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June 24, 2005

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Communication, CG Docket No. 02-278

Dear Ms. Dortch:

The Fax Ban Coalition, which represents virtually all segments and sizes of the business and association community, files this *ex parte* letter to request that if the Commission adopts a further extension of the stay of the rules in this proceeding, which the Coalition has been urging the Commission to do,¹ that it make the effective date of an order the date upon which such order is released by the Commission, which will serve the public interest. That step would avoid the significant harm to businesses and consumers that would result if the amended rule is permitted to become effective even for a short time. Given that the current stay is set to expire in less than one week, an immediate effective date of a further stay order is necessary and in the public interest.

The Commission may exercise authority on its own motion or pursuant to this request, and upon good cause, to issue a stay that will take effect immediately upon release of its order. Section 1.103(a) of the Commission's Rules states that the effective date of any Commission action shall be the date of public notice of such action unless otherwise specified by law or Commission rule. This section has a qualification, however, that "the Commission may, on its own motion or on motion by any party, designate an effective date that is either *earlier* or later in time than the date of public notice of such action."²

¹ See Fax Ban Coalition Petition for Further Extension of Stay, CG Docket No. 02-278 (Apr. 15, 2005) ("Extension Request").

² 47 C.F.R. § 1.103(a) (emphasis added). Section 1.427 of the Rules states that rules issued by the Commission will be made effective 30 days from the time public notice is published in the Federal Register, except that for good cause the Commission may make any (continued...)

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The Commission has recognized and used this authority in the past. For instance, in a recent order the Commission granted a partial stay of the rules concerning disruptions to communications.³ In doing so, the Commission ordered “on our own motion for good cause found, pursuant to Section 553(d)(1),(3) of the Administrative Procedure Act ... and Section 1.103(a) of the Commission’s Rules ... that the effective date of this Order and of the stay is the date upon which this Order is released by the Commission.”⁴ The Commission explained that its December 22, 2004 order “addresses Commission rules that are currently pending but are expected to become effective on January 3, 2004, hence the need for putting the Order into effect immediately.”⁵ On other occasions, too, the Commission has recognized and exercised its authority to implement orders immediately, including stays of the effective dates of rules.⁶

In this proceeding the Commission has previously recognized good cause to make an order granting extension of the stay effective on less than thirty days’ notice.⁷ Good cause exists here to provide for immediate effectiveness of a further stay of the new fax rules.

rule issued effective within less than 30 days. In this instance, of course, the Commission would not be issuing a new rule; the new rule was published back in 2003. Rather, the Commission would be issuing a stay of its rules. *See* 5 U.S.C. § 553(d)(1), (3); *In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Order, 9 FCC Rcd 2475 n.9 (rel. October 29, 1993). In any event, pursuant to the proviso in § 1.103(a), the Commission has the authority to make the effective date earlier.

³ *See e.g., In the Matter of New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, Order Granting Partial Stay, 19 FCC Rcd 25,039 ¶ 12 (rel. Dec. 22, 2004).

⁴ *Id.* at ¶ 12.

⁵ *Id.* at n.30.

⁶ *See, e.g., In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Order, 7 FCC Rcd 2146 ¶¶ 4-5 (rel. Mar. 13, 1992) (granting partial stay of 64.704(c) and (d) and ordering “pursuant to Section 1.103(a) of the Commission’s rules ... that this Order is effective upon adoption”); *In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Order, 9 FCC Rcd 2475 ¶¶ 7-9 & n.9 (rel. Oct. 29, 1993) (ordering extension of effective date of provisions of Section 64.1510; providing “pursuant to Section 1.103(a) of the Commission, that this Order is effective upon release”; and further explaining that “because the rule change we have adopted herein relieves a restriction, the normal 30 day notice period is not required” and “[i]n any event, because of the emergency nature of our action, there is good cause for immediate effectuation”).

⁷ *See Order*, CG Docket No. 02-278, ¶ 11 & n.14 (rel. Oct. 1, 2004); *Order on Reconsideration*, CG Docket No. 02-278, ¶ 22 & n. 27 (rel Aug. 18, 2003).

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Because Commission action will come so close to June 30, 2005, the Commission's regular process of notice being effective upon publication in the Federal Register may mean that the stay would expire and the amended rules would take effect on July 1, 2005. As a result, businesses will immediately have to put into place their plans to comply with the new fax rules and incur the costs associated with such efforts for some short period of time (a notch in time),⁸ and then perhaps set aside those procedures once the stay becomes effective. This whipsaw effect on businesses adds to confusion about the state of the law, and that will invite unnecessary litigation. The larger concern is that businesses will respond to this uncertainty and fear of "notch" lawsuits (filed to target businesses that did not respond quickly enough to the shifting FCC rules) by quitting the transmission of commercially important faxes. Obviously, the start of July is a key part of the summer retail season, and it would not be in the public interest for the Commission to harm this important aspect of business communications, even for just a few days.⁹

Given the prospect of Congressional action (bipartisan legislation is under active negotiation by the Senate and House principals) and the significant impact that expiration of the stay, even for a brief time, will cause on businesses and consumers, the Commission should (a) grant the Extension Request immediately, and (b) make the effective date of any such order the date upon which the Commission's order is released.

This *ex parte* also serves as notification that the undersigned spoke via telephone with Monica Desai, Chief of the Consumer and Governmental Affairs Bureau, on June 23, 2005. The undersigned asked for prompt action on the request for extension of stay, and asked that any such extension be made effective immediately upon release.

Sincerely,



Gerard J. Waldron

Counsel to Fax Ban Coalition

⁸ As explained in a recent *ex parte* communication, Coalition members are preparing to comply with the new fax rules if they do take effect. See Letter from Gerard J. Waldron to Monica Desai, CG Docket No. 02-278 (May 17, 2005). Members have made preparations including the arduous and time-consuming process of collecting fax consent forms. Nevertheless, full implementation, even for a short period, will add significant time commitments and costs.

⁹ The Fax Ban Coalition summarized in its recent petition the irreparable harm that will be suffered by the business community if the extension of the stay is not granted. See Extension Request at 7-9.

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cc: Chairman Kevin Martin
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Daniel Gonzalez
Michelle Carey
Lauren "Pete" Belvin
Jessica Rosenworcel
Scott Bergmann
Monica Desai
Jay Keithley
Erica McMahon
Gene Fullano