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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rules and Regulations Implementing)
the Telephone Consumer Protection Act)
of 1991)

CC Docket No. 92-90

PETITION FOR STAY

The Consumer Electronics Group of the Electronic Industries Association ("EIA/CEG") and the Telecommunications Industry Association ("TIA") hereby request that the Commission stay the requirement imposed in the last sentence of 47 C.F.R. § 68.318(c)(3), as promulgated in the above-captioned Report and Order ("Order").¹ The requested stay is necessary to prevent serious injury to manufacturers of telephone facsimile machines and to protect consumers against needless constrictions in the availability of reasonably priced equipment.

EIA/CEG and TIA specifically request that the Commission stay this one provision until six months after issuance of a ruling on a related Petition for Reconsideration and Clarification, which is being filed contemporaneously with this petition. The reconsideration petition and the affidavits attached hereto discuss various

1/ FCC 92-443 (released Oct. 16, 1992). Official notice of the Commission's action appeared in the Federal Register on October 23, 1992. 57 Fed.Reg. 48,333 (1992).

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problems that would be caused by imposing new requirements on the manufacture of fax machines, beginning on December 20, 1992. This petition demonstrates that EIA/CEG and TIA have satisfied the criteria for a stay.

I. INTRODUCTION.

A. Interest of EIA/CEG and TIA.

EIA/CEG represents the consumer electronics industry, an industry that provides the American public with televisions, radios, videocassette recorders and videocameras, compact disc players, and a wide variety of other products. The membership includes most of the world's major consumer electronics manufacturers, as well as many smaller companies that produce, import, distribute, sell, and service electronics products. In recent years, EIA/CEG's members have also begun to produce and market a growing array of products which connect to telephone lines, including relatively inexpensive versions of products -- such as facsimile machines -- that initially were designed (and priced) primarily for business applications.

TIA is a full-service national trade association with membership of nearly 500 large and small companies. Its members provide materials, products, systems, distribution services, and professional services to the telecommunications industry in the United States and countries around the world. TIA represents the

telecommunications industry in association with the Electronic Industries Association.

B. Summary of the Problem.

Neither EIA/CEG nor TIA was a party to the proceedings which resulted in the rule in question, nor did they participate in the deliberations that resulted in the underlying statute. That statute, the Telephone Consumer Protection Act ("TCPA"),² is directed primarily at problems associated with abuses in the field of telemarketing and, to a lesser extent, at problems relating to the use of facsimile machines to transmit unsolicited advertising. The statute and the implementing regulation, however, have a broader sweep, and this has saddled manufacturers of facsimile machines with a burden which they cannot meet within the prescribed deadline.

The Commission has ordered that all facsimile machines manufactured on or after December 20, 1992, mark the date and time, the identity of the transmitting party, and the telephone number of the transmitting party (hereinafter collectively referred to as "date/time/ID") on every facsimile message. Manufacturers of low-end fax machines are unable to comply with this requirement.

Today, most fax machines incorporate the capability of transmitting the identity and telephone number

^{2/} Pub.L. No. 102-243, 105 Stat. 2394 (Dec. 20, 1991), to be codified at 47 U.S.C. § 227.

of the sending party.³ Many machines, however, lack the timekeeping circuitry necessary to label facsimile messages with date and time information. The machines lacking this capability tend to be "low-end" products, which are marketed primarily to consumers, as opposed to the more complex machines which are marketed to businesses.

If the absence of a clock function prevents the manufacture and sale of low-end machines to consumers,⁴ they will be forced either to purchase more expensive products or await the availability of redesigned low-end units (albeit at higher prices). Neither approach is necessary to meet any of the objectives of the TCPA.

Importantly, our proposals would not alter the implementation of the TCPA's other provisions relating to fax machines. Thus, beginning December 20, 1992, all transmissions of unsolicited advertisements to facsimile machines must cease. TCPA, § 337(b)(1)(C). And all senders of facsimile messages, whether they use new machines or old ones, must ensure that each message is properly labeled with the date/time/ID information mentioned above. TCPA, § 227(d)(2). Our concerns relate only to the requirement

^{3/} We believe that some machines do not have this capability, but we are not yet in a position to quantify this.

^{4/} As is explained in our reconsideration petition, the Commission may wish to clarify that what is required is not any internal timekeeping circuitry but, rather, the capability for the sender to program in the date and time of the message at the time it is sent.

governing the manufacture of fax machines, which specifies that those machines manufactured on and after December 20, 1992, must clearly mark the date/time/ID on the top or bottom of each transmitted page or on the first page of each transmission. TCPA, § 227(d)(2). Our petition for reconsideration discusses a number of issues relating to the manner in which this has been implemented in the last sentence of Section 68.318(c)(3) of the Commission's rules.

II. EIA/CEG'S and TIA'S REQUEST SATISFIES THE ESTABLISHED CRITERIA FOR ISSUANCE OF A STAY.

Requests for stay of an order of the Commission are evaluated according to the criteria established in Virginia Petroleum Jobbers Association v. F.P.C., 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).⁵ Under these standards, a stay will be granted where (1) the petitioner is likely to prevail on the merits; (2) the petitioner will be irreparably injured absent a stay; (3) a stay will not substantially harm other interested parties; and (4) the public interest will be served. The stay requested by EIA/CEG and TIA easily satisfies these criteria.⁶

^{5/} See American Telephone and Telegraph Co.: Provision of Basic Services Via Resale by Separate Subsidiary, 99 FCC 2d 551, 554-55 (1984); Comark Cable Fund III, 104 FCC 2d 451 (1985); Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669 (D.C. Cir. 1985).

^{6/} The Commission's authority to extend the regulatory deadline is discussed in the petition for reconsideration.

A. Likelihood Of Success On The Merits.

We believe that our reconsideration petition sets forth a compelling case for reconsideration of the manufacturing deadline of December 20, 1992.⁷ We have shown that manufacturers cannot alter their product designs and manufacturing plans to include a date- and time-stamping capability on fax machines by the December 20 deadline. We have demonstrated that retention of the existing deadline will deprive consumers of access to the most affordable facsimile products. We have explained that most, if not all, fax machines already have the capability to transmit the sender's name and telephone number, and that this is far more important in terms of legislative objectives than is labeling the date or time of the transmission.⁸ We have identified several ambiguities in the regulation, whose clarification may increase or diminish the difficulties of compliance, once they are resolved. In the aggregate, these and other factors create a strong "likelihood of success on the merits" in the reconsideration proceeding.

Our expectation of a favorable response to our petition for reconsideration is further reinforced by the

⁷/ To avoid repetition as much as possible, we hereby incorporate by reference the entire petition for reconsideration as if set forth in its entirety in the text of this stay request.

⁸/ We have also shown that many facsimile machines can label incoming fax messages with the date and time, even where this information is not communicated by the sender's machine.

Commission's past responsiveness to precisely the same considerations that are involved here. Transition periods in other Part 68 rulemakings have regularly allowed for 18 months between the issuance of new rules and the need for new products to conform to those rules. Transition periods in Part 15 rulemakings have been of similar duration, or even longer. The Commission has repeatedly extended deadlines when presented with evidence of a need to do so in order to prevent disruption to manufacturers and consumers.

The need for a reasonable transition is especially acute in the present circumstances. For one thing, most manufacturers of fax machines have just recently become aware of the date/time/ID requirement. For another, there are issues which should be clarified before the transition period even begins.

B. Irreparable Injury.

There can be no doubt that manufacturers of fax machines would be irreparably injured if the requested stay is not granted. Many existing models of facsimile machines do not incorporate the timekeeping capability necessary to mark the date and time on facsimile messages or even to enable the user to manually place this information on outgoing messages.⁹ These products cannot be redesigned before December 20, 1992.

^{9/} Of course, any fax machine will reproduce date/time/ID information if it is placed on the cover sheet of an outgoing transmission. Use of such cover sheets will be mandatory (Footnote 9 continued on next page)

Absent a stay, the manufacturing deadline is certain to arrive before EIA/CEG's and TIA's reconsideration petition can be addressed. Manufacturers will face tremendous uncertainty concerning the manufacture and marketing of facsimile machines that are already in production, to say nothing of others that have been designed but have not yet begun to be produced. These uncertainties extend to the redesign of existing and planned products, software and hardware changes, production schedules, marketing arrangements, and a variety of related matters. If decisions on these subjects must be made in the absence of a stay, significant disruption and expense will be inevitable, and these adverse consequences could not be undone by a subsequent decision to grant the petition for reconsideration.

C. Lack Of Harm.

Approval of the stay request would not cause harm to other parties. Independent of any requirement governing the manufacture of fax machines, the statute requires that businesses and individuals place the date/time/ID information on every fax transmission, regardless of what vintage fax machine they are using. Moreover, most machines already include the capability of transmitting the sender's name and telephone number, and this information is far more

(Footnote 9 continued from previous page)
beginning December 20 for any machine that does not automatically transmit this information.

relevant to the legislative purpose than is the particular day or hour when any given facsimile message is transmitted.

D. The Public Interest.

The foregoing discussion clearly shows that the public interest would be served by approval of the requested stay. All that is being sought is a preservation of the status quo ante pending review of EIA/CEG's and TIA's petition for reconsideration, which we hope and expect will receive a favorable response. In the interim, no public policy benefit would be achieved by adhering to a transition deadline that imposes impossible burdens on manufacturers and that limits consumer access to the most affordably priced facsimile products.

III. CONCLUSION.

For the reasons stated above, EIA/CEG and TIA respectfully ask that the Commission stay the effective date of the last sentence of 47 C.F.R. § 68.318(c)(3) until six months after the release of a ruling on our petition for reconsideration of the Order. In addition, because of the substantial uncertainty and disruption currently faced by

the industry, we respectfully request that the Commission issue its ruling on our stay request as expeditiously as possible.

Respectfully submitted,

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November 23, 1992

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AFFIDAVIT OF SHARP
ELECTRONICS CORPORATION

This affidavit is made in support of the Petition for Stay of the Consumer Electronics Group of the Electronic Industries Association and the Telecommunications Industry Association, the defined terms of which are used herein with the same meanings.

1. Sharp Electronics Corporation ("Sharp") with its principal offices at Sharp Plaza, Mahwah, New Jersey markets Sharp brand facsimiles in the United States that are produced by Sharp's parent company, Sharp Corporation, in factories overseas. Sharp has had the leading market share of the domestic facsimile market for the past five years. Last year that market share was slightly more than 20% according to published industry statistics. Sharp sells approximately 425,000 units of facsimiles annually in this country.

2. Sharp was unaware of the application of the TCPA to its facsimiles until the implementing regulations that were published in the Federal Register on October 23, 1992 were brought to our attention by EIA/CEG on November 11, 1992. Further lead time to comply with these regulations than the December 20, 1992 effective date would permit and further clarification of the Commission's requirements for the implementation of the TCPA as regards facsimiles are necessary.

3. All Sharp facsimiles have the capability to provide a header message that can be programmed by the user sending a

facsimile to identify itself and the telephone number. Facsimiles designed for light home office or consumer use do not, however, have a clock feature that identifies the date and time of transmission. The clock feature has only been sought by users of more high end equipment that has other associated features such as polling or delayed transmission. To conform to the date/time/ID requirement will require addition of the clock function to those low end facsimiles that do not have it, possible modification of the clock function on those facsimiles that now have this feature and revision of the user manuals to explain the need to use the feature in accordance with the regulations implementing the TCPA. The addition or modification of the clock feature will require redesign of the circuitry of the products.

4. The Sharp model facsimiles that do not have date and time identification and their suggested retail prices are as follows:

UX-102	\$645
UX-103	\$695
UX-172	\$795
UX-112	\$695
UX-183	\$795
FO-130	\$795
FO-225	\$895

If manufacture of these products ceased on December 20, 1992, component parts worth some \$800,000 would have to be destroyed and some \$1 million of extraordinary redesign costs would be incurred. In addition to these direct costs, a significant loss in revenues would occur both to Sharp and its many dealers and distributors in the United States. In addition, consumers will be affected adversely because of a reduced supply of affordable fax equipment which will lead in turn to a lessening of competition and higher prices.

5. Sharp is anxious to comply with the Commission's regulations implementing TCPA but respectfully requests sufficient lead time to make any modifications called for in a cost effective way and without interruption of production schedules or inventories. A reasonable lead time for Sharp would be a minimum of six months. I believe other companies in the facsimile business would likewise face similar extraordinary costs and need similar minimum lead time to make modifications for compliance.

The foregoing statements are made under penalties of perjury this 23rd day of November, 1992.

Donald P. Mossman

Donald P. Mossman
Vice President and
General Counsel
SHARP ELECTRONICS CORPORATION

Sworn to before me this 23rd
day of November, 1992.

Gayle Spencer
Notary Public

GAYLE SPENCER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 13, 1997

Before the
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Washington, D.C. 20554

November 23, 1992

In the matter of)
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the Telephone Consumer Protection Act)
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AFFIDAVIT OF MATSUSHITA ELECTRIC CORPORATION OF AMERICA

This affidavit is made in support of the Petition For Reconsideration and Clarification and the Petition For Stay filed jointly by the Consumer Electronics Group of the Electronic Industries Association and the Telecommunications Industry Association. The defined terms of which are used herein with the same meanings.

1. Matsushita Electric Corporation of America (MECA) with its principal sales offices at One Panasonic Way, Secaucus, New Jersey markets Panasonic, Panafax and other OEM trade name facsimile machines in the United States that are manufactured by MECA's parent company, Matsushita Electric Industrial Company, in overseas factories. We first became aware that all facsimile machines must be capable of providing user programmable date/time/ID as it appeared in the Federal Register on October 23, 1992.

2. We presently market various low end facsimile machines for less than \$500 that do not contain internal clock generator circuitry that would enable user programming of date and time transmissions. In 1992, we marketed more than 150,000 of such products and presently have in inventory also 30,000 pieces of facsimile machine's main printed wiring boards (PWB) that does not provide this feature.

3. We would require about four months to introduce clock generator circuitry into the PWB and an additional two months for testing and evaluation to assure proper performance, compliance, and quality control. As such, we would request a minimum of six months Stay to this ruling to allow an orderly transition to introduce facsimile machines with the capability of providing user programmable date/time/ID transmission.

4. If a Stay is not issued, we could anticipate an overall loss of revenues that could reach as high as \$32,000,000. In addition, consumers will be affected adversely because of reduced supply of affordable facsimile machines which will lead in turn to a lessening of completion and higher prices.

5. MECA is anxious to comply with the FCC regulations implementing TCPA, but respectfully requests sufficient lead time to make modifications called for in a cost effective way and without interruption of production schedules or inventories. A reasonable lead time for MECA would be a minimum of six months.

The foregoing statements are made under penalties of perjury
this 23rd day of November, 1992.

Sincerely yours,



Richard Mullen
Project Manager
Matsushita Electric Corporation of America
Product Safety & Compliance Division

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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the Telephone Consumer Protection ACT of 1991)

AFFIDAVIT OF SAMSUNG ELECTRONICS AMERICA, INC.

PETITION FOR RECONSIDERATION AND CLARIFICATION

This Affidavit is made in support of petition for reconsideration and clarification of the Consumer Electronics Group of the Electronics Industries Association and the Telecommunications Industry Association.

We were not aware that the designs of consumer fax machines might be subject to new FCC requirements until November 10, 1992.

We are still uncertain about precisely how the machines must be designed to comply with the rule in the following respects:

- Is it sufficient for the machine to have the capability for the user to program a date, time, business name, and telephone number, or must the machine be inoperable unless the user programs in this information?
- Is it permissible for the machine to have a switch which allows for this date/item/ID to be transmitted, or not, at the user's option, or must this function be permanently enabled?

Even if we knew precisely what was required by the rule, we would need a minimum of six additional months before we could conform all of our equipment to the new requirements. We currently manufacture three models of equipment which do not include the capability of labeling fax transmissions with the date and time. However, these three models have the capability of transmitting the sender's name and address. These products carry list prices of \$600 and are sold exclusively through consumer-oriented outlets.

If the Commission does not extend the deadline as requested by EIA/CEG, our company will be injured in the following manner:

- Circuit Board will be junked: Need to modify current circuit board in order to install clock chip.
- Need to procure Clock Chip.
- Will require six months for redesign of the board and for component purchasing lead time.

- There will be an additional cost of \$16 per fax unit to manufacture under these guidelines.
- Lost sales of 24,000 units (\$7.2 M).

If the commission does not extend the deadline as requested by EIA/CEG, we believe that consumers will be injured by reason of a reduced supply of affordable fax machines, and this in turn will mean less competition and higher prices.

The foregoing statements are made under penalties of perjury this 23 Day of November 1992.



Ki Ryoung Song
Executive Vice President
Samsung Electronics America, Inc.