

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

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**Beck Simmons LLC's Comments on Francotyp-Postalia, Inc. Petition  
seeking "Retroactive Waiver" of the Commission's Rule Requiring  
Opt-Out Notices on Fax Advertisements Sent With Permission**

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## Executive Summary

In its order of October 30, 2014, the Commission granted retroactive “waivers” of 47 C.F.R. § 64.1200(a)(4)(iv) purporting to absolve the 24 petitioners of civil liability in private litigation and allowed other TCPA defendants to seek similar waivers until April 30, 2015. The Commission stressed that “all future waiver requests will be adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.” The Francotyp-Postalia petition (along with the Allscripts petition) is the first of the follow-on waiver petitions contemplated by the October 30 order.

First, the Commission should deny Francotyp-Postalia’s request for a waiver because it does not claim it obtained “prior express invitation or permission” to send its faxes. The petition seeks an advisory ruling on a hypothetical situation that does not warrant consideration.

Second, if the Commission entertains the petition, it should clarify the standard for a “waiver” from 47 C.F.R. § 64.1200(a)(4)(iv). The October 30 order is unclear whether a petitioner must show it was *actually* confused about the law or whether the Commission will *presume* a petitioner to be confused in the absence of evidence the petitioner was merely ignorant of the law or had actual knowledge of the opt-out rules.

Finally, the Commission should deny the petition under either standard. If the standard is actual confusion, the Commission should refuse to issue a waiver because Francotyp-Postalia does not claim it was “confused,” and contemporaneous filings with the Commission show that interested parties understood immediately that the plain language of the 2006 Junk Fax Order required opt-out notice on faxes sent with “prior express invitation

or permission.” If the standard is a rebuttable presumption of confusion, then the Commission should allow Plaintiff to investigate, either before the Commission or in court, whether Francotyp-Postalia was aware of the opt-out rules when it sent its faxes, since it has avoided that subject in its filings in court and in its petition.

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Opt-Out Notices on Fax Advertisements Sent With Permission**

Commenter Beck Simmons LLC (“Plaintiff”) is the plaintiff in a private TCPA action pending in the United States District Court for the Eastern District of Missouri against petitioner Francotyp-Postalia, Inc. (“FP”).<sup>1</sup> FP filed a petition on October 14, 2014, seeking a “retroactive waiver” of the regulation requiring opt-out notice on fax advertisements sent with “prior express invitation or permission,” intended to relieve FP of any liability under that regulation in private litigation.<sup>2</sup> The Consumer and Governmental Affairs Bureau sought comments on the petition November 4, 2014.<sup>3</sup>

The Commission issued an order on 24 similar petitions on October 30, 2014 (“Opt-Out Order”).<sup>4</sup> That order rejected the challenges to the validity of the opt-out regulation

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<sup>1</sup> *Beck Simmons LLC v. Francotyp-Postalia, Inc.*, No. 14-cv-1161 (E.D. Mo.).

<sup>2</sup> *Petition of FP Mailing Solutions, Inc. for Declaratory Ruling or Waiver*, CG Docket Nos. 02-278, 05-338 (Oct. 14, 2014).

<sup>3</sup> *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Nov. 4, 2014) (“Public Notice”).

<sup>4</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express*

raised in FP’s petition,<sup>5</sup> but granted the requested “waivers.”<sup>6</sup> As instructed by the Public Notice, Plaintiff will not address the requests for declaratory relief in these comments and will address only FP’s request for a waiver.<sup>7</sup>

### **Factual Background**

Few of the relevant facts are known to Plaintiff, since no discovery has taken place in the underlying lawsuit, which FP has moved to stay pending final resolution of its petition. On July 3, 2014, Plaintiff filed its First Amended Class Action Complaint challenging FP’s alleged practice of sending “unsolicited facsimile advertisements” in violation of the TCPA.<sup>8</sup> The complaint alleges FP sent a fax advertisement to Plaintiff on October 31, 2011,<sup>9</sup> and that Plaintiff did not give FP “prior express invitation or permission,” making the fax an “unsolicited advertisement,” giving rise to \$500 minimum statutory damages.<sup>10</sup> Plaintiff

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*Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) (“Opt-Out Order”).

<sup>5</sup> *Id.* ¶¶ 19–20, 32 & n.70 (ruling Commission issued regulation under its statutory authority to “implement” the TCPA by empowering consumers to “halt unwanted faxes” and regulation is enforceable through the TCPA’s private right of action, and refusing to repeal regulation because it reflects “good policy,” given that “opt-out notice is not only necessary but essential to further the governmental interest in protecting consumer[s] from unwanted fax ads”).

<sup>6</sup> Plaintiff’s counsel opposed these “waivers,” arguing the Commission has no authority to interfere in private TCPA litigation and that such an order would violate the separation of powers and due process and constitute a taking without just compensation. Plaintiff will not repeat those arguments here. On November 10, 2014, Plaintiff appealed the waiver portion of the order to the D.C. Circuit Court of Appeals in *Sandusky Wellness Center, LLC v. FCC*, No. 14-1235 (D.C. Cir. Nov. 10, 2014).

<sup>7</sup> Public Notice at 2 (stating “we find it unnecessary to seek additional comment on the Petitioners’ request for declaratory ruling” and seeking comment only on the “requests for waiver consistent with the guidance” in the Opt-Out Order).

<sup>8</sup> Ex. A, First Amended Compl. (Doc. 14) ¶ 1.

<sup>9</sup> *Id.* ¶ 10.

<sup>10</sup> *Id.* ¶ 25.

alleges on information and belief that FP sent unsolicited fax advertisements to “more than forty persons,” making joinder of all class members impracticable.<sup>11</sup>

In addition, the complaint alleges that, even where a sender claims to have “prior express invitation or permission,” the Commission’s regulations require that the fax “must include an opt-out notice” informing consumers of the right to opt out of future faxes and providing instructions for doing so under 47 C.F.R. § 64.1200(a)(4)(iv).<sup>12</sup> The complaint alleges FP’s faxes fail these requirements, since they contain no opt-out language at all.<sup>13</sup>

FP answered the complaint on September 5, 2014.<sup>14</sup> The Answer does not assert that FP obtained “prior express invitation or permission” from Plaintiff or any other class member.<sup>15</sup> On September 9, 2014, FP filed a motion to stay the litigation pending the ultimate outcome of its petition (which it had not yet filed).<sup>16</sup> The motion does not claim FP obtained prior express invitation or permission from Plaintiff or any other class member.<sup>17</sup> On October 14, 2014, FP filed a reply in support of its motion to stay, which describes Plaintiff as a “former customer” but does not claim permission.<sup>18</sup>

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<sup>11</sup> *Id.* ¶ 35.

<sup>12</sup> *Id.* ¶ 19.

<sup>13</sup> *Id.* ¶ 18.

<sup>14</sup> Ex. B, Answer (Doc. 21).

<sup>15</sup> *Id.* at 17–18.

<sup>16</sup> Ex. C, Mem. Supp. Mot. Stay (Doc. 23) at 1, 3, n.1, 5.

<sup>17</sup> *Id.* at 1–5.

<sup>18</sup> Ex. D, Reply Supp. Mot. Stay at 1–8.

On October 14, 2014, FP filed its petition with the Commission. The petition claims Plaintiff is a “former customer,” but does not claim FP obtained Plaintiff’s prior express invitation or permission before sending the fax at issue.<sup>19</sup>

### Argument

#### **I. FP’s petition should be denied because it does not claim prior express invitation or permission.**

The Opt-Out Order noted there was a “dispute” over whether the 24 petitioners at issue actually acquired prior express permission.<sup>20</sup> There is no such dispute with respect to FP’s petition because FP does not claim it obtained permission from Plaintiff or anyone else. It does not claim permission in its Answer in the underlying litigation,<sup>21</sup> its motion to stay the underlying litigation,<sup>22</sup> its reply in support of that motion,<sup>23</sup> or its petition to the Commission.<sup>24</sup>

FP is essentially asking the Commission for an advisory ruling on whether it would be entitled to a waiver from a permission-related regulation if permission were present (or even asserted). This hypothetical question is not worthy of the Commission’s consideration, and the Commission should deny FP’s petition outright.

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<sup>19</sup> FP Pet. at 3.

<sup>20</sup> *Id.* n.104.

<sup>21</sup> Ex. B, Answer at 1–18.

<sup>22</sup> Ex. C, Mem. Supp. Mot. Stay at 1–5.

<sup>23</sup> Ex. D, Reply Supp. Mot. Stay at 1–8; *see also id.* at 7 (stating Plaintiff is a “former customer”).

<sup>24</sup> FP Pet. at 1–8.

**II. The Commission should clarify whether the standard for a waiver from § 64.1200(a)(4)(iv) is *actual* confusion or *presumed* confusion, but FP’s petition fails either standard.**

If the Commission entertains FP’s petition notwithstanding the absence of a claim of permission, it should clarify “the guidelines” for a waiver, which are unclear.<sup>25</sup> The Opt-Out Order states that the lack of notice in the 2005 rulemaking and an inconsistent footnote in the 2006 Junk Fax Order “led to confusion or misplaced confidence on the part of petitioners,” justifying a waiver.<sup>26</sup> It also states these factors “caused businesses mistakenly to believe that the opt-out notice requirement did not apply.”<sup>27</sup> These statements suggest the Commission found that the 24 petitioners covered by the order were entitled to waivers because, prior to sending their faxes, they did in fact (1) receive inadequate notice, (2) read the regulation and the footnote, and (3) suffer actual “confusion or misplaced confidence” as a result.<sup>28</sup>

At the same time, however, the order states these factors “*may have* contributed to confusion or misplaced confidence,”<sup>29</sup> that the combination of factors “*presumptively* establishes good cause for retroactive waiver,” and that “nothing in the record here demonstrat[es] that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement . . . but nonetheless failed to do so.”<sup>30</sup> The Commission also

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<sup>25</sup> Public Notice at 2.

<sup>26</sup> Opt-Out Order ¶ 26.

<sup>27</sup> *Id.* ¶ 27.

<sup>28</sup> Plaintiffs do not concede that any of the 24 petitioners met these standards.

<sup>29</sup> Opt-Out Order ¶ 25.

<sup>30</sup> *Id.* ¶ 26 (emphasis added).

emphasized that “simple ignorance” of the law “is not grounds for a waiver.”<sup>31</sup> These statements suggest the Commission found the law objectively “confusing,” giving rise to a *presumption* that the 24 petitioners were “confused,” and that Plaintiffs failed to rebut that presumption with evidence the petitioners knew opt-out notice was required or were simply ignorant of the law.

Plaintiff’s counsel expect several dozen TCPA defendants to petition the Commission for waivers from § 64.1200(a)(4)(iv) in the next six months. Five waiver petitions have been filed since the Opt-Out Order was issued October 30, 2014.<sup>32</sup> In addition, defendants in non-fax TCPA litigation, such as telemarketing and junk-text cases, will petition for waivers from various regulations. A defendant in a text-message case filed one such waiver petition before the Opt-Out Order was issued.<sup>33</sup> On November 17, 2014, a commenter on a separate petition for declaratory ruling argued the Commission should create a “path for retroactive waiver” from the telemarketing rules.<sup>34</sup> The Commission should clarify the standard under which it issued its waivers from § 64.1200(a)(4)(iv) for both the ensuing fax-waiver petitions, as well as the many non-fax-waiver petitions the Commission will be presented with over the coming months and years.

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<sup>31</sup> *Id.*

<sup>32</sup> See Petitions of Howmedica Osteonics Corp. (Nov. 7, 2014); The Emery Wilson Corp. (Nov. 10, 2014); ACT, Inc. (Nov. 12, 2014); Amicus Mediation & Arbitration Group, Inc. (Nov. 13, 2014); and Alma Lasers, Inc. (Nov. 14, 2014).

<sup>33</sup> See Petition of Bijora, Inc. (Oct. 7, 2014).

<sup>34</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Association*, Comments of ACA International (Nov. 17, 2014) at 2 & 10.

**A. If the standard is *actual* confusion, FP’s petition should be denied because FP does not claim confusion and parties before the Commission in 2006 immediately acknowledged the plain language of the rule.**

With respect to FP’s petition, if the standard is *actual* confusion, the petition should be denied because FP does not claim it was “confused” or had “misplaced confidence” about whether opt-out notice was required when it sent its fax advertisement to Plaintiff.<sup>35</sup> FP argues the regulation is objectively “ambiguous,” but it does not claim that *it* was actually confused at any point in time.<sup>36</sup> If the standard is actual confusion, FP’s petition should be denied on this ground alone.

In addition, the record of prior proceedings demonstrates that interested parties—one of whom, Staples, Inc., obtained a “waiver” in the Opt-Out Order<sup>37</sup>—immediately understood the plain language of the 2006 rule. There were two petitions for reconsideration of the 2006 Junk Fax Order, one of which was filed by the law firm of Levanthal Senter & Lerman (“LSL”) on behalf of CBS and other broadcasting clients on June 2, 2006.<sup>38</sup> The LSL petition noted that the new rules required “that all faxed advertisements include an opt-out notice,” including those sent with permission.<sup>39</sup> The LSL petition did not seek reconsideration of the rule; it sought clarification that it could place the opt-out notice on a

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<sup>35</sup> FP Pet. at 1–8.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Comments of Staples, Inc., CG Docket No. 02-278, 05-338 (Jan. 18, 2006) (stating Staples “strives to implement immediately any do-not-fax request it receives, and usually is able to do so within 30 days”).

<sup>38</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Petition for Reconsideration or Clarification of Levanthal Senter & Lerman PLLC (June 2, 2006) (“LSL Petition”) at 1.

<sup>39</sup> *Id.* at 2.

cover page, arguing consumers who previously gave permission would still be able to “exercise their right to opt-out of unwanted faxed advertisements.”<sup>40</sup> Public notice of the LSL petition for reconsideration was published in the Federal Register pursuant to Rule 1.429(e) on June 28, 2006.<sup>41</sup>

Three parties filed comments on the LSL petition, including the American Society of Association Executives (“ASAE”) and the Named State Broadcasters Associations (“NSBA”).<sup>42</sup> The ASAE acknowledged that the 2006 Junk Fax Order states, “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.”<sup>43</sup>

The ASAE argued the “plain language” of this rule inappropriately extended to “solicited facsimile advertisements” and asked the Commission to “vacate” it.<sup>44</sup> The relevant section of ASAE’s 2006 comments reads as follows in its entirety:

The plain language of this provision imposes the opt-out notice requirement on both unsolicited and *solicited* facsimile advertisements. The Fax Act requires advertisers to include such notices only on any *unsolicited* facsimile advertisement, but neither the Fax Act nor the Telephone Consumer Protection Act of 1991 (“TCPA”) authorizes the Commission to impose any notice requirement on *solicited* facsimile advertisements.

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<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 71 Fed. Reg. 36798, 36798 (June 28, 2006).

<sup>42</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Nos. 02-278, 05-338, Comments of American Society of Association Executives (July 12, 2006); National Association Broadcasters Comments (July 13, 2006); Joint Comments of the Named State Broadcasters Associations (July 13, 2006).

<sup>43</sup> ASAE Comments at 4.

<sup>44</sup> *Id.* at 2.

By applying the notice requirement to solicited facsimile advertisements, the Commission has exceeded its authority, especially with respect to nonprofit associations. In the Fax Act, Congress explicitly authorized the Commission to exempt nonprofit professional and trade associations from any notice requirement whatsoever. This provision demonstrates that Congress recognized the favored, unique position of nonprofit associations and did not intend for the Commission to impose additional requirements on such associations – especially requirements unauthorized by Congress through the Fax Act, the TCPA, or otherwise.

Accordingly, ASAE respectfully urges the Commission to vacate the portion of the Report and Order that imposes a notice requirement with respect to *solicited* facsimile advertisements.<sup>45</sup>

Although the ASAE filed comments on the LSL petition for reconsideration, it did not (1) petition for reconsideration of the 2006 order, (2) petition for rulemaking to amend the regulation, or (3) petition for a declaratory ruling to “clarify” the law before it became effective August 1, 2006, since the “plain language” was clear.

The NSBA comments raised the same arguments, asking the Commission to “vacate the notice requirement to the extent it applies to solicited facsimile advertisements” on the basis that the Commission “lack[ed] the authority” to issue it under the TCPA.<sup>46</sup> The NSBA argued the Commission should “on its own motion” correct this “critical flaw” in the 2006 Junk Fax Order.<sup>47</sup> The NSBA did not petition for reconsideration, petition to amend, or petition for clarification.

Following the ASAE and NSBA comments, either of the two parties that filed timely petitions for reconsideration of the 2006 order (the Direct Marketing Association and LSL) could have sought to “supplement” their petitions to raise the challenge to the

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<sup>45</sup> *Id.* at 4–5.

<sup>46</sup> Named State Broadcasters Associations Comments at 3.

<sup>47</sup> *Id.* at 5–6.

Commission’s statutory authority via a “separate pleading stating the grounds for acceptance of the supplement,” as allowed by Rule 1.429.<sup>48</sup> Neither petitioner did so.

On October 14, 2008, the Commission decided the two petitions for reconsideration of the 2006 order, which it granted in part and denied in part.<sup>49</sup> The Commission denied LSL’s request to allow opt-out notice to appear on a cover page.<sup>50</sup> The order does not expressly address the challenges to the Commission’s statutory authority to require opt-out notice on faxes sent with permission raised in in the ASAE and NSBA comments.<sup>51</sup>

No party petitioned for reconsideration of the 2008 order pursuant to Rule 1.429.<sup>52</sup> No party appealed the 2006 order or the 2008 order under the Communications Act and the Hobbs Act on the basis that the opt-out-notice rule was “confusing.” No party filed a petition to clarify the rule until more than two years later, when Anda filed its petition November 30, 2010. No party petitioned to repeal or amend the opt-out-notice rule until nearly five years later, when Staples filed its petition July 19, 2013.

In sum, the record of proceedings demonstrates that the parties who participated in the rulemaking from 2005 to 2008 understood exactly what the plain language of the rule

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<sup>48</sup> 47 C.F.R. § 1.429l; *see also 21st Century Telesis Joint Venture v. F.C.C.*, 318 F.3d 192, 199 (D.C. Cir. 2003) (refusing to consider constitutional challenge on appeal where party sought to supplement a timely petition for reconsideration but failed to explain why argument was omitted from petition).

<sup>49</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Order on Reconsideration, 23 FCC Rcd 15059 (rel. Oct. 14, 2008) ¶ 23.

<sup>50</sup> *Id.* ¶ 15.

<sup>51</sup> *Id.* ¶¶ 1–24.

<sup>52</sup> 47 C.F.R. § 1.429; *see N. Am. Telecommc’ns Ass’n v. F.C.C.*, 772 F.2d 1282, 1286 (7th Cir. 1985) (telecommunications association could obtain review of FCC orders by appealing from FCC’s subsequent reconsideration decision within appropriate time, even though association’s prior appeal of substantive FCC order had been dismissed as untimely).

meant, and they chose not to appeal it. Contemporaneous legal observers not involved in the proceedings understood the rule as well.<sup>53</sup> The courts understood the plain language of the rule.<sup>54</sup> Under these circumstances, the Commission cannot reasonably find that FP was actually confused or misguided about the opt-out requirement.

**B. If the standard is *presumed* “confusion,” then investigation is necessary to determine whether FP was aware of the opt-out rules when it sent its faxes before the Commission purports to “waive” Plaintiff’s cause of action.**

If the standard for a waiver from § 64.1200(a)(4)(iv) is that a petitioner is considered “presumptively” confused unless the plaintiff can show the petitioner was simply ignorant of the law or that it “understood” that it “did, in fact, have to comply with the opt-out notice requirement,”<sup>55</sup> then Plaintiff does not currently have any evidence to rebut the presumption. The underlying lawsuit was filed earlier this year, and no discovery has been conducted in light of FP’s efforts to stay the case pending final resolution of its petition. Thus, only FP has knowledge of whether it was simply ignorant of the law or whether it “understood” that it had to comply with the regulation before it sent its faxes.

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<sup>53</sup> See, e.g., *FCC Issues Regulations Implementing Junk Fax Prevention Act*, 60 Consumer Fin. L.Q. Rep. 401 (Fall 2006) (“The opt-out notice must be included in all facsimile advertisements, including those based on an established business relationship or in response to a recipient’s prior express invitation or permission.”).

<sup>54</sup> See, e.g., *In re Sandusky Wellness Ctr., LLC*, 570 F. App’x 437 (6th Cir. 2014) (ordering district court to apply the rule); *Nack v. Walburg*, 715 F.3d 680, 687 (8th Cir. 2013) (citing “plain language” of the rule); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013) (applying plain language of the rule in affirming class certification and summary judgment).

<sup>55</sup> *Id.* ¶ 26.

FP's petition does not state whether it was aware of the opt-out-notice rules before it sent its faxes.<sup>56</sup> It claims that, after being sued, FP “immediately reviewed its current practices” and “implemented procedures going forward to ensure its compliance,”<sup>57</sup> but that says nothing about whether FP knew opt-out notice was required before it was sued.

Plaintiff has a due-process right to investigate whether FP was aware of the opt-out notice rules if that factor is dispositive of its private right of action under the TCPA.<sup>58</sup> The Commission may, “on its own motion,” hold any “proceedings as it may deem necessary . . . for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations.”<sup>59</sup> In such proceedings, the Commission may “subpoena witnesses and require the production of evidence” as the Commission determines “will best serve the purposes of such proceedings.”<sup>60</sup>

Here, FP's petition seeks a “determination of [Commission] policies,” and Plaintiff respectfully requests that, before the Commission attempts to absolve FP of liability in Plaintiff's lawsuit before there has been any fact-finding, the Commission hold such proceedings that it deems necessary and exercise its subpoena power to determine whether

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<sup>56</sup> FP Pet. at 1–8.

<sup>57</sup> *Id.* at 3.

<sup>58</sup> See, e.g., *Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57; *Applications of AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Dissenting Statement of Commissioner Pai (arguing Commission violated petitioners' “due process rights” by denying “serious arguments that merit the Commission's thoughtful consideration” in “cursory two-page order”).

<sup>59</sup> 47 C.F.R. § 1.1.

<sup>60</sup> *Id.*

FP knew about the opt-out-notice rules when it sent its faxes. In the alternative, Plaintiff requests the Commission stay a ruling on FP's petition and enter an order stating that it will not rule on FP's petition until Plaintiff has conducted discovery regarding FP's actual knowledge (or lack thereof) prior to sending its faxes.

### **Conclusion**

The Commission should deny FP's petition for waiver because FP does not claim it obtained permission from anyone. The petition is purely hypothetical and not worthy of consideration. If the Commission entertains the petition, it should clarify whether the standard for a waiver is *actual* confusion or *presumed* confusion. If actual confusion is required, the Commission should deny the petition because FP does not claim it was confused. If the standard is a presumption of confusion that may be rebutted with evidence of ignorance of the law or an intentional violation, Plaintiff requests the Commission allow Plaintiff to investigate whether FP was aware of the opt-out rules, either before the Commission or in court, before the Commission purports to absolve FP of civil liability on that basis.

Respectfully submitted,

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