

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Junk Fax Prevention Act

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Petition of Joseph T. Ryerson & Son, Inc. for
Declaratory Ruling

CG Docket No. 05-338

CG Docket No. 02-278

**Reply Comments of Robert Biggerstaff on the Comments
of Joseph T. Ryerson & Son, Inc.**

Petitioner Ryerson repeats one snippet of the *Westfax Order* over and over like a mantra—“a fax sent as email over the Internet is not subject to the TCPA.”¹ But Ryerson ignores the earlier sentence in that paragraph of the *Westfax Order* that explains this question is raised in the context that “Westfax’s concern appears to be that the conversion of the fax to email *after* it is sent removes it from the TCPA’s reach. That is not the case.”² This context is, as I explained in my reply comments, a basic paradigm of e-faxes—the “fax” transmission subject to the TCPA has already taken place and been completed before the fax image is saved. After it is saved, it is subsequently forwarded on as an attachment to an e-mail. It is the subsequent sending of the e-mail with the fax as an attachment— which occurs after the TCPA-governed fax transmission has already concluded and after any TCPA violation has already been consummated—that is a “fax sent as an e-mail.”

This was a legitimate concern for Westfax because in at least one instance I am aware of, a user of a fax-to-e-mail (“e-fax”) service had made a TCPA claim against the

¹ Citing *Westfax Order* at ¶ 10. Ryerson repeats this no less than 4 times in its reply comments.

² *Westfax Order*, ¶10 (Emphasis in original).

service, for sending the user an e-mail with a junk fax as an attachment.³

Ryerson distills this question from the 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.”⁴ Yet Ryerson never says what the term “traditional” fax is or how it is relevant, since the TCPA contains no such language. It appears Ryerson uses that term to mean a desktop fax machine with a scanner and printer within the same chassis.⁵ Such a limited reading of the TCPA would reverse a number of prior Commission orders, and in fact would violate the statute itself, since the sending device need not be a “telephone facsimile machine.”

Ryerson goes on to suggest that “[i]n 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.”⁶ Yet the use of paper for receipt, much less for sending, is not an element of the TCPA, and the Commission has repeatedly eschewed any use or consumption of paper—or lack thereof—to be a relevant consideration.

Ryerson claims that “the broad definitions advocated by the Opposing Comments would include email, and that is why declaratory relief is needed.”⁷ Yet here is the disconnect. Send an e-mail to a fax broadcaster instructing it to send out 5,000 faxes to the attached list of fax numbers does not constitute “sending a fax by e-mail” as contemplated

³ Some e-fax services send advertising e-mails that are formatted like a received fax to their customers as a way of generating additional income, particularly in the case of free e-fax services.

⁴ Ryerson Reply Comments, p.3.

⁵ Robert Braver seemed to reach the same conclusion, finding Ryerson’s suggestion contemplates “manually feeding [faxes] into old-fashioned analog fax machines.” Comments of Robert H. Braver at p. 3.

⁶ Ryerson Reply Comments at p.6.

⁷ Id, p.5.

by the *Westfax Order*. Someone who sends a spam e-mail to the recipients e-mail address is not sending a fax. Someone who received an actual fax, and then forwards that fax to 100 e-mail addresses is sending spam e-mail, not faxes. This is not rocket science. This has been clearly set out in the *Westfax Order*. Any perceived lack of clarity appears to be due solely to an intentional self-inflicted vision impairment by Petitioner.

The TCPA and Commission interpretations are broad to protect consumers from scofflaws who will exploit loopholes. Where necessary, the Commission has adopted limiting constructions, such as in the *Westfax Order*, that expressly prevent the result Ryerson suggests, that “the broad definitions advocated by the Opposing Comments would include email.”⁸

Petitioner’s intentional myopia also extends to its understanding of harms from junk faxes. Ryerson claims “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. 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.”

The risks are decidedly not the same as for spam e-mail. Some of these differences: As I explained in opening comments, e-faxes contain large attachments, often several megabytes in size. This is not true of e-mail spam.

1. E-mail can be filtered with keywords, Bayesian filters, and off-the-shelf simple configurations that can easily catch 99% of spam e-mail. Because junk fax e-faxes are images without routing data for the source of the fax transmission, they are

⁸ It is clear that as written, the TCPA’s definition of “telephone facsimile machine” could have encompassed a personal computer with a data modem and a printer receiving e-mail. But we must not forget, the term of art is “telephone *facsimile* machine” and the Commission’s limiting construction in the 2003 *TCPA Order*, and reiterated in the *Westfax Order*, made the appropriate distinction between sending a fax and sending an e-mail.

immune to such filters.

2. Spam e-mail that is not stopped by spam filters, is almost always recognizable by the subject line or sender identification, so a user can delete it without opening, saving time and bandwidth. To even recognize a junk e-fax as junk, the large fax image has to be downloaded and examined.
3. Spam e-mail is filterable by the ISP, which can implement sophisticated filters and blocklists to stop nearly all spam e-mail. E-faxes, because they are legitimate e-mails coming from legitimate sources (i.e. the e-fax service provider) are not blockable by an ISP.
4. E-mail messages have comprehensive headers with routing data that provide a positive traceback system that enables exceptionally good identification of spam e-mail. Fax transmissions only have 2 pieces of available information about the sender: 1) CallerID and 2) Transmitting Station ID ("TSID"). For junk faxes, both CSID and TSID are nearly always missing or falsified, making any filtering on those data worthless.

Next, Ryerson suggest that consumers simply use "free" services to avoid costs of receiving junk e-faxes. Yet Ryerson provides no analysis of the terms of service for "free" services.⁹ Furthermore, Ryerson identifies no free cell phone service so that the bandwidth necessary to review and dispose of e-faxes will be "free." Nor has Ryerson accounted for the time and frustration of the consumer.

Ryerson itself cited the Eighth Circuit which found junk faxes "burden[] the computer networks of those recipients who route incoming faxes into their electronic mail

⁹ Many if not all inject massive advertising to subsidize the free service, or require onerous consent terms such as consenting to on-line tracking of behavior, purchases, and other communications

systems.”¹⁰ As demonstrated earlier, the burdens of a spam e-mail are significantly smaller and more susceptible to interdiction efforts than a junk fax received as an e-fax.

Finally, CAN-SPAM is also woefully inadequate for junk faxes since it does not provide for a private right of action by recipients of spam. This alone makes it largely worthless to consumers who are the recipients of the illegal missives.

CONCLUSION

When someone sends faxes by providing a list of fax numbers and an advertisement to a fax broadcaster with instruction to send the advertisement to those fax numbers, they are without any doubt sending faxes subject to the TCPA when their agent (fax broadcaster) acts on those instructions. This is true regardless of the method by which the instructions are sent to the broadcaster. This is true regardless of whether the subsequent faxes are ultimately received by a fax server (e-fax), computer with a fax modem, or a desktop fax machine, and true regardless of any forwarding technology employed after receipt of the fax transmission. Ryerson’s Petition should be denied.

Thank you very much for your time considering my comments. I remain,

Sincerely

/s/ Robert Biggerstaff
Robert Biggerstaff
December 15, 2015

¹⁰ *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003).