

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Joseph T. Ryerson & Son, Inc. for Declaratory Ruling)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338

APPLICATION FOR REVIEW

Glenn L. Hara
Brian J. Wanca
Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501
ghara@andersonwanca.com

Attorneys for Applicant Anderson + Wanca

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APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission’s rules,¹ Applicant Anderson + Wanca seeks review by the full Commission of the Order issued by the Consumer & Governmental Affairs Bureau on September 4, 2020, in the above-captioned proceeding.²

The Ryerson Bureau Order granted the Petition of Joseph T. Ryerson & Son, Inc. (“Ryerson”),³ concluding that under the reasoning of the recent Amerifactors Bureau Order,⁴ Ryerson did not send its unsolicited advertisement “to a telephone facsimile machine” as defined by 47 U.S.C. § 227(a)(3) because it was received by an “online fax service” and then forwarded to the end-user by email.⁵ As with the Amerifactors Bureau Order, which is currently the subject

¹ 47 C.F.R. § 1.115.

² See *In re Petition of Joseph T. Ryerson & Son, Inc. for Declaratory Ruling*, CG Docket Nos. 02-278, 05-338, Declaratory Ruling, 2020 WL 5362216 (CGAB Sept. 4, 2020) (“Ryerson Bureau Order”).

³ See *Petition of Joseph T. Ryerson & Son, Inc. for Declaratory Ruling*, CG Docket Nos. 02-278, 05-338 (filed Nov. 3, 2015) (“Ryerson Petition”).

⁴ See *In re Amerifactors Fin. Group, LLC Pet. for Expedited Declaratory Ruling*, CG Docket Nos. 02-278, 05-338, Declaratory Ruling, 2019 WL 6712128 (CGAB Dec. 9, 2019) (“Amerifactors Bureau Order”).

⁵ Ryerson Bureau Order ¶ 4.

of a separate Application for Review,⁶ the Commission should reverse the Ryerson Bureau Order under Rule 1.115(b)(2) because its reasoning regarding “online fax services” is in conflict with the statute, regulations, case precedent, and established Commission policy, and is based on erroneous factual findings.⁷ As the Commission has previously ruled, “it would make little sense to apply different rules based on the device [a stand-alone fax machine or to one associated with a personal computer or fax server] that ultimately received it.”⁸

In the alternative, the Commission should vacate the Ryerson Bureau Order and remand for an inquiry into the mistaken “understand[ing]” underlying the Amerifactors Bureau Order that a “fax server or similar device” that receives a fax and converts it to email “cannot itself print a fax,” and is therefore not “equipment which has the capacity . . . to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.”⁹ The Bureau’s “understand[ing]” on this important and material question of fact is unsupported by the record, and it is erroneous.

⁶ See Application for Review of Career Counseling, Inc., CG Docket Nos. 02-278, 05-338 (filed Jan. 8, 2020).

⁷ 47 C.F.R. § 1.115(b)(2)(i) & (iv).

⁸ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14134, ¶ 202 (rel. July 3, 2003) (“2003 Order”).

⁹ Amerifactors Bureau Order ¶ 11.

Executive Summary

Since the enactment of the Telephone Consumer Protection Act of 1991 (“TCPA”), the Commission has rejected every attempt by fax advertisers to “circumvent” the TCPA by arguing that a particular type of fax-receiving device is not a “telephone facsimile machine,” be it a “computer fax modem board,” as addressed in the 1995 Order,¹⁰ or a “computerized fax server” that converts the fax to a different format and forwards it to the end-user’s email “inbox,” as addressed in the 2003 Order and the WestFax Order.¹¹ The Ryerson Bureau Order, like the Amerifactors Bureau Order, conflicts with these prior Commission rulings, as well as numerous case authorities applying the TCPA and the Commission’s rules in private TCPA enforcement actions.

Commission precedent and case precedent holds that, even where the consumer uses an online fax service to route faxes, the consumer who is the target of the fax has a right to sue under the TCPA.¹² It makes no sense to rule, as the Ryerson Bureau Order and Amerifactors Bureau Order do, that a “fax server” that receives “faxes” is not a “telephone facsimile machine” simply because the fax is then converted to another format to be accessed by the end-user. That conclusion is contrary to the statute, regulations, case authority, and established Commission policy, and it should be reversed.

¹⁰ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12405, ¶ 28 (rel. Aug. 7, 1995) (“1995 Order”).

¹¹ 2003 Order ¶¶ 199–200; *In re WestFax, Inc. Petition for Consideration & Clarification*, 30 FCC Rcd. 8620, 8623, ¶ 9 (rel. Aug. 28, 2015) (“WestFax Order”).

¹² WestFax Order ¶ 12 (ruling “the ‘recipient’ of a fax is the consumer for whom the fax’s content is intended and to whom the fax’s content is sent by dialing that consumer’s fax number,” and not the online fax service “that convert faxes to email” on the consumer’s behalf); *J2 Glob. Commc’ns, Inc. v. Protus IP Sols.*, 2010 WL 9446806, at *8 (C.D. Cal. Oct. 1, 2010) (holding that “‘the recipient’ of an unsolicited fax is the person to whom the fax is directed and not” the online fax service provider).

In addition, the Amerifactors Bureau Order on which the Ryerson Bureau Order relied was based on the mistaken “understand[ing]” that “an online fax service cannot itself print a fax,” and “the user of an online fax service must connect his or her own equipment in order to do so,” so the receiving equipment lacks the “capacity” to print, as required by 47 U.S.C. § 227(a)(3).¹³ That “understanding” is supported by nothing in the record, and it is erroneous. Any “equipment” that can receive a fax and convert it to another format and send it as an email attachment has the “capacity” to print the fax as well. Because the Ryerson Bureau Order is based on the same erroneous factual predicate as the Amerifactors Bureau Order, it should be reversed. In the alternative, to the extent the Commission determines that further factual development is required as to the “capacity” of the “equipment” used by online fax services, the Commission should vacate the Ryerson Bureau Order and remand for further inquiry on that issue.

¹³ Ryerson Bureau Order ¶ 14 (citing Amerifactors Bureau Order ¶ 11).

Questions Presented

Pursuant to Section 1.115(b), this Application identifies two questions for review:

- (1) Whether the Bureau’s reasoning, based on the Amerifactors Bureau Order, that a “fax server or similar device” is not a “telephone facsimile machine” as defined by 47 U.S.C. § 227(a)(3) if it is used as part of an “online fax service,” where the end-user accesses the fax as the user would access an email, is “in conflict with statute, regulation, case precedent, or established Commission policy,” warranting Commission review under Rule 1.115(b)(2)(i).
- (2) Whether the Bureau’s understanding, also based on the Amerifactors Bureau Order, that “an online fax service cannot itself print a fax” is based on an “erroneous finding as to an important or material fact” warranting Commission review under Rule 1.115(b)(2)(iv).

Argument

I. The Ryerson Bureau Order is in conflict with the statute, regulation, case precedent, and established Commission policy.

The Ryerson Bureau Order is “in conflict with statute, regulation, case precedent, or established Commission policy,” warranting review under Rule 1.115(b)(2)(i). The TCPA makes it unlawful to “use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement,” unless certain exceptions are met.¹⁴ Congress passed this provision of the TCPA¹⁵ for the “purpose” of “facilitat[ing] interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers.”¹⁶ The statute defines “telephone facsimile machine” as any “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.”¹⁷ Congress authorized the Commission to “implement” this prohibition.¹⁸

The Commission has given the statutory term “telephone facsimile machine” a broad construction, in accordance with the principle that the TCPA is “a remedial statute that was passed to protect consumers”¹⁹ and so “should be construed to benefit consumers.”²⁰ In 1995, for example, the Commission ruled that “telephone facsimile machine” includes “computer fax

¹⁴ 47 U.S.C. § 227(b)(1)(C).

¹⁵ Pub. L. No. 102-243, § 3(a), 105 Stat. 2394.

¹⁶ S. Rep. 102-178 at 1, 1991 U.S.C.C.A.N. 1968, 1968.

¹⁷ 47 U.S.C. § 227(a)(3).

¹⁸ *Id.* § 227(b)(2).

¹⁹ *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013).

²⁰ *Physicians Healthsource, Inc. v. Boehringer, Ingelheim Pharm., Inc.*, 847 F.3d 92, 96–97 (2d Cir. 2017).

modem boards,” which “enable personal computers to transmit messages to or receive messages from conventional telephone facsimile machines *or other computer fax modem boards*,” holding such devices are “telephone facsimile machines” under the TCPA.²¹

In 2002, the Commission initiated a rulemaking proceeding to update its regulations, seeking public comment on, among other issues, whether the development of “computerized fax servers” might “warrant revisiting the rules on unsolicited faxes.”²² Several “industry representatives” filed comments urging the Commission to rule that faxes that are sent to “fax servers” and then forwarded to the end-user’s “inbox” by email are not sent to a “telephone facsimile machine” because they “do not implicate the harms Congress sought to redress in the TCPA, as they are not reduced to paper and can be deleted from one’s inbox without being opened or examined.”²³

In the 2003 Order, the Commission rejected these arguments, ruling that that “unsolicited faxes impose costs on consumers, result in substantial inconvenience and disruption, and also may have serious implications for public safety.”²⁴ Even when a fax is sent to a “fax server” and then forwarded to the end-user by email, the Commission concluded, the “computerized fax server” is a “telephone facsimile machine.”²⁵ The Commission reasoned that the TCPA “broadly applies to any equipment that has the *capacity* to send or receive text or images,” and that the focus on the “capacity to transcribe text or images” is designed to “ensure that the prohibition on

²¹ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12405, ¶ 28 (rel. Aug. 7, 1995) (“1995 Order”) (emphasis added)

²² *In re Rules & Regulations Implementing Tel. Consumer Prot. Act of 1991*, 17 FCC Rcd. 17459, 17482 (Pub. Notice Sept. 18, 2002) (emphasis added).

²³ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14133 ¶ 199 (rel. July 3, 2003) (“2003 Order”).

²⁴ *Id.*

²⁵ *Id.* ¶ 200.

unsolicited faxing not be circumvented.”²⁶ The Commission ruled that “Congress could not have intended to allow easy circumvention of its prohibition when faxes are (intentionally or not) transmitted to personal computers and fax servers, rather than to traditional stand-alone facsimile machines.”²⁷ The Commission noted that, although a fax may not automatically print when it is received by a fax server and forwarded to the end-user’s email inbox, such faxes may nevertheless “shift the advertising costs of paper and toner to the recipient, if they are printed,” and they “may also tie up lines and printers so that the recipients’ requested faxes are not timely received.”²⁸

Even apart from the harms of lost paper or toner or tying up of lines, the Commission ruled that Congress was also concerned with the “interference, interruptions, and expense” to businesses and interstate commerce in general caused by junk faxes, and ruled that faxes sent to a fax server and forwarded to the user’s “inbox” “may increase labor costs for businesses, whose employees must monitor faxes to determine which ones are junk faxes and which are related to their company’s business.”²⁹ The Commission ruled that “because a sender of a facsimile message has no way to determine whether it is being sent to a number associated with a stand-alone fax machine or to one associated with a personal computer or fax server, it would make little sense to apply different rules based on the device that ultimately received it.”³⁰ The Commission also addressed the concerns of commenters regarding “commercial facsimile services,” that “transmit faxes to the recipients as email attachments,” ruling that those

²⁶ *Id.* ¶ 201 (emphasis added).

²⁷ *Id.*

²⁸ *Id.* ¶ 202.

²⁹ *Id.* ¶¶ 199–202.

³⁰ *Id.* ¶ 202.

“commercial facsimile services” do not violate the TCPA by forwarding faxes to the recipients because “any rules the Commission adopts with respect to unsolicited facsimile advertisements would not extend to facsimile messages transmitted as email over the Internet.”³¹

On September 25, 2009, WestFax, Inc. filed a petition asking the Commission to “clarify” the 2003 Order to rule that an “efax”—in which “[a] facsimile transmission is received on a fax server,” and then “the fax server converts the message into a digital image file that is then sent as an email attachment via the Internet to the recipient”—is not sent to a “telephone facsimile machine” and thus not covered by the TCPA.³² WestFax argued that the evils Congress sought to remedy in the TCPA do not “make[] any sense” when applied to efaxes, and that “the House Report findings” cited in the 2003 Order “are terribly dated.”³³ WestFax argued that Congress’s findings regarding lost paper, toner, as well as its findings regarding time wasted “monitoring” unwanted faxes by employees, and “inability to process actual business communications or lines or printers tied up,” were “not accurate with respect to faxes sent to fax servers.”³⁴ WestFax argued, “[t]his is the 21st century,” and asked the FCC to update its rules to account for “fax servers.”³⁵

On August 28, 2015, the Consumer & Governmental Affairs Bureau denied the WestFax Petition, relying largely on the 2003 Order.³⁶ The Bureau rejected “the contention that efaxes do not implicate the TCPA’s consumer protection concerns” because they “may shift the advertising

³¹ *Id.* ¶ 199 & n.736.

³² *WestFax, Inc. Petition for Consideration & Clarification*, CG Docket Nos. 02-278, 05-338 (Sept. 25, 2009) at 2.

³³ *Id.* at 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *In re WestFax, Inc. Petition for Consideration & Clarification*, 30 FCC Rcd. 8620, 8623, ¶ 9 (rel. Aug. 28, 2015) (“WestFax Order”).

costs of paper and toner to the recipient if they are printed” and can cause “interference, interruptions, and expense” the same as any junk fax.³⁷ The Bureau ruled that efaxes “just like paper faxes, can increase labor costs for businesses, whose employees must monitor faxes to separate unwanted from desired faxes.”³⁸ The Bureau applied the 2003 Order, ruling that “it would make little sense to apply a different set of rules (or, in this case, no rule at all) to faxes sent to one type of device (a standalone fax machine) versus another (a computer and its attachments) when the sender generally does not know what device will receive the fax.”³⁹ No party sought reconsideration of the WestFax Order or filed an application for review.

In sum, the Commission has consistently rejected³⁷ the argument that a fax is not sent to a “telephone facsimile machine” when it is received by a “fax server” and then forwarded to the end user on a computer. The implication of both the Ryerson Bureau Order under review here and the Amerifactors Bureau Order—that a “fax server” receiving a fax transmission may or may not be a “telephone facsimile machine” depending on whether the fax is then converted to some other format—is contrary to the language of the statute, as interpreted by the 2003 Order and the WestFax Order.

The Ryerson Bureau Order follows the reasoning of the Amerifactors Bureau Order, which misconstrued the 2003 Order, focusing on the statement that the TCPA does not prohibit faxes “sent as email over the Internet,” and characterized the reasoning of the 2003 Order as applying solely to “a personal computer attached to printer and modem,” which “would remain within the scope of the statute.”⁴⁰ To the contrary, the Commission’s ruling that faxes “sent as

³⁷ *Id.* ¶ 11.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Amerifactors Bureau Order ¶ 5.

email over the Internet” are not sent to a “telephone facsimile machine” merely made clear that the “online fax service” does not violate the TCPA by forwarding the fax to the end-user by email.⁴¹ The 2003 Order clearly held that the *fax* transmission—from the fax sender to the “fax server” maintained by the “commercial facsimile service”—is still sent to a “telephone facsimile machine.”⁴² The 2003 Order is also not limited to “a personal computer attached to printer and modem,” as the Amerifactors Bureau Order stated. The 2003 Order expressly considered and rejected the suggestion that a fax sent to a “computerized fax server” and then forwarded to the end-user’s email “inbox” is not sent to a “telephone facsimile machine.”⁴³ Indeed, a “fax server” is functionally nothing more than a computer with multiple fax modems.

The Amerifactors Bureau Order sought to distinguish the WestFax Order on the basis that it “did not consider” the same type of “online fax services” described in the Amerifactors Petition, where (1) the WestFax Order considered only “whether the mere conversion of a conventional fax to email at some point in the transmission chain removed the fax from the TCPA’s reach” and (2) the WestFax Order “assumed,” “based on a limited record,” that “that the ‘efax’ in question was sent to a computer with an attached fax modem that had the capacity to print the fax, as required by statute.”⁴⁴

This reasoning is erroneous because the WestFax Order considered exactly the same type of “online fax services” raised in the Amerifactors Petition and the Ryerson Petition, where “the recipient computers are attached to fax servers *or services* that convert the fax into a format that

⁴¹ 2003 Order ¶ 199 & n.736.

⁴² *Id.*

⁴³ *Id.* ¶¶ 199–200.

⁴⁴ Amerifactors Bureau Order ¶ 15.

is attached to an email received by the computer.”⁴⁵ It specifically considered WestFax’s “efax service,” “FaxForward,” which WestFax described as “a service that ‘automatically converts received faxes into electronic images that are delivered directly to your email inbox.’”⁴⁶ There is no difference between the “efax” service considered in the WestFax Order and the “online fax services” considered in the Amerifactors Bureau Order and Ryerson Bureau Order, in which faxes are received by a “fax server” and users access the faxes “the same way that they do email: by logging into a server over the Internet or by receiving a pdf attachment [as] an email.”⁴⁷

The courts overseeing private TCPA actions have consistently held that faxes received by the user through an “online fax service” are nevertheless sent to a “telephone facsimile machine.” As the district court explained in *Am. Copper & Brass, Inc. v. Lake City Indus. Prods, Inc.*, 2013 WL 3654550, at *5 (W.D. Mich. July 12, 2013), although the Commission “exempted from the TCPA the act of forwarding a fax by email” in the 2003 Order, “the first step—the transmission of the original fax—still falls within the confines of the TCPA.”

In *J2 Glob. Commc’ns, Inc. v. Protus IP Sols.*, two providers of “online fax services” argued that, by intercepting and converting faxes to emails, they were the “recipients” and had standing to assert TCPA claims.⁴⁸ The district court rejected this argument, holding that “[g]iven the plain language, purpose, and statutory scheme of the TCPA, the Court concludes that ‘the recipient’ of an unsolicited fax is the person to whom the fax is directed and not an unknown intermediary, like j2 [or Protus], who intercepts the transmission.”⁴⁹ The district court held that

⁴⁵ WestFax Order ¶ 9.

⁴⁶ *Id.* ¶ 4.

⁴⁷ Amerifactors Bureau Order ¶ 2.

⁴⁸ 2010 WL 9446806, at *8 (C.D. Cal. Oct. 1, 2010).

⁴⁹ *Id.*

under the Commission’s rules, persons who receive faxes on a computer as opposed to a stand-alone fax machine have no less right to sue for TCPA violations:

[T]he FCC has concluded that faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA’s prohibition on unsolicited faxes. However, a facsimile machine does not have standing under the TCPA; rather, “the recipient” has standing, “the recipient” being the person to whom the . . . unsolicited fax advertisement is directed.⁵⁰

In *Whiteamire Clinic, P.A., Inc. v. Cartridge World N. Am., LLC*, the plaintiff received the subject fax via an online fax service, which then converted it to email.⁵¹ The defendant argued that the plaintiff lacked standing to sue, and the district court rejected the argument, holding that, despite the lack of wasted paper or ink toner, the fax nevertheless “wasted [plaintiff’s] time reviewing the junk emails that could have been spent on other business activities,” and “impede[d] Plaintiff’s ability to engage in the free flow of commerce,” and that “Plaintiff suffered damages to his business in lost time and in diversion of resources and can be made whole by injunctive and monetary relief through this Court.”⁵²

The courts recognize, as the Commission recognized in the 2003 Order and the WestFax Order, that “[e]ven a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk,” and “[t]hat loss, and the statutory remedy, are the same for all recipients.”⁵³ The Sixth Circuit recognized in *American Copper & Brass, Inc. v. Lake City Indus. Prods.*, that “Congress was generally concerned with the costs associated with unsolicited fax advertisements. But

⁵⁰ *Id.* at *7 (citing 2003 Order).

⁵¹ 2017 WL 561832, at *3 (N.D. Ohio Feb. 13, 2017).

⁵² *Id.*

⁵³ *Holtzman v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013); *see also Imhoff Inv., LLC v. Alfocchino, Inc.*, 792 F.3d 627, 632 (6th Cir. 2015) (quoting *Turza* with approval).

unsolicited fax advertisements impose costs on all recipients, irrespective of ownership and the cost of paper and ink, because such advertisements waste the recipients' time *and impede the free flow of commerce.*"⁵⁴ The Eighth Circuit held in *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.* that "unsolicited fax advertising interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems."⁵⁵ These case authorities are consistent with the congressional "purpose" in passing the TCPA: to "facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers."⁵⁶

As to "established Commission policy," the 2003 Order and the WestFax Order clearly establish the Commission's policy that faxes that are received by "fax servers" and then forwarded to the user's email "inbox" by "commercial facsimile services" are sent to "telephone facsimile machines."⁵⁷ Outside the TCPA context, the Commission has refused to exempt "electronic facsimile (e-fax)" services from universal service contributions, reasoning that e-fax services "are receiving the benefit of accessing the public network and therefore assessing universal service contributions on these entities is appropriate."⁵⁸

⁵⁴ 757 F.3d 540, 544 (6th Cir. 2014) (emphasis added).

⁵⁵ 323 F.3d 649, 655 (8th Cir. 2003).

⁵⁶ S. Rep. 102-178 at 1, 1991 U.S.C.C.A.N. 1968, 1968.

⁵⁷ 2003 Order ¶ 199, n.736; WestFax Order ¶ 9.

⁵⁸ *In re High-Cost Universal Serv. Support Fed.-State Joint Bd. on Universal Serv. Lifeline & Link Up Universal Serv. Contribution Methodology Numbering Res. Optimization Implementation of the Local Competition Provisions in the Telecomm'ns Act of 1996 Developing A Unified Intercarrier Comp. Regime Intercarrier Comp. for Isp-Bound Traffic Ip-Enabled Servs.*, 24 FCC Rcd. 6475, 6691 (Nov. 5, 2008)

In sum, the Ryerson Bureau Order, like the Amerifactors Bureau Order, conflicts with the statutory definition of “telephone facsimile machine,” as applied in established Commission precedent and case precedent, and it should be reversed.

II. The Ryerson Bureau Order relies on the erroneous findings in the Amerifactors Bureau Order as to important or material questions of fact regarding whether a “fax server” is a “telephone facsimile machine” and whether consumers using “online fax services” are injured by junk faxes.

The Ryerson Bureau Order is based on the same “erroneous finding as to an important or material fact” as the Amerifactors Bureau Order, warranting Commission review under Rule 1.115(b)(2)(iv). Specifically, both orders hinge on the Bureau’s “understand[ing]” that “an online fax service cannot itself print a fax—the user of an online fax service must connect his or her own equipment in order to do so.”⁵⁹ Based on that “understanding,” the Amerifactors Bureau Order concluded that “[a]s such, an online fax service is plainly not ‘equipment which has the capacity . . . to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper,’” and is therefore not a “telephone facsimile machine” under 47 U.S.C. § 227(a)(3).⁶⁰

Like the Amerifactors Bureau Order, the Ryerson Bureau Order cites nothing in the record for its understanding that “an online fax service cannot itself print a fax,” and this understanding is erroneous. As noted by Robert Biggerstaff, the only expert in the relevant technology to comment on the Amerifactors Petition or the Ryerson Petition, every “fax server” used by an “online fax service” has “the capacity to print,” given that “1) nearly all fax servers are constructed from standard server parts that include printing ports (serial, parallel, USB, infrared, etc.); 2) they are (by definition) connected to networks and thus can print to network-

⁵⁹ Ryerson Bureau Order ¶ 11 (quoting Amerifactors Bureau Order ¶ 11).

⁶⁰ *Id.*

attached printers; and 3) because they (by definition) can send e-mails with the fax images attached, they can utilize e-mail to printer functions (such as Hewlet Packard ePrint) to print.”⁶¹ Contrary to the implication of the Amerifactors Bureau Order, this fact does not implicate the issue of equipment that may lack the “present capacity” to perform a task but could “potentially” gain that capacity through “modifications such as software changes,” as the D.C. Circuit considered in *ACA Int’l v. FCC*.⁶² Rather, in this instance, the “equipment” that the “online fax service” uses to receive a fax transmission and convert it to email plainly has the present, actual “capacity” to print a fax, without modifications such as software changes.⁶³

Ultimately, the core assertion that “an online fax service cannot itself print a fax”⁶⁴ does not pass basic logical scrutiny. Such services must be able to print faxes, if for no other reason than when testing their systems or performing maintenance to confirm received faxes are being processed properly—such as comparing original “test” fax images to those received by their service and to ensure readability and formatting of the image files their service creates. In conclusion, the Ryerson Bureau Order, like the Amerifactors Bureau Order, is based on an erroneous factual finding that all “fax servers” lack the capacity to print a fax, and it should be reversed.

III. The Ryerson Bureau Order should be changed to deny the Petition and reaffirm the conclusion of the 2003 Order and the WestFax Order that a “fax server” is a “telephone facsimile machine” and that users of “online fax services” are injured by junk faxes.

⁶¹ Biggerstaff Comments in Opposition to the Amerifactors Petition at 4–5 (filed Sept. 1, 2017); Comments of Robert Biggerstaff on the Petition of Joseph T. Ryerson & Son, Inc. for Declaratory Ruling at 2 (filed Dec. 8, 2015) (“Biggerstaff Comments”) (stating that “[e]very fax receiving device that can receive a fax, has the capacity to print”).

⁶² 885 F.3d 687, 693 (D.C. Cir. 2018).

⁶³ Biggerstaff Comments at 2.

⁶⁴ Ryerson Bureau Order ¶ 14 (citing Amerifactors Bureau Order ¶ 11).

Pursuant to Commission Rule 1.115(b)(3), Applicant states that the “respects in which the action taken by the designated authority should be changed” are as follows:

(1) The Order should deny the Ryerson Petition and reaffirm the conclusion of the 2003 Order and the WestFax Order that a fax that is received by a “fax server” is sent to a “telephone facsimile machine” as defined by 47 U.S.C. § 227(a)(3), regardless of whether the fax is converted to another format and emailed to the recipient as part of an “online fax service”;⁶⁵

(2) The Order should reaffirm that, even where a fax is received by a fax server and forwarded by email and is not automatically printed, it is nevertheless covered by the TCPA, where Congress was also concerned with the “interference, interruptions, and expense” to businesses and interstate commerce caused by junk faxes, and where such faxes “may increase labor costs for businesses, whose employees must monitor faxes to determine which ones are junk faxes and which are related to their company’s business.”⁶⁶

IV. In the alternative, the Commission should vacate the Ryerson Bureau Order and remand for an inquiry into whether the “equipment” used by “online fax services” has the requisite “capacity” to be a “telephone facsimile machine.”

As discussed in Section II, above, the Bureau’s understanding reflected in the Ryerson Bureau Order and the Amerifactors Bureau Order that “an online fax service cannot itself print a fax”⁶⁷ is erroneous. The “equipment” that the online fax service uses to receives a fax transmission and convert it to email absolutely has the capacity to print the fax.

At the very least, however, the Commission should vacate the Ryerson Bureau Order and remand to the Bureau to conduct appropriate fact-finding on this issue. The Ryerson Bureau Order cites nothing in the record and relies solely on the Amerifactors Bureau Order for its

⁶⁵ 2003 Order ¶ 199 & n.736; WestFax Order ¶ 9.

⁶⁶ 2003 Order ¶¶ 199–202.

⁶⁷ Ryerson Bureau Order ¶ 14 (citing Amerifactors Bureau Order ¶ 11).

mistaken understanding, and it would be a simple matter to investigate whether the “equipment” used by “online fax services” has the requisite “capacity.” As Robert Biggerstaff relayed in his comments, such an inquiry would undoubtedly confirm that any “equipment” that has the capacity to perform the functions of an online fax service also has the capacity to print a fax.⁶⁸

Conclusion

For the foregoing reasons, the Commission should reverse or vacate the Ryerson Bureau Order and reaffirm its rulings in the 2003 Order and the WestFax Order that a fax sent to a “fax server” is sent to a “telephone facsimile machine” as defined by 47 U.S.C. § 227(a)(3), regardless of whether the fax is then converted to another format and accessed by the end-user through an “online fax service.”

Dated: October 5, 2020

Respectfully submitted,

By: s/Glenn L. Hara

Glenn L. Hara
Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501

⁶⁸ Biggerstaff Comments at 2.

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I caused the foregoing Application for Review to be served on the parties listed on the attached service list via U.S. first-class mail, postage prepaid.

s/Glenn L. Hara

SERVICE LIST

Todd Bank
119-40 Union Turnpike
Kew Gardens, NY 11415

Robert Biggerstaff
P.O. Box 614
Mt. Pleasant, SC 29465

Robert H. Braver
816 Oakbrook Drive
Norman, OK 73072

Cynthia Brinker
17070 Birds Eye
Lake Mathews, CA 92570

Connector Castings, Inc.
640 Cepi Drive, Suite A
Chesterfield, MO 63005

Johnny Daciolas
1021 Vista Lomas Lane
Corona, CA 92879

Michael Friend
21604 Peters Lane
Neuvo, CA 92567

Mark Gregg
146 Cambridge Rd.
Coatesville, PA 19320

Vincent Lucas
P.O.Box 272
Pierce TWP, OH 45102

Steve Nocerini
440 Majestic Cove
Alpharetta, GA 30004

Jason Stephens
201 Hawthorne Drive
Belton, MO 64012

Jimmy A. Sutton
14231 Hilltop Way
Saratoga, CA 95070

Joseph T. Ryerson & Sons, Inc.
c/o Blaine Kimery
Vedder Price
222 N. LaSalle Street
Chicago, IL 60601