meeting with one of the company’s trained fitness professionals, a reading on the company’s InBody system, which is a state of the art body scanner, and access to the company’s app.
 - b. The other option for a gift recipient is to utilize the \$100 towards his/her first month, which comes with a free 60 minute meeting with a fitness professional, the InBody reading, free key card (valued at \$49), free Heart Rate Belt (Valued at \$69) a free Virtual Coach, as well as access to the company’s heart rate system software which gives real time results during a workout and a post workout recap once the individual leaves.
7. Anytime admits that it called a consumer who asked to be removed from the call list. This was an error. It is part of Anytime’s practice to remove individuals from the call list that request it. Anytime apologizes. However, this error with one consumer does not change the definition of “telephone solicitation call” as it is written in the law.

8. Anytime acknowledges that calls made for “the purpose of obtaining information and establishing a date and time for an appointment...” was previously an exception written into the Do Not Call chapter of the SD Code. The exception was removed in 2007. However, nothing was added to the definition of “telephone solicitation call.” Removal of the exception does not change the nature of the phone calls made by Anytime. Anytime does not solicit sales via phone. Therefore, the calls in question are not “telephone solicitation calls.”

9. The cases cited by Staff are not on point and factually dissimilar to the case at hand:

- a. *Reichenbach v. Chuyng Holdings, LLC* 823 N.E.2d 29. Staff argues this case helps define “telephone solicitation” as it appears in SD law. However, the case actually discusses the definition of, “unsolicited advertisement” as it appears in Title 47 of the US Code.

According to US Code, “unsolicited advertisement” is defined as, “any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person’s prior express invitation or permission.”

Under SD law, to be a “telephone solicitor” is defined as “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...”

According to the US Code, the key is whether the availability of service was communicated in an unwanted way. In SD, the key is whether an unwanted call was made for the purpose of securing a sale.

Comparing the two definitions is improper. This case cannot be used in any way to guide the Commission. The definition of an improper call as defined in Federal Code is very different than the definition of an improper call in South Dakota. Our legislature has determined a call must be made to sell a service or product to fall within the regulation of the SD PUC. The US Code defined improper calls in a much broader fashion. This state cannot use the Federal Code definition of an improper call. The SD PUC has jurisdiction to enforce SD Code only.

- b. *Chesbro v. Best Buy Stores, L.P.* 705 F.3d 913 (9th Cir. Dec 27, 2012). This case factually addresses pre-recorded automated calls. The pre-recorded calls, in the *Best Buy* case inform a consumer of a benefit they received from Best Buy (reward points) that can only be used if the consumer purchases more at Best Buy. The points can only be used if another purchase is made at Best Buy. This fact scenario is not like the Anytime calls that are the subject of this declaratory ruling.

Anytime does not utilize a pre-recorded message or any automated service to make phone calls. Real-live humans make the calls. Furthermore, the consumer called does not need to make a purchase to take advantage of the free \$100 membership. Consumers gifted the \$100 membership can use the \$100 and walk out the door thereafter without any ongoing financial obligation to Anytime.

The call made to consumers by Anytime is not "dual purpose" as discussed in the *Best Buy* case. The Anytime caller is not trying to sell anything on the phone. Rather, he/she is merely trying to give away a \$100 gift, no obligation to purchase a membership. All examples given in the *Best Buy* case (and by Commission Staff) require the consumer agree to buy or otherwise obligate themselves to a product or service that will cost money. That is simply not the case with the calls Anytime makes. The case is not on point.

10. On July 17, 2019 Anytime filed correspondence with the Commission requesting more than the 60 day time (as set in Administrative Code) for this case to be heard. The sole purpose of this request is to provide an opportunity for Anytime representatives to speak directly to the Commission at a scheduled Commission meeting. The company understands that the Commission permits parties to appear via phone at its scheduled meetings. However, the question presented is of significant importance to Anytime and it requests the opportunity to make a personal appearance.

The Petition was filed on July 10, 2019. The Commission's scheduled August 6 meeting date was not workable for Anytime and Commission Staff is not available for the scheduled August 20 Commission meeting. It seems, to be fair to both parties, that a September date should be identified. Staff and Anytime identified the Commission's regularly scheduled September 17, 2019 meeting as a date that works for both parties.

The questioned practice has been discontinued pending resolution of this case and Anytime is not attempting to cause any unnecessary delay. No harm can possibly be identified as a result if the matter is not heard until September 17, 2019.

CONCLUSION

The law at issue is:

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;

Anytime calls South Dakota consumers that are referred to it by family or friends. No random phone calls are made. 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:

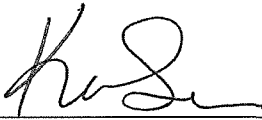
- i) Solicit a sale from the consumer on the phone call. In fact, Anytime has never sold a membership over the phone. It is against company policy to do so.
- ii) Solicit an extension of credit for consumer goods on the phone call. Anytime does not extend credit.
- iii) Seek information from the consumer 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 can do so without any further obligation to Anytime. An interested consumer must physically go to the 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).

Dated this 18 day of July, 2019.

MAY, ADAM, GERDES & THOMPSON LLP

BY:  _____

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CERTIFICATE OF SERVICE

18 Kara C. Semmler of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 18 day of July, 2019, she electronically filed a copy of the foregoing in the above captioned action through the SD PUC electronic filing system and served all parties listed on the Service List.



KARA C. SEMMLER