

Before the
Federal Communications Commission
Washington, DC 20554

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

JOSEPH T. RYERSON & SON, INC.'S PETITION FOR DECLARATORY RULING

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Pursuant to 47 C.F.R. § 1.2, petitioner Joseph T. Ryerson & Son, Inc. (“Ryerson”), through its counsel, respectfully petitions the Federal Communications Commission (the “Commission”) to issue a declaratory ruling removing uncertainty related to application of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), to alleged “faxes” *sent and received* digitally. Specifically, Ryerson asks the Commission to declare that alleged “faxes” that *initiate* in digital form *and* are received in digital form do not fall within the TCPA. This is the appropriate conclusion because (1) the transmission described above is more closely analogous to an email than a traditional fax, meaning it should be governed by the CAN-SPAM Act of 2003, 15 U.S.C. § 7701, *et seq.*, rather than the TCPA, (2) application of the TCPA to the transmission described above would violate the First Amendment, and (3) application of the TCPA to the transmission described above would be void for vagueness under the First and Fifth Amendments. As described in greater detail below, a finding in Ryerson’s favor would be consistent with the Consumer and Governmental Affairs Bureau’s (the “Bureau”) ruling in *In the Matter of Westfax, Inc. Petition for Consideration and Clarification* CG Docket Nos. 02-278, 05-338, August 28, 2015 (the “Westfax Order”). To avoid doubt and to assist the federal courts in interpreting the applicable TCPA regulations, the Commission should declare that the TCPA does not apply to the type of messages referenced above.

I. Background

Ryerson is a leading distributor and processor of metals in North America. Founded in 1842, Ryerson is headquartered in Chicago and employs approximately 4,000 employees in more than 100 locations. On May 14, 2015, Ryerson was served with a putative class action lawsuit alleging violations of the TCPA. That case is pending in the United States District Court for the Eastern District of Missouri as *Connector Castings, Inc. v. Joseph T. Ryerson & Son, Inc. d/b/a*

Ryerson, and John Does 1-10, Case No. 15-cv-00851-NAB. The sole plaintiff, Connector Castings, Inc. (“Connector”) (ironically a customer of Ryerson’s), contends it received at least one unsolicited fax from Ryerson that allegedly did not comply with the 47 C.F.R. §64.1200(a)(4)(iv) (the “Opt-Out Rule”).

Ryerson petitioned for a retroactive waiver of the Opt-Out Rule requirement for solicited faxes, and the Bureau granted a waiver on August 28, 2015.¹ That waiver, however, is subject to pending challenges before the full FCC and D.C. Circuit Court of Appeals.²

As to the alleged “fax” attached as an exhibit to the Connector Complaint and First Amended Complaint, a Ryerson employee uploaded a digital version of the file to a Web portal managed and owned by a third party provider of communication tools that is unaffiliated with Ryerson. The communication to Connector therefore originated in digital form (not as a traditional facsimile).

Ryerson also has learned that Connector received the alleged “fax” via email. Connector used AT&T’s RingCentral Office@Hand tool to facilitate email receipt. Accordingly, no paper,

¹ See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 2005, Junk Fax Prevention Act of 2005, Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirements for Faxes Sent with Recipients Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Aug. 28, 2015.

² See *Application for Full Administrative Review by Bais Yaakov of Spring Valley, Roger H. Kaye, and Roger H. Kaye MD PC*, CG Docket Nos. 02-278, 05-338, Sept. 25, 2015; *Application for Full Administrative Review by Beck Simmons, LLC; Physicians Healthsource, Inc.; Radha Geismann, M.D., P.C.; Sandusky Wellness, LLC; Alan L. Laub, DDS, Inc.; North Branch Pizza & Burger Co.; True Health Chiropractic, Inc.; Alan Presswood, D.C., P.C.; Carradine Chiropractic Center, Inc.; Christopher Lowe Hicklin, DC, PLC; J. Barrett Company, Central Alarm Signal, Inc.; St. Louis Heart Center, Inc.; Eric B. Fromer Chiropractic, Inc.; Arnold Chapman; Shaun Fauley; Keith Bunch Associates, LCC; Michael C. Zimmer, D.C., P.C.; Wilder Chiropractic, Inc.; Law Office of Stuart R. Berkowitz; Proex Janitorial, Inc., Italia Foods, Inc.*, CG Docket Nos. 02-278, 05-338, Sept. 28, 2015; *Bais Yaakov of Spring Valley, et al. v. FCC, et al.*, Case No. 14-1234 (D.C. Cir.).

ink, or toner was used in the alleged transmission, and Connector’s phone line was not tied up for incoming business calls or faxes. For all intents and purposes, the transmission to Connector was exactly like an email — it started on a Web-based platform that looks like many email user interfaces, and it ended in the recipient’s email account. Thus, it should be treated as email. The TCPA was created to address specific policy concerns, and, as set forth in greater detail below, none of those concerns is implicated here.

II. Westfax Petition and Order

Westfax, Inc. (“Westfax”) filed its petition in 2009 (the “Westfax Petition”), seeking clarification of the TCPA as applied to what it labeled as “efaxes.” For the purpose of the Westfax Petition and the Westfax Order, an “efax” was defined as “a fax that is converted to email.” (Westfax Order at ¶ 4). The focus of the Westfax Order was exclusively on conversion of faxes to digital image files or PDFs *upon receipt*. Neither the Westfax Petition nor the Westfax Order addressed how the analysis might be different if the message was both incepted and received digitally. *See* Westfax Order at ¶ 10 (“Westfax raises no questions regarding a document sent as an email over the Internet.”).

In the Westfax Order, the Bureau ruled that “efaxes are subject to the TCPA’s consumer protections.” (Westfax Order at ¶ 8). But it acknowledged that “a fax *sent as email* over the Internet” — which does not fall within the definition of an efax — “is not subject to the TCPA.” (Westfax Order at ¶ 10) (emphasis in original). In fact, the Bureau expressly stated that “the Commission has previously interpreted the TCPA to apply only to those *that begin as faxes*.” (Westfax Order at ¶ 10) (emphasis added). The declaratory relief sought by Ryerson therefore is consistent with the Westfax Order, but Ryerson requests a declaratory ruling to avoid any doubt

that transmissions such as those at issue here that both begin and end in digital form are not covered by the TCPA.

III. Messages that are initiated and received in digital form are not governed by the TCPA.

The Commission has repeatedly found that “faxes ‘sent as an email over the Internet’ are not subject to the TCPA and the rules.” (Westfax Order at ¶ 10) (citing *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14132 (July 3, 2003)). In the Westfax Order, the Bureau acknowledged that such email is instead “subject to the CAN-SPAM Act.” (Westfax Order at n. 31). Accordingly, messages that are both initiated and received in digital form should be subject to the rules governing email, not the TCPA.

The fact that digital transmissions may (in some instances) be converted to analog protocols and sent over telephone lines is a distinction without a difference. Since the Internet’s inception, countless emails have been transmitted in the same fashion, with dial-up modems converting digital information to an analog signal that can travel along a normal telephone line. That signal is then converted back to a digital signal when it reaches its destination. Although digital high-speed Internet is becoming much more common, dial-up is still in use and it certainly has been the primary form of Internet access during much of the TCPA’s existence. Moreover, digital telephone lines are becoming more common, meaning that analog conversion may be unnecessary in many circumstances for digital transmissions.

Thus, conversion of a digital message to an analog signal is not an appropriate benchmark for determining whether a digitally incepted message is a fax covered by the TCPA or an email covered by the CAN-SPAM Act. The more appropriate standard, as indicated by the Westfax Order, is that the TCPA applies only to messages that “begin as faxes” (Westfax Order

at ¶ 10) — i.e., messages “sent as faxes over telephone lines . . . on the originating end.” (Westfax Order at ¶ 9). In those instances where traditional fax machines are used to send analog-incepted faxes over telephone lines, the TCPA applies. But where, as in the case of Ryerson, the “fax” is originated as a digital message, the message is more closely analogous to an email and the TCPA should not apply.

IV. Application of the TCPA to messages initiated and received in digital form would violate the First Amendment.

The declaratory relief requested by Ryerson is reinforced by the fact that applying the TCPA to messages both initiated and received in digital form would violate the First Amendment. The TCPA is a content-based restriction on speech. Regulations that distinguish between speech by its “subject matter” or “by its function or purpose” are content-based “and, therefore, are subject to strict scrutiny.” *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). The fax provisions of the TCPA clearly regulate speech by its function or purpose — namely, fax communications “advertising the commercial availability or quality of any property, good, or services,” 47 U.S.C. § 227(a)(5) — and are therefore content-based under *Reed*. Although the TCPA might be considered a regulation on commercial speech, the practice of affording “less protection to commercial speech than to other expression . . . has [long] been subject to some criticism,” *United States v. United Foods, Inc.*, 533 U.S. 405, 409-10 (2001), and *Reed* indicates no such exception to the general rule: “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Reed*, 135 S.Ct. at 2228 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). “Content-based laws . . . are presumptively unconstitutional and may be justified only if the government

proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S.Ct. at 2226.

Application of the TCPA to transmissions initiated and received in digital form would not be narrowly tailored to serve compelling state interests as outlined by Congress in passing the statute. In enacting the TCPA, Congress was focused on the fact that “the recipient assumes both the cost associated with the use of the facsimile machine and the cost of the expensive paper used to print out facsimile messages.” 102 H. Rpt. 317. Neither of those issues exists when the message is transmitted and received in digital form. Likewise, there are no concerns with the fact that “when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable to process actual business communications.” *Id.* An email recipient can receive multiple emails simultaneously and continue using its computer and email account for other purposes as emails come in. Finally, Congress stated an interest in avoiding “interference, interruptions and expense,” *id.*, but the *de minimis*, if not nonexistent, interruption associated with receipt of an additional email is not a sufficiently compelling government interest to overcome strict scrutiny.

Application of the TCPA to transmissions initiated and received in digital form is problematic even under the lesser standard of review that has often been applied to content-based regulations of commercial speech. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980). Under that standard, the government still must demonstrate (i) “a substantial interest to be achieved by restrictions on commercial speech,” (ii) that the restriction on speech “directly advance[s] the state interest involved,” and (iii) that the government’s asserted interest could not “be served as well by a more limited restriction on commercial speech.” *Id.* at 564. Here, the government has not established a substantial interest under the

TCPA in restricting transmissions sent and received digitally — nor could it have established a substantial interest when the TCPA was passed in 1992, before many significant developments in digital communications and marketing technology. Even if the government interests set forth in the legislative history of the TCPA could be imputed to application of the statute in this context, a restriction on digital transmission and receipt does not directly advance the stated interests in preserving ink, toner, paper, and fax machine time because digital transmission and receipt does not implicate these issues. Finally, it is clear that the government interest (to the extent there is one) in restricting transmissions sent and received digitally can be (and is) served by a more limited restriction: the CAN-SPAM Act of 2003. Thus, application of the TCPA to such transmissions would not serve a substantial government interest.

V. Application of the TCPA to messages initiated and received in digital form would render the statute void for vagueness under the First and Fifth Amendments.

The declaratory relief sought by Ryerson also is supported by the fact that applying the TCPA to messages both initiated and received in digital form would render the statute unconstitutionally vague. A law restricting speech is impermissibly vague if it fails to provide fair notice to reasonable persons of what is prohibited. *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497-99 (1982)). Moreover, “a more stringent vagueness test should apply” where a law interferes with the right of free speech. *Village of Hoffman Estates*, 455 U.S. at 497-99.

Nothing in the express language of the TCPA or its legislative history suggests that it would apply to transmissions that are both initiated and received in digital form. To the contrary, the plain language of the statute (interpreted consistently with the commonly understood meaning of the term “fax” when the TCPA was passed) and the legislative history suggest that the focus was exclusively on traditional, paper-based fax machines (either in transmission or in

receipt). Thus, if the TCPA is intended to apply to digital messages (digital at inception and at receipt), it fails to give a reasonable person notice of what is prohibited. *See, e.g., Grocery Mfrs. Ass'n v. Sorrell*, 2015 U.S. LEXIS 56147, 136-144 (D.Vt. April 27, 2015) (finding plaintiff likely to succeed in void-for-vagueness challenge to state food labeling law because it failed to provide reasonable notice of scope of conduct giving rise to civil penalties).

VI. Conclusion

For the foregoing reasons, Ryerson respectfully requests that the Commission declare that transmissions such as those at issue here that initiate in digital form and are received in digital form do not fall within the fax provisions of the TCPA.

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