

**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)	

Anderson + Wanca’s Comments on Ryerson’s Petition for Declaratory Ruling

Commenter Anderson + Wanca (“A+W”) opposes the Petition for Declaratory Ruling filed by Joseph T. Ryerson & Son, Inc. (“Ryerson”). A+W is an Illinois law firm that represents clients across the country in private litigation enforcing the Telephone Consumer Protection Act of 1991 (“TCPA”) and the Commission’s rules, including the fax-advertising rules. A+W is not involved in the litigation against Ryerson, but A+W submits these comments because a ruling on the Petition could have implications beyond Ryerson’s case.

The Consumer & Governmental Affairs Bureau sought comments on the Ryerson Petition on November 24, 2015.¹ As argued below, the Commission should deny the Petition because there is no controversy to resolve, where (1) the TCPA covers faxes sent using any “computer, or other device,” and (2) the Commission ruled 20 years ago that “computer fax modem boards” are “telephone facsimile machines” under the TCPA. In addition, Ryerson’s constitutional challenges to the TCPA fail because the statute has repeatedly withstood First Amendment challenges under the intermediate scrutiny applied to commercial speech and the statute clearly states what conduct is prohibited.

¹ *Consumer & Governmental Affairs Bureau Seeks Comment on a Petition for Declaratory Ruling filed by Joseph T. Ryerson & Son, Inc.*, CG Docket Nos. 02-278, 05-338 (Nov. 24, 2015).

I. There is no controversy to decide because the plain language of the TCPA precludes Ryerson’s requested declaratory ruling.

The Ryerson Petition raises no “controversy” or “uncertainty” for the Commission to resolve, as required by Commission Rule 1.2.² As the Public Notice observes, the Ryerson Petition is based on the notion “that the TCPA should only apply to messages initiated by a fax machine over telephone lines on the originating end.”³ Ryerson argues the TCPA applies only “where traditional fax machines are used to send analog-incepted faxes over telephone lines,” and not where the fax “is originated as a digital message” and sent by a computer.⁴ That contradicts the plain language of the statute.

The TCPA makes it unlawful “to use any telephone facsimile machine, *computer, or other device* to send, to a telephone facsimile machine, an unsolicited advertisement,” in the absence of a valid EBR defense.⁵ The receiving device must be a “telephone facsimile machine,” but the originating device can be any “other device” and, in particular, it can be a “computer.” Congress knew in 1991 that fax advertisers were using computers to broadcast thousands or millions of fax advertisements, and it took that into consideration in the statute. Thus, even if Ryerson is correct that it did not use a “telephone facsimile machine” to send its faxes—which is incorrect, as discussed below—it admits it used a “computer, or other device,” and there is no controversy to decide.

² 47 C.F.R. § 1.2.

³ Public Notice at 1.

⁴ Ryerson Pet. at 6.

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

II. There is no controversy to decide because the Commission has already ruled a computer equipped to send faxes is a “telephone facsimile machine.”

The Commission ruled in 1995 that “computer fax modem boards,” which “enable personal computers to transmit messages to or receive messages from conventional telephone facsimile machines or other computer fax modem boards” are “telephone facsimile machines” under the TCPA.⁶ The Commission concluded that “Congress could not have intended to allow easy circumvention of its prohibition on facsimile advertisements by simply using a computer to send a facsimile rather than a stand-alone facsimile machine.”⁷ Ryerson is attempting precisely the same end-run around the statute the Commission rejected 20 years ago, and the Petition should be denied.⁸

III. To the extent Ryerson challenges faxes received as e-faxes, the Petition is procedurally improper.

The Consumer & Governmental Affairs Bureau ruled in the Westfax Order that the definition of “telephone facsimile machine” includes “the fax server and modem, along with the computer that receives the efax because together they by necessity have the capacity to ‘transcribe text or images (or both) from an electronic signal received over a telephone line onto paper.’”⁹ The Bureau rejected “the contention that e-faxes do not implicate the TCPA’s

⁶ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12405 ¶ 28 (rel. Aug. 7, 1995).

⁷ *Id.* ¶ 29.

⁸ *See also In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14133 ¶ 200 (rel. July 3, 2003) (ruling that “developing technologies permit one to send and receive facsimile messages in a myriad of ways,” that “a modem attached to a personal computer allows one to transmit and receive electronic documents as faxes,” and that “[f]ax servers’ enable multiple desktops to send and receive faxes from the same or shared telephony lines”).

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

consumer protection concerns” because they “may shift the advertising costs of paper and toner to the recipient if they are printed” and can cause “interference, interruptions, and expense” the same as any junk fax.¹⁰ The Bureau ruled efaxes “just like paper faxes, can increase labor costs for businesses, whose employees must monitor faxes to separate unwanted from desired faxes.”¹¹ The Bureau relied on the Commission’s 2003 ruling that “it would make little sense to apply a different set of rules (or, in this case, no rule at all) to faxes sent to one type of device (a standalone fax machine) versus another (a computer and its attachments) when the sender generally does not know what device will receive the fax.”¹²

Ryerson argues the declaratory ruling it seeks is “consistent with” the Westfax Order, but it trots out the same arguments rejected in the Westfax Order—*i.e.*, that the TCPA should not apply because “no paper, ink, or toner was used in the alleged transmission, and Connector’s phone line was not tied up for incoming business calls or faxes.”¹³ The Westfax Order addressed these points, and the time period to seek review by the full Commission expired September 28, 2015.¹⁴ Ryerson did not comment on the Westfax Order or petition for Commission review, even though it was served with process in the underlying TCPA

¹⁰ *Id.* ¶ 11. The courts agree. *See, e.g., Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) (“Even a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk. That loss, and the statutory remedy, are the same for all recipients”); *Imhoff Inv., LLC v. Alfocino, Inc.*, 792 F.3d 627, 632 (6th Cir. 2015) (quoting *Turza* with approval); *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003) (noting “unsolicited fax advertising interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems”).

¹¹ Westfax Order ¶ 11.

¹² *Id.*

¹³ Ryerson Pet. at 3–4.

¹⁴ 47 C.F.R. § 1.115(d).

litigation May 14, 2015.¹⁵ Ryerson cannot obtain review of the Westfax Order through a duplicative petition for declaratory ruling.

IV. Ryerson’s constitutional challenges fail.

Ryerson argues that if the TCPA applies to faxes sent by computer and then converted to e-fax, the law violates the First Amendment under “strict scrutiny.”¹⁶ That is incorrect because the Supreme Court held the standard for regulating “commercial speech” is intermediate scrutiny in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*¹⁷

The *Central Hudson* Court recognized the “distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,” holding the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”¹⁸ Under *Central Hudson*, commercial-speech regulations need only be justified by a substantial government interest, directly advance that interest, and be narrowly drawn to serve that interest.¹⁹ The standard does not require “the least restrictive means” necessary to

¹⁵ Notably, Ryerson does not state who its fax broadcaster was. It may well have used Westfax. *See* Ryerson Pet. at 3 (referring only to “a third party provider of communication tools that is unaffiliated with Ryerson”).

¹⁶ Ryerson Pet. at 6–8.

¹⁷ 447 U.S. 557, 564 (1980); *see also* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (where statute “regulates commercial messages to protect consumers from . . . aggressive sales practices . . . the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review”).

¹⁸ *Id.* at 562–63.

¹⁹ *Id.* at 566.

accomplish the interest or a perfect fit between means and ends.²⁰ It requires only a “reasonable fit” with the regulations “in proportion to the interest served.”²¹

Two federal circuit courts of appeal, the Eighth and Ninth, have squarely addressed First Amendment challenges to the TCPA’s fax-advertising regime, both upholding the statute.²² The Commission ruled last year that the opt-out notice requirements did not violate the First Amendment, given that “Congress has expressed a strong governmental interest in protecting consumers from the costs and annoyance of unwanted fax ads” and the regulations reasonably achieved that goal.²³

Aware of this hole in its argument, Ryerson argues the distinction between commercial speech and non-commercial speech was effectively overruled by *Reed v. Town of Gilbert*, --- U.S. ---, 135 S. Ct. 2218, 2226 (2015). According to Ryerson, the commercial-speech doctrine no longer exists because “*Reed* indicates no such exception to the general rule.”²⁴ First, Supreme Court doctrines are not overruled by implication in this manner.²⁵ The Supreme Court holds “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals

²⁰ *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

²¹ *Id.*

²² *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (8th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 57 (9th Cir. 1995); *see also Texas v. Am. Blast Fax, Inc.*, 159 F. Supp. 2d 936, 939 (W.D. Tex. 2001) (TCPA “applies exclusively to commercial speech, and is not a ‘content-based’ regulation for purposes of the First Amendment”).

²³ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd. 13998, 14012 ¶ 32 (rel. Oct. 30, 2014).

²⁴ Ryerson Pet. at 6.

²⁵ *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

should follow the case which directly controls”²⁶ Second, *Reed* was not a commercial-speech case. It involved a church challenging an ordinance regulating outdoor signs based on whether they were, for example, “Ideological Signs,” “Political Signs,” or “Temporary Directional Signs.”²⁷ The Court could not have overruled *Central Hudson* or the commercial-speech doctrine in that context, and it certainly would not have done so by *not mentioning* the doctrine it was overruling.

Two federal circuit courts of appeal, the Second and Eleventh, have applied the *Central Hudson* commercial-speech standard post-*Reed*, both citing *Reed* without so much as suggesting the standard had been overruled.²⁸ The long line of Supreme Court precedent holding strict scrutiny does not apply to commercial speech has not been overruled, and the TCPA satisfies the standards for commercial speech, as the courts and the Commission have repeatedly concluded.

Finally, Ryerson argues if the TCPA applies to faxes sent using a computer and converted to e-faxes, then the statute is “unconstitutionally vague” because it “fails to provide fair notice to reasonable persons of what is prohibited.”²⁹ But the statutory language clearly states it is unlawful “to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement,” without a

²⁶ *Id.*

²⁷ *Reed*, 135 S. Ct. at 2224–25.

²⁸ *Expressions Hair Design v. Schneiderman*, 803 F.3d 94, 108 (2d Cir. 2015); *Dana’s R.R. Supply v. Atty. Gen., Fla.*, --- F.3d ---, 2015 WL 6725138, at *6 (11th Cir. Nov. 4, 2015).

²⁹ Ryerson Pet. at 8.

valid EBR defense.³⁰ There is nothing vague about the phrase “telephone facsimile machine, computer, or other device.” It means *any* device.

Ryerson argues “the commonly understood meaning of the term ‘fax’ when the TCPA was passed” was “traditional, paper-based fax machines (either in transmission or in receipt).”³¹ Ryerson is wrong on the “transmission” aspect of this argument because Congress included “computer” in the prohibition. It is doubly wrong because Congress made the prohibition broad enough to cover any “other device” that could be used in the future to transmit faxes. The Commission addressed the “receipt” aspect of Ryerson’s argument in the Westfax Order, ruling “telephone facsimile machine” includes “the fax server and modem, along with the computer that receives the efax because together they by necessity have the capacity to ‘transcribe text or images (or both) from an electronic signal received over a telephone line onto paper.’”³² That is the end of the inquiry.

Conclusion

For the foregoing reasons, the Commission should deny the Ryerson Petition for Declaratory Ruling in its entirety.

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Respectfully submitted,

By: s/Brian J. Wanca
Brian J. Wanca
Glenn L. Hara
Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: (847) 368-1500

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

³¹ Ryerson Pet. at 8–9.

³² Westfax Order ¶ 9.