

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**PETITION FOR CLARIFICATION OR RECONSIDERATION**

Nextel Communications, Inc. (“Nextel”), by its attorneys, and pursuant to Section 1.429 of the Rules, hereby petitions for clarification, or in the alternative, reconsideration of the Federal Communications Commission’s (“Commission’s”) Report and Order governing unsolicited facsimile advertisements pursuant to the Telephone Consumer Protection Act (“TCPA”).<sup>1</sup> Specifically, Nextel respectfully requests that the Commission either reconsider or clarify that the test for TCPA liability for unsolicited faxing – actual notice of a violation or a high degree of involvement in an unsolicited facsimile transmission – applies to any party involved in the faxing, and not simply just to fax broadcasters. That is, the Commission’s fact-based approach to liability can apply to any advertiser as well as any fax broadcaster and any entity in between. Nextel also requests that the Commission clarify that in its discussion of potential shared liability for unsolicited fax transmissions, it did not intend to preempt state laws that use a comparative responsibility, rather than a joint and several liability standard in circumstances of shared liability.

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<sup>1</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No. 02-278, FCC 03-153, 68 Fed. Reg. 44144 (July 25, 2003) (“Report and Order”).

**I. “ACTUAL NOTICE” OR “HIGH DEGREE OF INVOLVEMENT” IS REQUIRED TO ESTABLISH TCPA LIABILITY.**

In the Report and Order, the Commission amended its rules to clarify the circumstances that would give rise to a fax broadcasters’ TCPA liability. The new rule explicitly states that a fax broadcaster is liable for sending unsolicited facsimile advertisements if “it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.”<sup>2</sup> In adopting this two-part test, the Commission observed the new rule would “better inform the business community about the prohibition on unsolicited fax advertising and the liability that attaches to such faxing.”<sup>3</sup> The Commission further stated that the purpose behind the rule was to focus TCPA liability on a party’s “activity,” and not any particular party’s “label.”<sup>4</sup>

This focus on an entity’s activity and not its label is consistent with the Commission’s functional approach taken in enforcement proceedings and with the Commission’s stated purpose of better informing both consumers and businesses about the TCPA’s prohibition on unsolicited fax advertising and circumstances that could give rise to potential liability. The Commission would further inform the public of potential liability, however, by clarifying that the two-part liability test outlined in the Report and Order applies to any party involved in an unsolicited fax transmission and not simply to fax broadcasters alone. A party should be liable for a TCPA violation if the party either (a) has actual notice of the unsolicited facsimile transmission and fails

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<sup>2</sup> 47 C.F.R. § 64.1200 (a)(3)(ii); *see* Report and Order at ¶ 195.

<sup>3</sup> Report and Order at ¶ 195.

<sup>4</sup> *Id.*

to take steps to prevent such transmission, or (b) the party has a high degree of involvement in the unsolicited facsimile transmission. This clarification to the Report and Order will better inform both consumers and businesses regarding how, and when, a party may be liable under the TCPA for sending an unsolicited facsimile transmission. No change to the Commission's new rule addressing fax broadcaster liability is required.

**II. TWO OR MORE PARTIES DEMONSTRATING A "HIGH DEGREE OF INVOLVEMENT" MAY SHARE TCPA LIABILITY.**

When addressing fax broadcasters' TCPA liability, the Commission recognized that multiple parties could be involved in the transmission of an unsolicited fax. For example, the Commission noted that if the company whose products are advertised supplies a list of fax numbers, but the fax broadcaster exhibits a high degree of involvement by reviewing and assessing the content of the facsimile message, both parties may be liable under the TCPA.<sup>5</sup> In this situation, the Commission observed that both parties may be "jointly and severally liable" under the TCPA.<sup>6</sup> Nextel requests confirmation that the Commission did not intend by this statement to supplant inconsistent state laws regarding the apportionment of responsibility among multiple liable parties.

Indeed, because joint and several liability often has harsh and unfair consequences, the vast majority of states have modified or eliminated it in favor of a comparative responsibility

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<sup>5</sup> *Id.* at ¶ 195, n. 724.

<sup>6</sup> Under common law principles of joint and several liability, each party that contributes to an indivisible injury used to bear full responsibility for all of the plaintiff's damages, even if other parties who shared liability were more culpable. RESTATEMENT (THIRD) OF TORTS, APPORTIONMENT OF LIABILITY § 10; § A18 cmt. a; § D18 cmt. b (2000).

framework for apportioning fault among liable defendants.<sup>7</sup> This legislative shift away from a joint and several liability standard does not in any manner reduce a plaintiff's recovery nor does it exonerate defendants who are liable for a plaintiff's injury. Comparative responsibility merely introduces a much-needed element of fairness by allocating responsibility among liable parties in proportion to their culpability.<sup>8</sup>

The TCPA permits private suits for damages in state courts, if permitted by state law. Indeed, the TCPA did not preempt preexisting state law as to intrastate fax transmissions and thereby acknowledged that state law principles for shared liability would be retained. The TCPA left it to each state to set the standard for shared liability in this context. It would be remarkable for the Commission to have, by this statement, automatically displaced 46 different state laws by dictating the imposition of a pure "joint and several" liability standard. This would be an unorthodox and unusual step, particularly considering that the issue was not identified as within the scope of the Notice of Proposed Rulemaking; that states did not comment on the issue; and that the record does not reflect evidence that the continued application of state comparative responsibility schemes would be inconsistent with the TCPA's objectives.<sup>9</sup>

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<sup>7</sup> Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 *Washington & Lee L. Rev.* 475, 533-34 (2002); *see* 57B *Am. Jur. 2d Negligence* sec. 1243 (2003) ("Under the pressure of the 'tort reform' movement, a number of legislatures have modified or abolished the rule of joint liability."); *RESTATEMENT (THIRD) OF TORTS, APPORTIONMENT OF LIABILITY* sec. 17, cmt. a ("The clear trend over the past several decades has been a move away from pure joint and several liability").

<sup>8</sup> *See* 65 *CJS Negligence* sec. 155 (2003).

<sup>9</sup> *See* *RESTATEMENT (THIRD) OF TORTS, APPORTIONMENT OF LIABILITY* sec. E18, cmt. b (noting that 46 states have adopted some form of comparative responsibility standard for liability).

Instead, the better reading of this particular discussion in the Report and Order is that the Commission simply recognized that, in certain situations, multiple parties exhibiting a “high degree of involvement” in sending an unsolicited facsimile advertisement could share liability under the TCPA in accordance with the law governing the apportionment of responsibility among multiple parties in the local forum of a given lawsuit. A clarification to the Report and Order stating that multiple parties can share liability under the TCPA in accordance with applicable federal or state law would remove any possible confusion concerning the Commission’s intent. A clarification would obviate potential conflict between the Report and Order and applicable state or federal comparative-responsibility law and would not require any modification to the new rules.

### III. CONCLUSION

By clarifying that the Commission intended to use a functional, fact-based analysis of a particular party's activities to determine when a party is liable under the TCPA, the Commission can better inform both consumers and businesses regarding TCPA liability for sending unsolicited facsimiles. By confirming that it did not intend to preempt applicable state comparative responsibility standards, the Commission can ensure that the rules of the road as to how liability is shared if multiple parties are liable are straightforward. Nextel's requested clarifications will avoid potential conflict with applicable state and federal law and will require only minor modification to the discussion contained in the Report and Order. As such, Nextel requests that the Commission clarify the Report and Order in accordance with this petition.

Respectfully submitted,

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August 25, 2003