

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 REPLY COMMENTS IN SUPPORT
OF PETITION FOR DECLARATORY RULING**

Blaine C. Kimrey
bkimrey@vedderprice.com
Bryan K. Clark
bclark@vedderprice.com
VEDDER PRICE P.C.
222 N. LaSalle St.
Chicago, IL 60601
T: (312) 609-7500
F: (312) 609-5005

Attorneys for Joseph T. Ryerson
& Son, Inc.

Dated: December 15, 2015

In response to the Petition for Declaratory Ruling (the “Ryerson Petition”) filed on November 4, 2015, by Joseph T. Ryerson & Son, Inc. (“Ryerson”), 13 companies and individuals have filed comments.¹ Five of those comments support the declaratory relief sought in the Ryerson Petition. It is important for the Federal Communications Commission (the “Commission”) to understand the motivations of the remaining eight commenters. One of them is Connector Castings, Inc. (“Connector”), which is a company that routinely files putative class action lawsuits under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), including the case pending against Ryerson in the United States District Court for the Eastern District of Missouri. Commenter Anderson + Wanca acknowledges that it is a law firm that focuses on representing plaintiffs in TCPA litigation, and commenter Robert H. Braver states that he personally has been a plaintiff in many TCPA cases. Other commenters also have similar financial interests in TCPA litigation — Vincent Lucas has represented himself in various TCPA matters in Ohio, Robert Biggerstaff has routinely served as an expert witness for plaintiffs in TCPA cases, and Todd Bank has represented many individuals (including himself) in TCPA actions. In short, the Commission should exercise the appropriate amount of skepticism with respect to the Opposing Comments, given that these individuals and companies each stand to gain financially if the Commission expands the TCPA.

The arguments set forth in the Opposing Comments also are unconvincing. The Ryerson Petition is materially distinct from the Commission’s prior actions and addresses an uncertain area of statutory interpretation. The harms that the TCPA was designed to prevent do not exist

¹ See Comments of Mark Gregg, Comments of Johnnie Daciolas, Comments of Michael Friend, Comments of Cynthia Brinker, and Comments of Jason Stephens (collectively, the “Supporting Comments”), and Comments of Vincent Lucas, Comments of Robert Biggerstaff, Comments of Robert H. Braver, Comments of Anderson + Wanca, Comments of Todd C. Bank, Comments of Connector Castings, Inc., Comments of Steve Nocerini, and Comments of Jimmy A. Sutton (collectively, the “Opposing Comments”).

when faxes are both sent and received in digital form, and finding otherwise would violate the First Amendment and render the TCPA void for vagueness in this context. Ryerson therefore 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.

I. The Ryerson Petition is procedurally and substantively proper.

Several of the Opposing Comments suggested that Ryerson’s Petition should be denied because there is no “uncertainty” to be removed by the requested declaratory ruling.² They argue that (a) the question posed by Ryerson was already answered 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”), and (b) the definition of a “fax” under the TCPA is so clear that there is no “uncertainty” for the Commission to address. The Opposing Comments are wrong on both counts, and in making their arguments, they demonstrate precisely why a declaratory ruling is needed.

A. The Ryerson Petition is materially distinct from the Westfax Order.

The Opposing Comments criticize the Ryerson Petition as being duplicative of the petition that precipitated the Westfax Order (the “Westfax Petition”). But Ryerson’s petition is not limited to “efaxes” as that term was defined in the Westfax Order. The Westfax Order defined an “efax” as “a fax that is converted to email.” (Westfax Order at ¶ 4). This simply begs the question — what is a “fax”? In this petition, Ryerson asks whether a document initiated digitally (rather than as a traditional fax) and never received as a traditional fax should be considered a “fax” under the TCPA. Accordingly, the Ryerson Petition is materially distinct from the Westfax Petition and is entirely appropriate for consideration by the Commission. The

² Comments of Robert H. Braver at p. 3, Comments of Anderson + Wanca at p. 4, Comments of Connector Castings, Inc. at p. 3.

fact that Ryerson did not comment on the Westfax Petition has no bearing on Ryerson’s ability to raise this separate inquiry via its own petition for declaratory relief.³ In fact, the uncertainty that Ryerson seeks to address was magnified *by* the Westfax Order. A declaratory ruling is needed because the Commission’s statement that “a fax *sent as email* over the Internet is not subject to the TCPA” (Westfax Order at ¶ 10) (emphasis in original) is inconsistent with the extremely broad position advocated by the Opposing Comments — which appears to bring even traditional emails under the coverage of the TCPA as long as they are sent with a system “capable of” sending an advertisement to a fax number.

In the Comments of Robert H. Braver, Mr. Braver argues that the Westfax Order has already addressed faxes that are both sent and received in digital form because there is nothing unique about the protocol Ryerson has described. (Comments of Robert H. Braver at p. 3). It is certainly true that Ryerson is not the only company that has used this sort of technology to communicate with customers. But Ryerson is aware of no instance — in the Westfax Order or elsewhere — in which the Commission has analyzed whether the language of the TCPA applies to “faxes” that are both sent and received in digital form. Ryerson does not argue, as Mr. Braver suggests, that the TCPA only applies to “manually feeding [faxes] into old-fashioned analog fax machines.” (Comments of Robert H. Braver at p. 3). The definition of a “telephone facsimile machine” focuses, however, on the machine’s ability to “transcribe text or images, or both, *from paper* into an electronic signal” or 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

³ Likewise, the fact that Ryerson is a defendant in a single putative class action lawsuit should not, as Opposing Comments have suggested, weigh against the relief sought by Ryerson. (Comments of Connector Castings, Inc. at p. 5). The question posed by Ryerson is entirely valid, and Ryerson has properly invoked the jurisdiction of the Commission to address it. The fact that the relief sought by Ryerson could be detrimental to plaintiffs’ class action lawyers does not mean the relief is inappropriate.

added). In an increasingly paperless world, the Commission should consider whether this definition actually applies to a transmission in which paper is never used by the sender or the recipient. That is not discussed in the Westfax Order.

B. The definition of a “fax” in this context is uncertain and warrants declaratory relief.

The Opposing Comments rely on all manner of rhetoric to suggest that Ryerson’s Petition raises a preposterous question, but their own attempts to define a “fax” demonstrate precisely why declaratory relief is needed.⁴ For example, Connector Castings does not define the term “efax,” but argues that the TCPA applies regardless of whether an “efax” is sent or received as an “efax.” (Comment of Connector Castings, Inc. at p. 3). Connector emphasizes the “capacity” of the machine at issue: “If a computer has the capacity to *send* an efax, the TCPA applies. If a computer has the capacity to *receive* an efax, the TCPA applies.” (Comment of Connector Castings, Inc. at p. 4) (emphasis in original). The problem is that this substantially overbroad definition would bring the transmission of *any unsolicited advertisement* sent by a computer “capable” of sending messages to a fax number (which, given the software now in existence, includes pretty much any computer) under the TCPA, regardless of whether that advertisement was sent as an email, a traditional fax, a text message, an instant message, a Tweet, or something else. The Commission has correctly acknowledged that “a fax *sent as email* over the Internet is not subject to the TCPA.” (Westfax Order at ¶ 10) (emphasis in original). But the broad definitions advocated by the Opposing Comments would include email, and that is why declaratory relief is needed.

⁴ Comments of Robert Biggerstaff at p. 5, Comments of Robert H. Braver at p. 3, Comments of Connector Castings, Inc. at p. 2, Comments of Steve Nocerini, Comments of Jimmy A. Sutton at p. 1.

The argument in the Comments of Anderson + Wanca that the Commission has already ruled that a computer equipped to send faxes is a “telephone facsimile machine” (Comments of Anderson + Wanca at p. 3) is similarly flawed. Although it is true that the 1995 Opinion and Order cited by Anderson + Wanca found that “computer fax modem boards” were “telephone facsimile machines” under the TCPA, that finding was based on the assumption (not surprising in 1995) that the fax would be received and printed. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391 (Aug. 7, 1995) (“1995 Opinion and Order”). The Commission said fax modem boards of the time were the “functional equivalent of stand-alone facsimile machines.” *Id.* at 12405. The technology that Ryerson is placing at issue here has changed significantly over the last 20 years and does not present the same concerns about “the cost of the paper used, the cost associated with the use of the facsimile machine and the costs associated with the time spent by the facsimile machine when receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive facsimile transmissions” that were the focus of the Commission’s inquiry in 1995. *Id.* Accordingly, the 1995 Opinion and Order does not settle this issue.

The TCPA definition of a “telephone facsimile machine” focuses on the machine’s ability to “transcribe text or images, or both, *from paper* into an electronic signal and to transmit that signal *over a regular telephone line*” or “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). The Commission is bound by the language of the statute, which focuses on the use of paper and the use of regular telephone lines. If, as in the scenario Ryerson has described, those aspects of the transmission are never implicated, the transmission should not fall under the TCPA. Moreover, as noted above, it is not enough to focus on the “capacity” of the machines

involved in the transmission because such a broad definition would bring email and numerous other technologies under the TCPA, which was not what Congress intended.

II. Contrary to the Opposing Comments, “faxes” initiated in digital form and received in digital form do *not* create the same alleged harms.

Some Opposing Comments acknowledge, as they must, that “faxes” initiated in digital form and received in digital form do not create all of the same harms posed by traditional faxes. *See* Comments of Robert Biggerstaff at p. 6, Comments of Robert H. Braver at p. 5. There is no doubt that these “faxes” do not use any ink, paper, or toner, nor do they tie up the recipient’s phone lines. Still, the Opposing Comments argue that “faxes” sent and received digitally create some of the same “harms.” But as Ryerson has explained above and in its Petition, the “faxes” at issue here are much more comparable to emails than traditional faxes, and the Opposing Comments fail to explain why the alleged harms suffered by recipients of “faxes” sent and received in digital form are different from the harms associated with receiving an unsolicited email or why the CAN-SPAM Act does not provide adequate protection for any such harms.

First, multiple commenters contend that receipt of unsolicited faxes in their email accounts causes them to use a portion of their limited mobile data packages when those emails are viewed on mobile devices.⁵ But the risk of this occurring from a “fax” sent and received in digital form is no greater than the risk associated with unsolicited email advertisements and therefore should receive no different treatment.

Next, multiple commenters contend that even when they receive “faxes” in digital form, they still have to expend time and energy to determine whether the advertisement is relevant and

⁵ Comments of Robert Biggerstaff at p. 6, Comments of Steve Nocerini at p. 1.

appropriate.⁶ Again, this is something that is now a part of everyday life, and the commenters do not explain how receiving a “fax” transmission of this nature is any different than receiving any other email with an attachment.

Third, multiple commenters contend that receipt of “faxes” in digital form still costs them money because they have paid fax-to-email services.⁷ However, a quick Internet search reveals there are options for receiving faxes as emails for free.⁸ The Commission’s policy decisions should not be dictated by the commenters’ choices to utilize a paid service rather than a free service. If consumers have serious concerns about the costs of receiving these “faxes” via email, they can proceed with the available free services. If they have chosen not to do so, then they clearly have made a calculated decision that it is better to use the paid service, despite whatever risks may exist.

Finally, multiple commenters contend that “faxes” received electronically are different than email (and thus should be treated under the TCPA instead of CAN-SPAM) because there are not tools or systems to filter “spam” faxes like there are for email.⁹ As an initial matter, this is incorrect. Leading fax-to-email provider efax.com has a system in place that allows users to report fax numbers from which they receive “spam” so that future transmissions from those fax

⁶ Comments of Robert Biggerstaff at p. 7, Comments of Robert H. Braver at p. 5, Comments of Todd C. Bank at p. 1.

⁷ Comments of Robert Biggerstaff at p. 6, Comments of Todd C. Bank at p. 1, Comments of Jimmy A. Sutton at p. 1

⁸ See, e.g., <http://www.faxbetter.com/> <last visited December 13, 2015>.

⁹ Comments of Robert Biggerstaff at p. 7, Comments of Robert H. Braver at p. 4.

numbers can be screened.¹⁰ But even if that were not the case — or even if the system used by efax.com is unique within the industry — that should not dictate the policy decisions of the Commission.

For the foregoing reasons, the alleged harms created by “faxes” sent and received in digital form are not the same as the harms created by traditional faxes.

III. Contrary to the Opposing Comments, application of the TCPA to “faxes” initiated in digital form and received in digital form would violate the First Amendment.

The Opposing Comments make two challenges to Ryerson’s First Amendment argument: (1) that Ryerson’s Petition used the incorrect standard for review under the First Amendment, and (2) that the TCPA, as applied in this context, meets the *Central Hudson* test because it directly advances a substantial government interest. *See* Comments of Anderson + Wanca at pp. 5-7, Comments of Connector Castings, Inc. at pp. 5-8. The commenters are incorrect on both counts. First, the Opposing Comments misconstrue Ryerson’s position with respect to the commercial speech doctrine. Ryerson does not argue, as the Comments of Anderson + Wanca claim, that *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015), “overruled” the commercial speech doctrine set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980). But the Supreme Court’s language in *Reed* indicates a more stringent approach for regulations that distinguish between speech by its “subject matter” or “by its function or purpose.” 135 S. Ct. at 2227. The TCPA fax provisions, which apply only to certain types of faxes, clearly distinguish between faxes based on their function or purpose. *See* 47 U.S.C. § 227(1)(C) (regulating only faxes that are “unsolicited advertisements”). The post-*Reed* cases

¹⁰ *See* “What do I do if I receive junk (SPAM) faxes?,” <https://www2.efax.com/help/faq> <last visited December 13, 2015>.

cited by Anderson + Wanca are not binding on the Commission, and the results of those cases do not mean a more restrictive test is not appropriate here.

That being said, the discussion of the appropriate standard is largely academic because application of the TCPA to “faxes” sent and received in digital form also fails under the less-restrictive *Central Hudson* test. Under *Central Hudson*, the government 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.” 447 U.S. at 564. Here, as set forth above and in the Ryerson Petition, the government does not have a “substantial interest” because the stated interests in passing the TCPA (preserving paper, ink, and toner of consumers, and keeping telephone lines from being tied up) are not implicated when the “fax” is both sent and received digitally. Moreover, even if those interests were applicable in this context, the government’s interest could be served just as well by a more limited restriction on commercial speech — the CAN-SPAM Act.

Connector argues that Congress had an interest in “discouraging fax advertising” (Comments of Connector Castings, Inc. at p. 7), but there is no support for this broader statement of the government’s interest. The case cited by Connector in support of this proposition, *Hatch v. Sunbelt Communications and Marketing*, 2002 U.S. Dist. LEXIS 26920, *12 (D. Minn. Sept. 4, 2002), merely outlines the same type of government interests (“paper, toner, human resources, business disruption”) that are typically mentioned (but do not apply in the context of a “fax” sent and received digitally). The government does not have an interest in halting all “fax” advertising — in fact, the legislative history indicates that Congress recognized the value of fax advertising and attempted to draft a statute that was “balanced in a way that protects the privacy of

individuals and permits legitimate telemarketing practices” because of “a desire to not unduly interfere with ongoing business relationships.” 102 H. Rpt. 317.

The Opposing Comments cite several cases upholding the constitutionality of the TCPA in the face of First Amendment challenges. *See* Comments of Anderson + Wanca at p. 6, Comments of Connector Castings, Inc. at p. 5. But those rulings are irrelevant here because they did not discuss the First Amendment implications of applying the TCPA to “faxes” that were both sent and received digitally. Those cases found that the TCPA advanced the substantial government interests in avoiding costs related to the loss of paper, ink and toner, and the prevention of other faxes from going out and coming in. *See, e.g., Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. Mo. 2003) (“There was evidence that unsolicited fax advertisements can shift to the recipient more than one hundred dollars per year in direct costs, that it takes thirty seconds for a one page fax to be received, that most machines can still only receive one fax at a time, that currently eighty percent of all faxes are printed on paper, and that 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.”). As set forth above, these issues do not exist in the context of “faxes” initiated in digital form and received in digital form. Accordingly, application of the TCPA to these “faxes” would violate the First Amendment.

IV. Contrary to the Opposing Comments, application of the TCPA to “faxes” initiated in digital form and received in digital form would be void for vagueness.

The overreaching in the definitions of a “fax” suggested by the Opposing Comments demonstrates precisely why application of the TCPA to “faxes” initiated and received in digital form would be void for vagueness. The Comments of Anderson + Wanca argue that the language of the TCPA means it is unlawful to send an “unsolicited advertisement” using “any

device,” including a “telephone facsimile machine, computer, or other device.” (Comments of Anderson + Wanca at pp. 7-8). Surely Anderson + Wanca does not intend to suggest that an “unsolicited advertisement” sent by email on a computer, by text message on a cellphone, or by an application on a tablet (such as Twitter) could violate the *fax provision* of the TCPA. But taken literally, that is what Anderson + Wanca’s interpretation of the statutory language says. That is, of course, directly at odds with the Commission’s holding in the Westfax Order that “a fax sent as email over the Internet is not subject to the TCPA.” (Westfax Order at ¶ 10) (emphasis in original). So how, then, under Anderson + Wanca’s view of the TCPA is a reasonable person to understand what is a “fax” under the TCPA?

The Opposing Commenters — all of whom have every incentive for the TCPA to apply as broadly as possible — contend that the notion of confusion about what is and is not a “fax” under the TCPA is “simply absurd.” (Comments of Robert Biggerstaff at p. 1). But the Supporting Commenters — all of whom are strangers to Ryerson — demonstrate that application of the TCPA to messages both sent and received digitally is much more vague than the Opposing Commenters are willing to acknowledge. Accordingly, the Commission should find that the TCPA fails to give a reasonable person notice that messages sent and received digitally would be covered by the fax provisions.

V. 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.

Dated: December 15, 2015

VEDDER PRICE, P.C.

By: /s/ Blaine C. Kimrey

Blaine C. Kimrey
bkimrey@vedderprice.com
Bryan K. Clark
bclark@vedderprice.com
222 N. LaSalle St.
Chicago, IL 60601
T: (312) 609-7500
F: (312) 609-5005

Attorneys for Joseph T. Ryerson & Son, Inc.