

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

In the Matter of)	
)	CG Docket No. 02-278
Petition of Joseph T. Ryerson & Son, Inc.)	
for Declaratory Ruling)	CG Docket No. 05-338

**COMMENTS OF CONNECTOR CASTINGS, INC., ON PETITION OF
JOSEPH T. RYERSON & SON, INC., FOR DECLARATORY RULING**

Joseph T. Ryerson & Son, Inc. (Petitioner), has petitioned the Federal Communications Commission (Commission or FCC) for a declaratory ruling. Connector Castings, Inc. (Connector Castings), hereby comments on the Petition. Petitioner chose not to comment on the petition by Westfax, Inc., on which the FCC issued its recent order (Westfax Order), little more than three months ago. (DA 15-977, Aug. 28, 2015.)

Petitioner should not be permitted to seek another FCC order, effectively removing the consumer protections Congress has afforded under the Telephone Consumer Protection Act (TCPA), as amended by the Junk Fax Prevention Act (JFPA). 47 U.S.C. § 227. The Petition should be denied because:

- The Petition is based on an incorrect technological assumption, that efaxes that are both sent and received in digital form, are like email and should be governed by CAN-SPAM,¹ and not TCPA;
- Petitioner is not entitled to a declaratory ruling because there is no “uncertainty.” Congress in the TCPA and the FCC in the Westfax Order, have removed any “uncertainty” that fax advertising is restricted, including efaxes, whether sent or received or both, or whether the transmission by telephone lines is analog or digital;
- Application of the TCPA, as amended by the JFPA, to fax advertising, whether sent or received or both as anifax, and whether transmission by telephone lines is analog or digital, does not violate the First Amendment; and

¹ Controlling the Assault on Non-solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701, *et seq.* (CAN-SPAM).

- Application of the TCPA, as amended by the JFPA, to fax advertising, whether sent or received or both, as an efax, and whether transmission by telephone lines is analog or digital, is not “void for vagueness” in violation of the First and Fifth Amendments.

Rather, the Petition to the Commission is a transparent attempt to delay further a pending TCPA junk-fax lawsuit against Petitioner: *Connector Castings, Inc. v. Joseph T. Ryerson & Son, Inc. d/b/a Ryerson, et al.*, No. 4:15-CV-00851-SNLJ, E.D. Mo. (“Eastern District of Missouri lawsuit”). In connection with Petitioner’s advocacy in the Eastern District of Missouri lawsuit, Petitioner is seeking to remove its dispute with Connector Castings from the TCPA’s consumer protections rubric and to delay the Eastern District of Missouri lawsuit. The Commission should not permit the Petitioner to use administrative proceedings to do so. As such, the Petition should be denied.

I. EFAXES, EVEN IF BOTH SENT AND RECEIVED DIGITALLY, ARE DIFFERENT FROM EMAIL.

The Petition should be denied because it is based on an assumption about technology that is simply wrong. It is based on an incorrect assumption that was clarified by the Commission in its Westfax Order: Efaxes are different from emails, and efaxes are to be governed by the TCPA. Westfax Order at 7 (“... efaxes are subject to the TCPA and the Commission’s related rules. . . . We find that efaxes are subject to the TCPA’s consumer protections.”).

Contrary to Petitioner’s assertion, the Commission has already decided in the Westfax Order that efaxes—just like conventional faxes—are governed by the TCPA. Whether an efax originates or is received in digital form, an efax is transmitted “in between” over a telephone line and should nonetheless be governed by the TCPA. An efax that is sent by email goes to an efax provider, is converted, and is then transmitted over telephone lines to a recipient. If the recipient also has an efax

provider, the efax is then reconverted and received in the recipient's "inbox," at that point similar to an email.

In contrast, an email is transmitted through data transmissions over the Internet, and does not "use" telephone lines. Email is governed by CAN-SPAM. *See* Westfax Order at 3. Efaxes, on the other hand, are governed by TCPA. *Id.*

The Commission already addressed and concluded that efaxes are subject to and governed by the TCPA, not CAN-SPAM:

Based on our clarification, consumers enjoy the same protections from unwanted efaxes as they do from conventional faxes.

Westfax Order at 7-9. Faxes that are both sent and received as efaxes, are nonetheless ***transmitted*** via telephone lines and are governed by the TCPA. The Petition should be denied because it is predicated on an incorrect assumption about technology.

II. PETITIONER SHOULD BE PROHIBITED FROM INITIATING AN ADMINISTRATIVE PROCEEDING REQUESTING A DECLARATORY RULING WHEN THERE IS NO "UNCERTAINTY."

The governing regulation, 47 C.F.R. § 1.2, authorizes the FCC to issue declaratory rulings to "remove uncertainty." 47 C.F.R. § 1.2(a). Petitioner should not be permitted to assert "uncertainty." Both the express language of the TCPA and the FCC's recent Westfax Order provide that the consumer protections afforded in the TCPA, and regulations promulgated thereunder, apply to fax advertising in the form of efaxes. The Commission's order was not limited. Efaxes are governed by the TCPA. Whether an efax is sent or received as an efax, it is not "uncertain" that the TCPA governs. If an efax is ***transmitted*** over a telephone line—whether sent or received or both as an efax, or whether the telephone transmission is analog or digital—the consumer protections afforded in the TCPA apply. 47 U.S.C. § 227; Westfax Order at 3, 7.

The express language of the TCPA provides that its consumer protections apply to efares. The Congress, in the TCPA, has expressly prohibited fax advertising via use of **automated telephone machine**, defined in the statute to include:

[E]quipment which has the capacity

(A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or

(B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

47 U.S.C. § 227(a)(3)(emphasis added). In other words, the TCPA may be triggered by the *type of equipment* used to send or receive, or both, efares. If a computer has the capacity to **send** an efare, the TCPA applies. If a computer has the capacity to **receive** an efare, the TCPA applies. The TCPA applies to efares, whether the efare is sent or received or both, because the electronic signal is **transmitted** over a telephone line. *See discussion, infra* at 3. Whether computers at either end of a transmission have efare is not controlling. Whether a telephone transmission is analog or digital is not controlling. Efares are **transmitted** via telephone lines, and therefore the TCPA governs efares.² The express language of the TCPA defeats any claimed “uncertainty”. 47 C.F.R. §1.2(a) (Commission may issue declaratory ruling terminating controversy or removing uncertainty).

Moreover, the FCC’s Westfax Order states that the TCPA applies to efares. Westfax Order at 3, 7. The Commission referred to “end-to- communication.” *Id.* If any part of the communication, between sending an efare and receiving an efare, like **transmission** of an efare, involves a telephone, the TCPA applies.

Petitioner wants its dispute with Connector Castings, now in federal court in the Eastern District of Missouri, to be removed from the TCPA rubric; however, such a result is contrary to the express language of the TCPA, and the FCC's declaratory ruling in the Westfax Order. 47 U.S.C. § 227; 47 C.F.R. § 64.1200; Westfax Order.

The Petition for a declaratory ruling is but an attempt to delay the federal lawsuit in Missouri. Petitioner should not be entitled to attack collaterally the Commission's recent Westfax Order and to initiate an administrative proceeding seeking a declaratory ruling from the FCC on matters that are not "uncertain" as required by Section 1.2.

III. APPLICATION OF THE TCPA, AS AMENDED BY THE JFPA, TO FAX ADVERTISING BY EFAXES BOTH SENT AND RECEIVED DOES NOT VIOLATE THE FIRST AMENDMENT.

Petitioner does not cite a single case or other authority that has held or determined the TCPA or the JFPA violate the First Amendment, or that applied "strict scrutiny" to the TCPA like content-based restriction on political speech. (Pet. at 6.)

The TCPA, and specifically the JFPA, is not a "content-based" restriction on speech. Petitioner does not cite a single case or other authority to support the notion that regulation of junk faxes in the TCPA are "content-based," and therefore require "strict scrutiny." To the contrary, there are many reported decisions upholding constitutionality of TCPA, *e.g.*, *Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 658 (8th Cir. 2003); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995), *aff'd* 844 F. Supp. 632 (D. Or. 1994), *Texas v Am. Blast Fax, Inc.*, 121 F. Supp.2d 1085, 1092 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997). All of those cases have applied the Supreme Court's decision in *Central Hudson Gas & Elec. Corp. v.*

² In contrast, an Internet fax or a commercial email is not governed by the TCPA, but rather by CAN-SPAM. *See* Westfax Order.

Public Service Comm'n of N.Y., 447 U.S. 557 (1980), to evaluate the TCPA. *See also Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (*Central Hudson* remains the appropriate test for the constitutionality of a restriction on commercial speech).

Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015), cited by Petitioner, does not require “strict scrutiny of regulations in the TCPA for fax advertising. *Id.* *Reed* involved a town’s sign code that treated “speech” on ideological signs, political signs, and signs directing the public to a church, differently from other signs. The Supreme Court concluded that the town’s sign code provided for content-based restrictions on speech in violation of the First Amendment. *Id.* *Reed* does NOT support the proposition that regulation of fax advertising in the TCPA is “content based” or requires “strict scrutiny.” All courts that have considered the constitutionality of the TCPA have applied the *Central Hudson* factors for commercial speech, like advertising.

Although there has been no discovery in the pending Eastern District of Missouri lawsuit, Connector Castings has not claimed that Petitioner’s faxes were false or misleading. If and until discovery shows otherwise, Petitioner and Connector Castings do not dispute that Ryerson’s faxes were neither false nor misleading. Connector Castings will address the last three *Central Hudson* factors:

- Whether there is a substantial governmental interest;
- Whether the regulation directly advances the governmental interest.
- Whether the regulation is “more extensive than necessary serve the interests that support it.

Central Hudson Gas & Elec. Corp., 447 U.S. at 566.

There is a “substantial government interest” in Congress regulation of Junk Faxes in the TCPA, the first *Central Hudson* factor. That unrestrained fax advertising has presented a significant problem is apparent from the legislative history, media reports,

and case law. This Commission observed in the Westfax Order that:

Unwanted fax advertisements can annoy customers, costing them time and money by way of interfering transmissions, and unplanned uses of paper and toner, as well as wear and tear on equipment.

* * *

We disagree that efaxes do not implicate the TCPA's consumer protection concerns. Faxes "sent to a computer" or fax server may shift the advertising costs of paper and toner to the recipient if they are printed, and can cause "interference, interruptions, and expense" that can result from junk faxes, whether physical or electronic. Efaxes, just like paper faxes, can increase labor costs for businesses, whose employees must monitor faxes to separate unwanted from desired faxes.

Westfax Order at 2-3, 11-12. According to the Government Accountability Office (GAO), complaints about junk faxes to the Commission are second only to FCC complaints about obscenity, and complaints about junk faxes are rapidly increasing. GAO-06-425.

The TCPA directly advances the governmental interest, the second *Central Hudson* factor. Here, the TCPA's regulation of fax advertising, including efaxes, advances Congress's interest in discouraging fax advertising. See *Hatch v. Sunbelt Communications and Marketing*, 2002 U.S. Dist. LEXIS 26920 (D. Minn. Sept. 4, 2002).

The TCPA is not "more extensive than necessary to service the governmental interest that supports it," the third *Central Hudson* factor. In *Nixon v. Am. Blast Fax, Inc.*, the Eighth Circuit Court of Appeals reasoned:

While there is differential treatment in TCPA of unsolicited fax advertisements and live telemarketing calls, the difference is consistent with TCPA's goal to protect members of the public from bearing the costs of unwanted advertising...The distinction made in TCPA between live telemarketing calls and faxes is also consistent with other concerns behind the statutory scheme.

323 F.3d at 657. Likewise, here, there is a basis for regulating efaxes in the TCPA no

differently from conventional faxes.

Application of *Central Hudson* confirms that the statute and regulations at issue here show that the TCPA, as interpreted by the Commission, does not violate the First Amendment. *Id.*

IV. APPLICATION OF THE TCPA, AS AMENDED BY THE JFPA, TO FAX ADVERTISING BY EFAXES BOTH SENT AND RECEIVED, IS NOT “VOID FOR VAGUENESS” IN VIOLATION OF THE FIRST AND FIFTH AMENDMENTS.

Petitioner suggests that application of the TCPA efares both sent and received in a digital form would render the statute unconstitutionally vague. For the reasons explained, *infra*, regulation of efares, even those efares that are both sent and received as an efare, is not vague.

A statute is only impermissibly vague if it fails to provide fair notice to reasonable persons of what is prohibited. However, neither of the cases cited by the Petitioner, *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), support that application of efares under the consumer protections afforded by the TCPA render the TCPA unconstitutionally vague. *Kolender* involved a provision of the California penal code, and *Village of Hoffman Estates* involved an ordinance purporting to regulate businesses that designed or marketed certain items that could be used as illegal drug paraphernalia. Neither was a TCPA or junk-fare case, and neither case supports the proposition that the TCPA, which clearly prohibits certain fare advertisements, including efares, is “void-for-vagueness.”

CONCLUSION

The Commission should deny Petitioner's petition seeking a declaratory ruling because the Commission there should not be "uncertainty" as required by 47 C.F.R. § 1.2. Rather its petition is but a strategy for further delay in the Eastern District of Missouri lawsuit. Moreover, application of the TCPA to e-faxes is not unconstitutional.

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CERTIFICATE OF SERVICE

I certify that on December 8, 2015, I served by email a true and correct copy of these Comments to the following:

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