

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
)	
To: The Commission)	

**NEWSPAPER ASSOCIATION OF AMERICA
AND NATIONAL NEWSPAPER ASSOCIATION
PETITION FOR STAY**

The Newspaper Association of America (NAA)¹ and the National Newspaper Association² hereby petition the Commission to stay its rules governing unsolicited facsimile advertisements, 47 U.S.C Section 64.1200(a)(3)(i).³ In particular, NAA and NNA respectfully request a stay of the Commission’s action to (1) adopt a new “prior, in writing, with signature” requirement before an advertisement may be sent via fax and (2) eliminate the established business relationship exception. NAA and NNA respectfully request issuance of a stay before the new rule takes effect. NAA and NNA will be filing a petition for reconsideration requesting the Commission reconsider its newly adopted rule.

¹ NAA is a nonprofit organization representing the newspaper industry and more than 2,000 newspapers in the U.S. and Canada. Most NAA members are daily newspapers, accounting for 87 percent of the U.S. daily circulation.

² NNA is a 118 year old association of community newspapers, serving about 3,000 small daily and weekly newspapers that have a primarily local and community editorial focus.

³ See Rules and Regulation Implementing the Telephone Consumer Protection Act of 1991, FCC 03-153 (released July 3, 2003), *summary published* 68 Fed. Reg. 44,144 (July 25, 2003). Hereinafter referred to as the Report and Order.

In considering a stay, the Commission considers: (1) the likelihood that the petitioner will prevail on the merits; (2) the threat of irreparable harm to the petitioner absent grant of the stay; (3) the potential harm to others from a stay; and (4) the public interest in granting the stay. *See Interstate, Interexchange Marketplace*, 12 FCC Rcd 15739, 15748 & n.56 (1997), *citing Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), *as modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). These criteria are satisfied, as shown herein.

I. NAA And NNA Are Likely To Succeed On The Merits

NAA and NNA believe that the Commission is likely to grant relief because, as will be shown in NAA and NNA's Petition for Reconsideration, the new rule for which the stay is sought goes beyond the Telephone Consumer Protection Act. In particular, the Commission decided that the only way to obtain "prior express invitation or permission" as required by the TCPA was through signed, written authorization, despite the lack of a "writing" requirement in the statute. Further, the Commission does not appear to have given any consideration to any other form of "prior express invitation or permission."

In addition, the Petition is likely to succeed on the merits because the longstanding business relationship exception to the fax rule was properly based on logic and common, inoffensive business practices, and its elimination would gravely disrupt normal business relationships, such as the relationship between small and medium-sized businesses and the newspapers through which they advertise.

II. Failure To Stay The New Rule Will Cause Irreparable Harm To Advertisers And Their Newspapers

The new fax rule will harm advertisers because they will no longer have easy access to valuable information that they come to rely on to make determinations on how best to reach their customers and potential customers, decisions that ultimately help them succeed in their day to day endeavors.

Newspapers will be harmed because the users of advertising will be impeded in their ability to find out about the availability of special sections or offers and therefore will lessen the use of newspapers as an advertising medium. The greatest harm comes from the disruption of relationships between a newspaper and its advertisers in a highly competitive advertising market.

Hundreds of thousands of advertisers in this nation – from local retail outlets, hardware stores, employers to small mom and pop businesses – work with their local newspapers on a daily, weekly, monthly and/or annual basis. Both small and large newspapers widely use unsolicited faxes to communicate with these advertisers about space availability, special offers or special seasonal published sections, such as upcoming back to school sections.

Given the thousands of advertisers with which an individual newspaper works, it will be overly burdensome, especially for smaller newspapers, to contact each and every one of its advertisers to get express written and signed permission to send unsolicited faxes. As a result, advertisers either will miss opportunities to promote their businesses, or will learn of such opportunities only at higher costs. For example, if the rule takes effect, newspapers will be compelled to use more expensive means of communicating

with advertisers – such as telephone or direct mail⁴ – which raise costs in time and money for all involved. Smaller newspapers with limited staffs performing multiple functions will be particularly impacted. Small advertisers equally will be harmed because they may not be able to get the information they need to decide whether they want to advertise because of constraints on newspaper resources and the effective elimination of unsolicited faxes as a communications tool.

The Commission based its new rule in part on the assumption that “businesses may easily obtain permission from existing customers who agree to receive faxed advertising when customers patronize their stores or provide their contact information.” *See* Report and Order, para. 191. However for newspapers, as well as most businesses, this does not hold true, particularly for business to business relationships, which are developed and conducted primarily over the phone. It will be difficult – not easy – for newspapers to present a consent form to thousand of advertisers to obtain the requisite signatures.

Incorporating written authorization into contracts with existing terms will take a great deal of time. More importantly, it will not solve the problem because most advertising relationships are based upon oral, rather than written agreements. These informal agreements are initiated primarily through phone calls or faxes. Because newspapers must prioritize which advertiser receives what type of contact, many smaller businesses receive only a fax because they do not advertise frequently or they only advertise in special sections. If the new rules are allowed to go into effect, these advertisers may not receive any notice about special offers.

⁴ Many businesses today still do not use email in any active manner.

III. A Stay Will Not Harm Advertisers That Would Receive The Faxes

Although the Report and Order discusses the cost of receiving unsolicited faxes, it does not recognize that for most advertisers these faxes are expected and welcomed as a practical means of doing business. As such, these costs are treated as ordinary and necessary business expenses. On the other hand, the new rule would harm advertisers that need and use newspapers to reach customers.

Instead of harming businesses, a stay would avoid harm. Thirty days is a grossly insufficient amount of time for businesses to adjust to such radically different requirements. Perhaps the Commission expects that the senders of unsolicited faxes will simply cease doing so without causing any disruption to commonplace business relationships. Such is not the case. Newspapers, for example, must contact their advertisers in order to obtain signed written authorization for any unsolicited faxes sent after August 24. However, obtaining this authorization is in addition to the daily work of publishing a newspaper and it will be impossible to reach the thousands of newspaper advertisers in that short amount of time. The consequence will be severe in the form of lost business for the advertisers.

Although the Commission presumably intends to help small and medium-sized businesses, the effect of allowing the new fax rule to take effect will be to harm those very businesses. A stay is the only way to avoid that harm.

IV. A Stay Is In The Public Interest

No harm will result if a stay is granted because the FCC has rules that presently govern unsolicited faxes, rules that all parties have lived with for more than a decade. Because the new rules will dramatically change the relationship between a newspaper and

its advertisers, as well as other business relationships, the public, including the advertising public, will be better served if the Commission stays the rules and further studies the impact the new rules will have on business operations such as newspaper advertising practices.

V. Conclusion

For the foregoing reasons, the Newspaper Association of America and the National Newspaper Association respectfully request a stay of the effectiveness of 47 U.S.C Section 64.1200(a)(3)(i) governing unsolicited fax advertising insofar that the new rules would: (1) adopt a new “prior, in writing, with signature” requirement and (2) eliminate of the established business relationship exception.

Respectfully Submitted,



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