

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

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| IN THE MATTER OF AF PIERRE, INC. |) | STAFF’S RESPONSE TO |
| DBA ANYTIME FITNESS’ PETITION FOR |) | PETITION FOR DECLARATORY |
| A DECLARATORY RULING REGARDING |) | RULING |
| ALLEGED DO NOT CALL VIOLATIONS |) | |
| |) | TC19-041 |

Staff of the South Dakota Public Utilities Commission (Commission) hereby files this Response to Anytime Fitness’s Petition for Declaratory Ruling. On July 10, 2019, the Commission received a Petition from AF Pierre, Inc. d/b/a Anytime Fitness (Petitioner or AF). In its Petition, AF seeks a ruling from the Commission as to whether it is in violation of the Do-Not-Call Laws found in SDCL Chapter 49-31.

Commission Staff originally contacted Petitioner after receiving several complaints regarding AF calling South Dakota residents in a business practice that Petitioner admits in their Petition. Staff had hoped to work through the issue to bring AF into compliance, and we appreciate the opportunity to work with them now in this Declaratory Ruling. However, as of the filing of this Response, to Staff’s knowledge AF has not yet registered as a telephone solicitor.

It is Staff’s position that by making unsolicited calls to South Dakota residents whose numbers are on the Do-Not-Call registry and by making these calls without registering as a telemarketer, AF violated South Dakota and federal law. Staff disagrees with the Petitioner’s interpretation of the applicable statutes, as well as some of the facts described by AF in its Petition. The facts and circumstances as Staff understands them are as follows:

1. Anytime Fitness, LLC is a Minnesota corporation with franchise locations throughout South Dakota, including a location in Pierre.
2. AF is a commercial enterprise and not a tax-exempt, nonprofit organizations.
3. Staff became involved after Staff received an informal complaint from an individual who had received several calls from AF. This South Dakota resident had requested to AF that they not call them, but the phone calls continued after the SD resident made this request.
4. After receiving this SD resident complaint, Staff reached out to AF, AF confirmed in a voicemail to Staff that AF called this person on at least five occasions, some of which occurred after the individual requested not to be contacted again.
5. AF is not registered as a telephone solicitor in South Dakota.
6. Subsequent to the first complaint, Staff has received information from at least three other SD residents who were similarly contacted by AF.
 - a. None of these persons had a prior business relationship with Petitioner;
 - b. All of these individuals are listed on the Do-Not-Call registry;
 - c. All of these individuals were called on a telephone that meets the definition of a residential telephone pursuant to SDCL 49-31-1(20).
7. AF informed Staff that the practice of collecting phone numbers from new members and calling those new member's family and friends was an integral part of its business model.

I. Legal Arguments

“Within the federal government’s web of indecipherable acronyms and byzantine programs, the Do-Not-Call registry stands out as a model of clarity. It means what it says. If a person wishes to no longer receive telephone solicitations, he can add his number to the list. The [Telephone Consumer Protection Act (TCPA)] then restricts the telephone solicitations that can

be made to that number.”¹ “Congress enacted the law to protect against invasion of privacy that were harming people. The law empowers each person to protect his own personal rights.

Violations of the law are clear, as is the remedy.”²

AF made these calls for the ultimate purpose of making a sale. Adding an extra step to the process does not negate that fact. The calls made by AF were therefore willful violations of the TCPA and South Dakota law.

AF claims it is not a making telephone solicitation calls as defined in SDCL 49-31-1(30). It is AF’s contention that it is merely making calls to schedule an appointment and offer a gift card for a trial membership. But the bottom line is, AF is contacting by telephone South Dakota residents to get them to become members.

Additionally, it is important to note that the perceived loophole which Petitioner seeks to take advantage was closed by the Legislature in 2007 by SB 23. Prior to the change in 2007, the law contained an exception to the definition of “unsolicited telephone call” that applied to any call made “for the purpose of obtaining information and establishing a date and time for an appointment with the telephone solicitor...” AF now attempts to mask its telephone solicitation calls by seeking to offer trial memberships and tours of its facilities. This is precisely the business practice the Legislature ended. If Petitioner’s interpretation was accurate, every cable company in the country would circumvent the Do Not Call registry by offering a month free trial. Car dealerships could call without restriction to offer people free test drives of their new or used cars. This behavior is a perfect example of what the registry seeks to prevent.

¹ *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 649 (2019).

² *Id.* at 650.

Because unwanted telephone solicitation has become a national problem, many courts throughout the United States have had occasion to address the various provisions of the laws in this field. In a 2012 case, the United States Court of Appeals rejected the argument put forth by the solicitor, Best Buy Stores, that it was not engaging in solicitation because the calls encouraging participation in its rewards program were “purely informational” and did not “explicitly reference any property, goods, or services.”³ The Court noted that “The FCC has determined that so-called ‘dual purpose’ calls, those calls with both a customer service or informational component as well as a marketing component, are prohibited.”⁴ The Court stated that it applied “a measure of common sense” in reasoning that the recipient of the call would be required to go to a Best Buy store or website and make a purchase in order to redeem the rewards points offered in the phone call, thus, encouraging the listener to make a future purchase.⁵

The *Best Buy* case, which ultimately resulted in a \$4.55 million settlement⁶, is right on point for the current issue. It stands for the proposition that a phone call with the purpose of making a future sale falls within the prohibitions of the TCPA. The dual purpose of providing information about the gym does not negate that fact or cure the violation.

Another relevant case comes from the Court of Appeals of Ohio. In a 2004 case, that Court rejected the caller’s argument that it was not engaging in telephone solicitation because the call required the recipient to do an affirmative act in order to hear the actual sales pitch.⁷ In the same vein, the fact that the recipients of the calls from AF would need to take the affirmative step of going to the gym does not relieve AF of the requirements of the TCPA. The Ohio Court

³ *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913 (9th Cir. Dec. 27, 2012).

⁴ *Id.* at 917 (citing, *2003 Report and Order* at 14097-98 ¶¶ 140-142).

⁵ *Id.* at 918.

⁶ *Chesbro v. Best Buy Stores, L.P.*, 2014 WL 793362.

⁷ *Reichenbach v. Chung Holdings, LLC*, 823 N.E.2d 29, 33.

went on to say that the FCC “has also expressed the opinion that a sale is not required in order for the message to contain an unsolicited advertisement and that offers for ‘free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute an unsolicited advertisement.’”⁸

Furthermore, Petitioner seems to apply that because it intends to make the ultimate sale at its place of business after calling and inviting the recipient to the gym, Petitioner is not technically selling anything over the phone. Nothing in the applicable statutes provides for such an exception.

AF is not running a charity. The “gift” of \$100 it offers over the phone is not without strings attached. One cannot take advantage of the \$100 without buying or contracting for something. This practice could be compared to a car dealer calling to offer a \$1,000 gift card, but the recipient has to buy the \$20,000 car. It is a hallmark violation of the Do-Not-Call Registry.

Telemarketers, such as AF, are also expected to keep individual Do-Not-Call lists, reflecting persons who have directly told the company that they do not wish to receive further solicitations, in addition to check the Do-Not-Call Registry to avoid bothering those who have asked to be left alone.⁹ At least one of those persons called by AF relayed to Staff that she requested not to be called again, but received at least three additional phone calls. This was admitted by AF in a voicemail to Staff.

⁸ *Reichenbach*, supra 33.

⁹ *Krakauer*, supra 649.

Indeed, there is a lawful way to go about advertising a new business to friends and family of new customers, but the way AF is going about it is decidedly unlawful. Other businesses give the gift cards to the new customer for the new customer to pass on to friends and family. Such action is not prohibited by the TCPA.

Finally, Staff has been told by AF that the practice in dispute is a practice that all other AF franchises are instructed to follow, leading Staff to believe the violations of this nature are numerous and widespread.

The Federal Trade Commission (FTC) and state governments throughout the country have been working hard in recent years to rein in unsolicited telemarketing. In June of this year, the FTC announced Operation Call it Quits.¹⁰ In the FTC's crackdown, defendants have been fined up to tens of millions of dollars each in a determined effort to end unlawful practices.

II. Conclusion

Petitioner requests the Commission issue a declaratory ruling to determine whether it is a telephone solicitor as defined in SDCL 49-31-1(30). Staff submits that the case law overwhelmingly supports a ruling that AF is acting as a telephone solicitor. By making numerous unsolicited marketing calls, AF has violated the laws of the State of South Dakota and put an unwanted burden on those receiving the unwanted calls. Staff requests the Commission rule that AF is a telephone solicitor and direct AF to come into compliance with applicable laws and regulations.

¹⁰ See FTC press release: <https://www.ftc.gov/news-events/blogs/business-blog/2019/06/operation-call-it-quits-theres-no-quit-our-fight-against>.

Dated this 15th day of July 2019.

A handwritten signature in blue ink that reads "Kristen Edwards". The signature is written in a cursive style and is positioned above a horizontal line.

Kristen N. Edwards

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