

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

In the Matter of)	
)	
Petition for Declaratory Ruling and/or Waiver of A-S)	CG Docket No. 02-278
Medication Solutions, LLC)	
)	CG Docket No. 05-338
)	
)	

**PETITION FOR WAIVER OF SECTION 64.1200(a)(4)(iv)
OF THE COMMISSION’S RULES AND/OR DECLARATORY RELIEF**

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**PETITION FOR WAIVER OF SECTION 64.1200(a)(4)(iv)
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Pursuant to Section 1.3 of the Rules¹ of the Federal Communication Commission (the “Commission” or “FCC”), A-S Medication Solutions, LLC (“A-S Medication” or “Petitioner”) respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) of its Rules² (“Rule” or “Regulation”) with respect to faxes that have been transmitted by A-S Medication (or on its behalf) with the prior express permission of the recipients or their agents (“Solicited Faxes”) after the effective date of the Regulation.

In its FCC Order 14-164 (“October 2014 Order”),³ the Commission granted retroactive waivers of the Rules to the petitioners in response to the admitted uncertainty and confusion about whether the opt-out notice applies to faxes sent with consent. Although the waivers granted in the October 2014 Order apply to the identified petitioners, the Commission made clear that other, similarly situated entities, like A-S Medication, may also seek such waivers.⁴

As with the petitioners that have already been granted retroactive waivers of the Rule, confusion as to its applicability to faxes sent with prior express permission has negatively impacted A-S Medication.⁵ Moreover, as the Commission acknowledged in its Order, with regard to the other petitioners,⁶ enforcement of this Section against A-S Medication could,

¹ 47 C.F.R. §§ 1.2, 1.3; 5 U.S.C. § 554 (e).

² 47 C.F.R. § 64.1200(a)(4)(iv).

³ See *Petitions for Declaratory Ruling, Waiver and/or Rulemaking Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014).

⁴ October 2014 Order, at ¶¶ 22-31.

⁵ *Id.* at ¶¶ 22-26.

⁶ *Id.* at ¶ 27.

potentially, subject it to millions of dollars in statutory damages, penalizing it for providing information pertaining services to persons that specifically requested, or agreed, to receive it via facsimile. In contrast, enforcement of this Section does nothing to further the goals of the Act—the regulation of *unsolicited* facsimile advertisements—but merely provides persons who agreed to receive faxes an avenue for obtaining a monetary reward based on a technicality in the law.

Alternatively, A-S Medication requests a declaratory ruling (a) that Section 64.1200(a)(4)(iv)⁷ applies to unsolicited facsimile advertisements, only;⁸ or, (b) that the Commission based Section 64.1200(a)(4)(iv)⁹ on statutory authority other than 47 U.S.C. § 227 (b). To the extent that the Commission makes a declaratory ruling, waiver or “other relief” is appropriate for unsolicited facsimile advertisements sent within the context of an established business relationship, A-S Medication prays that it, similarly, receives that relief.

I. BACKGROUND.

A-S Medication is a pharmaceutical wholesaler and distributor, licensed by the Food and Drug Administration that provides its customers with prepackaged medications, delivery and medication dispensing services. A-S Medication has now been sued in a putative class action under the TCPA,¹⁰ along with two individuals.¹¹ The plaintiff seeks class wide damages, for

⁷ 47 C.F.R. § 64.1200(a)(4)(iv).

⁸ 47 U.S.C. § 227 (a)(1)(5).

⁹ 47 CFR § 64.1200(a)(4)(iv).

¹⁰ *Physicians Healthsource, Inc. v. A-S Medication Solutions, LLC, et al.*, 12-cv-0515 (N.D.Ill.). The parties dispute, *inter alia*, whether the fax was sent with prior express permission or invitation. However, this factual dispute will be resolved by the Court and does not impact the question of law raised by in this and other petitions.

¹¹ The suit seeks to hold two individuals Walter Hoff, the CEO, and James Barta *personally* liable for the faxes sent by A – S Medication.

faxes sent by A-S Medication to their customers who have provided their prior express consent to receive such facsimiles.¹² Plaintiff’s putative class action lawsuit seeks annihilating damages.

A. The Current Regulatory And Statutory Framework.

The Telephone Consumer Protection Act, as codified in 47 U.S.C. § 227, *et seq.*, and amended by the Junk Fax Prevention Act of 2005 (“JFPA”)¹³ prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited fax advertisement.”¹⁴ Congress has declined to impose restrictions on advertisements sent with the recipient’s express consent; instead, it has chosen to prohibit the use of a telephone facsimile machine to send an “*unsolicited advertisement*” to another fax machine, only.¹⁵ An “unsolicited advertisement” is defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”¹⁶ There have been no amendments to this definition since its inception.

As relevant to this Petition, the Regulation states that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an

¹² *Id.*

¹³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227; Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The JFPA amended the rules regarding unsolicited faxes; however, the law governing faxes sent with the recipient’s express permission remained, materially, unchanged. Of significance, JFPA restored the EBR exemption to the prohibition on unsolicited faxes. Congress realized, however, that recognizing a recipient’s “implied” consent through an EBR might still subject some recipients to unwanted faxes. Consequently, as an additional measure of protection, against potentially unwanted faxes, Congress required that advertisers provide EBR recipients with an easy, cost-free way to terminate the EBR and opt out of future unsolicited faxes. Specifically, part of the JFPA, now codified at 47 U.S.C. § 227(b)(2)(D), Congress required *unsolicited* fax advertisements sent pursuant to an EBR must provide an “opt-out” notice on the fax that would inform recipients how to contact the sender and stop future faxes, Congress expressly limited these opt-out notice requirements to “*unsolicited* advertisement[s]” sent pursuant to an EBR. Critically, it did not impose any opt-out notice requirement for faxes sent *with* the recipient’s express consent; indeed, Congress made no amendments to the law regarding such fax advertisements.

¹⁴ 47 U.S.C. § 227 (a)(5) and (b)(1)(C).

¹⁵ 47 U.S.C. § 227 (b)(1)(C).

¹⁶ 47 U.S.C. § 227 (a)(5).

opt-out notice.”¹⁷ In addition to the Regulation, the Commission also adopted rules implementing the JFPA.¹⁸ As explained in the October 2014 Order, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission’s intent to apply the opt-out notice to Solicited Faxes.¹⁹ The Commission clarified this issue in the October 2014 Order.

In the October 2014 Order, the Commission stated “that senders of fax ads must include certain information on the fax ads that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.”²⁰ Due to confusion caused, in part, by the contradictory footnote,²¹ the Commission decided to grant retroactive waivers to affected parties.

¹⁷ See 47 C.F.R. § 64.1200(a)(4)(iv); see *Rules and Regulations Implementing the Telephone Consumer Protection Act of 2005, Report and Third Order on Reconsideration*, 21 FCC Rcd at 3812, ¶ 48 (2006) (the “Junk Fax Order”). The Regulation was added when the Commission adopted its final opt-out notice rules in April 2006. This new rule was mentioned as an afterthought—as part of a paragraph devoted mainly to the unrelated issue of the legal status of consent obtained prior to the new rules’ effective date. Yet, it imposed a new and unprecedented requirement on *solicited* fax advertisements. The Commission’s also failed to identify a specific source of statutory authority for this unprecedented regulation, but merely appended a list of various statutory provisions to the end of its order.

¹⁸ See *id.* In December 2005, the Commission issued a Notice of Proposed Rulemaking to implement the JFPA (“NPRM”). The proposed rules included a renewed recognition of the EBR provision, an updated definition to match the new statute, and “specific [opt-out] notice requirements on unsolicited facsimile advertisements.” Regarding these opt-out notice requirements, the NPRM proposed adopting new rules that tracked the statutory language. It did *not* contemplate extending the opt-out notice requirement to Solicited Faxes.

¹⁹ Junk Fax Order, 21 FCC Rcd at 3818, ¶42, n. 154 (“We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”)(emphasis added).

²⁰ See October 2014 Order, ¶ 1.

²¹ The Commission detailed the reasons for such uncertainty in the Fax Order: “Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out rule did not apply to fax ads sent with prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. The record indicates that inconsistency between a footnote contained in the Junk Fax Order and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Specifically, the footnote stated that ‘the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.’ The use of the word ‘unsolicited’ in this one instance may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” See October 2014 Order, ¶¶ 24-25.

Affected parties are those, like A-S Medication, who have sent fax ads with the recipient's prior express permission and may reasonably have been uncertain about opt-out notice requirements for such fax ads. As explained by the Commission:

[W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether the requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out notice requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt out notice to such recipients required by our rules.

* * *

We believe the public interest is better served by granting such limited retroactive waiver than through strict application of the rule.

The Commission stated that the other affective parties similarly situated to the initial petitioners—like A-S Medication—have until April 30, 2015 to seek a waiver.

II. DISCUSSION.

A. **The Commission Should Grant A-S Medication a Limited Retroactive Waiver Of Section 64.1200(a)(4)(iv).**

A-S Medication respectfully requests that the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) for any fax A-S Medication sent—with the express consent or invitation of the recipient—after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver for good cause shown, and the Commission should grant a waiver if, after considering all relevant factors, a waiver is in the public interest.²² Among other things, a waiver is appropriate where “[t]he underlying purpose of the rule(s) would not be served” or “unique or unusual factual circumstances” mandate a waiver

²² 47 C.F.R. § 1.3; *In re Rath Microtech Complaint Regarding Electronic Micro Sys., Inc.*, Memorandum Opinion and Order, 16 FCC Red 16,710, 16,714, ¶ 15 (2001).

to avoid an application of the rule that would be “inequitable, unduly burdensome or contrary to the public interest.”²³ Here, a waiver is appropriate for both reasons.

The Commission has already determined that both elements are present with regard to Section 64.1200(a)(4)(iv) and, accordingly, granted retroactive waivers of Section 64.1200(a)(4)(iv) to twenty-seven (27) petitioners in its October 2014 Order.²⁴ A-S Medication is “similarly situated” to those petitioners.²⁵ The same public interest concerns noted by the Commission in its October 2014 Order are at issue here; and, neither the Commission’s goals nor the public interest are served by subjecting this company to a potentially multi-million dollar lawsuit with respect to claimants, who *agreed* to receive subject faxes. Moreover, the same confusion regarding the applicability of Section 64.1200(a)(iv) and the same issues regarding notice that impacted those petitioners have similarly affected A-S Medication.²⁶

1. Waiver Would Not Undermine The TCPA’s Policy Objectives.

Granting waiver to A-S Medication would not undermine the policy objectives of the TCPA. The Commission has articulated a single purpose for Section 64.1200(a)(4)(iv): an opt-out notice is required “to allow consumers to stop *unwanted* faxes in the future.”²⁷ This policy is not undermined where, as here, A-S Medication faxed to customers who had chosen—and provided “prior express permission”—to receive information regarding its products and services via facsimile as part of their ongoing relationship.

²³ 47 C.F.R. § 1.925(b)(3)(i)-(ii).

²⁴ October 2014 Order at ¶ 36.

²⁵ *Id.* at ¶ 30.

²⁶ *Id.* at ¶¶ 22-26.

²⁷ JFPA Order ¶ 48 (emphasis added).

More broadly, unlike indiscriminate “fax blasters” to the general consumer public, A-S Medication sent faxes to its customers who have expressly agreed to receive information via facsimile. Accordingly, where, as here, A-S Medication sent recipients faxes that they *wanted*, a waiver would manifestly not undermine a policy objective to stop *unwanted* faxes.

Requiring strict compliance with Section 64.1200(a)(4)(iv) with respect to faxes sent by A-S Medication with the recipients’ consent would be inequitable, unduly burdensome, and contrary to the public interest. A-S Medication is facing annihilating class action lawsuit for an alleged failure to include appropriate opt-out notices on faxes sent to claimants who suffered no actual harm. Requiring strict compliance with Section 64.1200(a)(4)(iv) would be tremendously burdensome and inequitable: the recipients of these fax advertisements had explicitly agreed to receive them, had the means and ability to revoke their consent at any time, and never expressed any interest or desire to do so. Strict compliance would also be contrary to the public interest, as exposing fax senders to massive class action liability for engaging in consensual communications with their customers would work an economic injustice on businesses and the customers that they serve.

2. Special Circumstances Suggest Deviation Is Appropriate.

As the Commission has explained, special circumstances counsel in favor of deviation from the general rule—rather than strict adherence.²⁸ As detailed in the October 2014 Order, there was industry-wide confusion as to whether faxes sent with prior express permission must include an opt-out noticed based, in part, on the special circumstance of a confusing footnote in

²⁸ October 2014 Order at ¶¶ 23-26.

the Junk Fax Order.²⁹ A-S Medication, like many other companies, was reasonably confused as to whether faxes sent with permission must include an opt-out notice.

Moreover, as detailed *supra*, denial of waiver could, potentially, subject A-S Medication to crushing damages. The Commission made clear that public interest favors not subjecting businesses that understandably were confused by the Regulation and inadvertently (and allegedly) acted outside of it, like A-S Medication, to potentially ruinous damages:

The record in this proceeding demonstrates that a failure to comply with the rule—which as noted above could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages...This confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.³⁰

A-S Medication is similarly situated vis-à-vis the petitioners identified in the October 2014 Order and equally entitled to a retroactive waiver. Granting a retroactive waiver of 64.1200(a)(4)(iv) to A-S Medication would not undermine the TCPA policy objective to prevent unwanted faxes because the faxes sent by A-S Medication were wanted by the recipients. Moreover, like the prior petitioners, A-S Medication sent faxes to its customers with prior express permission and/or consent and was reasonably uncertain about whether opt-out notices were required on such faxes. And, consequently, the public interest would be better served by the FCC’s granting waiver rather than exposing A-S Medication to potential, catastrophic statutory damages.

²⁹ *Id.* at ¶¶ 24, 28.

³⁰ *Id.* at ¶ 27.

A-S Medication respectfully requests that it be granted such relief on the bases described in this Petition.

B. Alternatively, the Commission Should Issue One Or Both Of The Following Declaratory Rulings.

1. The Commission Should Declare That Section 64.1200(a)(4)(iv) Does Not Apply To Faxes Sent With “Prior Express Invitation or Permission.”

A declaratory ruling clarifying that Section 64.1200(a)(4)(iv) does not apply to facsimiles sent with the “prior express invitation or permission” should be issued for at least three reasons.

First, the plain language of the Rule and the Commission’s orders implementing the rule is unclear and, as currently implemented, inconsistent with the statute. The Act and the Commission’s rules are confined, squarely, to *unsolicited* facsimile advertisements.³¹ The Commission’s rules are, similarly, limited to “*unsolicited* advertisement[s],”³² except that the Commission has then included an additional penalty for in Section 64.1200(a)(4)(iv) that purports to regulate *solicited*³³ faxes—an independent prohibition that has no basis in the statute or any other provision of the Commission’s rules. Moreover, the Commission’s order implementing Section 64.1200(a)(4)(iv) plainly states the requirement to provide an opt-out notice “only applies to communications that constitute unsolicited advertisements,”³⁴ but subsequently provides that “entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-out notice.”³⁵

³¹ 47 U.S.C. § 227 (b)(1)(C) (emphasis added).

³² 47 C.F.R. § 64.1200(a)(4) (emphasis added).

³³ *Id.* § 64.1200(a)(4)(iv) (emphasis added).

³⁴ *JFPA Order* ¶ 42, n.54.

³⁵ *Id.* ¶ 48.

Second, the Commission has never been empowered—by the TCPA or the JFPA—to adopt opt-out notice rules for solicited facsimiles. Congress limited Section 227(b) of the TCPA to unsolicited advertisements; and, thus restricted the Commission’s jurisdiction to promulgate regulations.³⁶ Indeed, the Commission has acknowledged that the TCPA’s scope is limited to unsolicited fax advertisements.³⁷ Given the absence of any grant of jurisdiction from Congress, the Commission did not have the power to create a prohibition with regard to *solicited* faxes.³⁸

Third, requiring opt-out language on faxes sent with the prior express consent of the recipient—as the Rule purportedly contemplates—runs contrary to the First Amendment. Lawful and truthful commercial speech may be subject to regulation only where the proposed restriction directly advances a substantial government interest and that the rule “is not more extensive than is necessary to serve that interest.”³⁹ Section 64.1200(a)(4)(iv) does not satisfy his test.⁴⁰ The government’s interest is with regard to this Regulation is weak given that the consenting customer has already agreed to receive the facsimile and therefore has a simple and effective method of communicating an opt-out request to the sender.

³⁶ 47 U.S.C. §227(b)(1)(C), (D).

³⁷ See, e.g., *JFPA Order*, 21 FCC Red at 3788-89, 3791, ¶ 1-3, 7; 21 FCC Red at 3810, ¶ 42 n.154; *JFPA NPRM*, FCC Rcd at 19,758, ¶ 1.

³⁸ *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462, 122 S. Ct. 941, 956 (2002)(“Congress...did not delegate authority to the Commissioner to develop new guidelines or to assign liability in a manner inconsistent with the statute”); *Federal Maritime Comm’n v. Seatrain Lines, Inc.*, 411 U.S. 726, 744, 93 S.Ct. 1773 (where there are “specific grants of ... authority” courts should not “construe ambiguous provisions” to expand an agency’s authority); see also *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 998 (D.C. Cir. 2013). Moreover, An agency’s “power to execute laws does not include the power to revise clear statutory terms” and an agency must operate “within the bounds of reasonable interpretation” when it interprets ambiguous statutory language. *Util. Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2442, 189 L. Ed. 2d 372 (2014)(“an agency interpretation that is ‘inconsisten[t] with the design and structure of the statute as a whole,’ does not merit deference”), citing *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. —, —, 133 S.Ct. 2517, 2529 (2013).

³⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of NY.*, 447 U.S. 557, 566 (1980).

⁴⁰ See, e.g., *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (careful cost and benefit analysis required before speech rights can be burdened); *Edgefield v. Fane*, 507 U.S. 761,770-71 (1993) (government bears burden to develop record sufficient to justify state interest).

2. The Commission Should Clarify That The Opt-Out Notice Requirement For Faxes Sent With Prior Express Consent Was Not Adopted Pursuant To Section 227(b) Of The Act.

To resolve this uncertainty, the Commission should clarify that the legal basis of its opt-out notice requirement for solicited fax advertisements is not Section 227(b) of the TCPA.⁴¹ Especially now that courts are misapprehending the actual basis for Section 64.1200(a)(3)(iv) of the Commission's rules—threatening to expose senders of solicited faxes to crushing liability—the Commission must move swiftly to identify the proper legal basis as required under the APA.

As discussed above, the rule does not align with the text, legislative history, or purpose of Section 227(b). Section 227(b) contains no language authorizing the Commission to adopt rules regarding faxes sent with the recipient's express consent, and certainly does not instruct the Commission to require an opt-out notice in such cases. Such a rule also is not rationally related to the interests animating the enactment of Section 227(b).⁴² Nevertheless, absent the Commission's guidance, at least one court has proceeded under the incorrect assumption that the rule was properly promulgated pursuant to Section 227(b), and others may reach the same conclusion. That assumption is not only wrong but also dangerous, as it could expose legitimate senders of solicited faxes to significant liability that Congress plainly never intended to authorize. In particular, Section 227(b)(3) creates a private right of action that permits suits in

⁴¹ 5 U.S.C. § 553(b)(2), (c); *Home Box Office Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). The APA requires an agency engaging in rulemaking to include a “reference to the legal authority under which the rule is proposed” with “a concise general statement of [the rule's] basis and purpose” when adopting a final rule.

⁴² Senate Report at 7. As explained above, Congress enacted Section 227(b)(2) because it recognized that recipients receiving faxes pursuant to an EBR but without express consent—and in many cases without significant contact with the sender—needed an easy way to “stop future unwanted faxes sent pursuant to such relationships.” An EBR provides a reasonable basis for inferring that a business will be willing to receive faxes from an advertiser with whom it has an existing relationship, that inference may turn out to be unwarranted in some instances, and those businesses may not know how to halt fax transmissions absent an opt-out notice. By contrast, when a sender relies on express consent rather than an EBR, there is no need to provide the recipient with a detailed opt-out notice: just as it had the ability to opt-in, a recipient possesses the power to opt-out.

state court based on “a violation of this subsection *or the regulations prescribed under this subsection*.”⁴³ Accordingly, it opens the floodgates to countless private actions—by plaintiffs who suffered no actual harm but seek statutory damages—for violations of a rule that Congress never contemplated.”⁴⁴ A-S Medication is now subject to such a suit and potentially liable for catastrophic damages to persons who had previously agreed, or requested, to receive advertisements or other information via facsimile.

III. CONCLUSION.

For the foregoing reasons, A-S Medication requests that the Commission grant A-S Medication a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited faxes after the effective date of the Regulation. A-S Medication respectfully requests that the Commission issue a declaratory ruling clarifying (1) that Section 64.1200(a)(4)(iv) of the Commission's rules applies only to unsolicited fax advertisements and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(4)(iv) of the Commission's rules.

Respectfully submitted,

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⁴³ 47 U.S.C. § 227(b)(3) (emphasis added).

⁴⁴ *Id.* § 227(b)(3)(B).