Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

In the Matter of
RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA)

DOCKET # 05-338

Comments of Douglas M. McKenna
Concerning Implemention of the Junk Fax Prevention Act of 2005

To the Commission and the Commissioners:

Douglas M. McKenna hereby submits his comments with regard to implementing regulations pursuant to the 2005 Junk Fax Prevention Act ("JFPA"). The JFPA amended the 1991 Telephone Consumer Protection Act ("TCPA") in several ways, most pertinently by adding an Established Business Relationship ("EBR") exception to the TCPA's definition of "unsolicited". Prior to this, the TCPA completely banned unsolicited fax advertisements with no exception for implicit consent, of which an EBR is a prime example.

Background

I own and operate a small home-based business that relies on a fax machine to receive solicited purchase orders and other business communications from around the world (I have customers in 50 states, and about 25 countries). In spite of my never having given permission or invitation to any individual or business to transmit advertisements, in the last six years, my business has suffered the receipt of approximately 2,000 junk faxes on just one telephone line to which a standard paper fax machine is attached.

Unlike nearly all such "kleptomarketing" victims, I have been actively enforcing or attempting to enforce the junk fax provisions of the TCPA for some six years. I have complained to the Commission, whose *still-uncollected* $5.3 million forfeiture against Fax.com and its principals was based in significant part (about one-fifth) on the junk faxes I brought to the FCC's attention. I

have testified in front of my state (Colorado) legislature to help pass stronger state anti-junk fax statutes. I have listened to the Colorado Attorney General's office testify to the legislature (a) that it has almost no money to enforce either federal or state law that supposedly protects Colorado persons, entities, and consumers from junk faxes, and (b) that it expected victims to privately enforce the law (indeed, I have spoken to an employee of the AG's office who said that they are as inundated with junk faxes as everyone else). I have appeared on statewide television and nation-wide radio to help publicize the unlawfulness of junk faxes. I have written op-ed pieces on the junk problem for our local paper, and have been responsible for, and the subject of, numerous newspaper columns decrying the junk fax problem.

And yet, regardless of my out-of-the-ordinary efforts and experiences, my company fax machine still receives junk faxes regularly. The most recent one arrived today as I was finishing up these comments. From discussing the junk fax problem with other individuals and businesses in my community, it is obvious to me that the constant violation of my company's rights (under federal, state, municipal, and common law) is on the low end of the scale. Others who don't fight back with legal tools suffer more violations than my company does.

I estimate that several thousand dollars of fax supplies are non-consensually destroyed each and every day in my community. Multiply that by every community across the United States, and we're talking about many millions, likely billions, of dollars in destroyed property, every year, as part of a scourge of automated abuse of the telephone network and equipment attached thereto.

Established Business Relationship Problems that Must Be Addressed

It is essential that the Commission tread with the greatest of care in the area of prescribing regulations with respect to the EBR regulations. Without such care, my small business's—indeed most small business's—ability to rely upon its fax machine will likely become significantly more tenuous than it is now. The junk fax blasting industry will pry open every ambiguity in the Commisions rules and language they can to create loopholes, in order to continue with their automated thievery.

Problem 1

Consider what happened to me personally a few years ago. For several years, my company received junk faxes from someone who was touting equipment financing services. Once I finally figured out their true corporate name and where they were located, I sent them a letter saying they were violating the law. The president of that company called me and point-blank lied to me, saying that someone at my company had called them several years earlier and requested their ads. In other words, he was claiming that his and my company had an EBR. I knew this to be absolutely false, as would any owner of a one-person business such as mine, because (a) I am the only person at my business who could give such consent and had never done so, and (b) my business has never needed to finance any equipment of any kind. I have never permitted anyone, certainly not some California company I had never heard of and never contacted, to send fax ads to my company machine. As is typical, they had hired a fax blaster who provided the fax numbers, and sent their ads indiscriminately, waiting for their victims to spend time and energy to "opt-out" of future junk faxes.

This after-the-violation, totally-fabricated EBR shenanigans is part of the regular modus-operandi of these sociopathic advertisers, who are responsible for 99% of the national problem of junk faxes. Prior to the JFPA, there was no exception in the TCPA for EBR-related junk faxes, and certainly no statutory authority for the FCC to create one out of whole cloth (indeed, the complications created by the JFPA now would never have occurred had it not been for the FCC's mistake on this aspect of consent). The TCPA's statutory language required nothing less than "express" consent. But now, without careful FCC language otherwise, unscrupulous junk faxers will hang their hats on a manufactured EBR "defense" in the hopes of turning any litigation against them into a judicial coin-flip as to whom to believe with respect to consent.

For this reason, it is vitally important to all TCPA enforcers who wish to avail themselves of the courts for the FCC to make absolutely and unambiguously clear that the burden of proof for EBR with respect to unsolicited fax advertising must be born by the advertiser/sender. And that it must be a bona fide EBR in existence prior to the fax transmission. This is of course in complete conformance with the burden of proof with respect to consent generally, which is always on the per-

son who expects to benefit from an exception in the law. The TCPA's language places restrictions only on senders of junk faxes. Issues of consent are the only affirmative defense available to relieve a fax advertiser of liability under the TCPA.

The Commission must make clear also that any contact between the recipient victim and the fax advertiser or blaster or "lead generator", after the violative transmission, does not constitute the creation of an EBR for the purposes of further transmissions.

The Commission must make clear that there is no EBR defense whatsoever for faxes transmitted without proper identification, including the legal name that any sender/advertiser does business with, as registered with the appropriate state authorities.

The commission must additionally make clear that all regulatory violations it promulgates are privately actionable under § 227(b).

Problem 2

I am familiar with an internet service provider ("ISP") in Colorado that is a small business with many thousands of customers. This ISP has two fax machines. The first is for typical business uses, and receives a great many junk faxes. The second is dedicated for one particular use concerning that company's security and ability to protect the interests and goodwill of its customers during rare internet emergencies, when email or web access becomes partially or wholly impaired. An emergency might happen once a year or even less often, at any time of the day or night, but when it happens it becomes vitally important to be able to receive and send large amounts of detailed technical information that must be timely and accurate. Voice telephone lines don't suffice to accomplish this when the information is already written down on faxable pages (technical manuals, computer source code for patches, complex instructions for rebooting servers or routers, etc.).

This ISP has every right to prepare a working, stocked fax machine, and expect—indeed, require—that no one will use it during extended periods of uneventful time. It has the right to

expect that that machine will be competely operational when it is needed (hopefully never, but inevitably there are internet blockages, backhoe cuts of trunk lines, viruses and worms, denial of service attacks, packet traffic jams, etc.). Yet this ISP's special purpose fax machine's utility is regularly severely harmed by unsolicited fax ads. The very purpose of every fax machine is to be reliably ready to operate while unattended. Yet the stream of violative junk faxes inexorably renders such a machine inoperable the moment it runs out of supplies (paper and toner). If an ISP cannot timely respond to or receive vital information using the only viable means of technical communication during an emergency, it can easily lose millions of dollars in customer goodwill in a matter of hours. This particular ISP's security fax machine's number has never been published, yet its number has been on many junk fax lists for years, discovered by war-dialing.

But … every one of that ISP's thousands of customers has an EBR with it. Should just a few of them hire an unscrupulous fax blaster who has that security fax number in its database (as many of them already do), and to which they then indiscriminately send unsolicited fax ads, those customers should obviously still be liable under the TCPA for causing the exact same harms to the ISP as a complete (non-EBR) stranger. The TCPA must remove statutory liability only for faxes sent in furtherance of a legitimate EBR to a fax number properly related to the substance of that EBR (i.e. requests for information about products, etc.), and even then only for those faxes that comply with other of the FCC's regulations, in particular its identification requirements. The fax number to which ads are sent must be provided by the recipient and maintained by the advertiser in the context of the EBR to avoid this type of severely harmful situation.

I would therefore urge the Commission to rule that an advertiser who indiscriminately transmits ads to fax machines cannot make use of the EBR exception at all if the list of fax numbers transmitted to includes non-EBR recipients.

<u>Problem 3</u>

One of the deceptive tricks of some unscrupulous fax blasters of the past was to provide a toll-free "remove me from your list" telephone number (to comply with some state laws) on their junk faxes that, when you called it, presented the caller with an automated system that said, "Press 1 to

remove your number, press 2 to add your number". The entire system was a ruse, as the fax blaster would continue to send faxes. But if one called the number and pressed "1", and then attempted to litigate over subsequent junk faxes under the TCPA, the fax blaster would show up in court with their 800 number phone bill, and testify that on such-and-such a date the recipient called (which was true), but that the caller gave consent by pressing "2" (which was false). Or the blaster will simply obfuscate the issue by saying the caller must have pressed the wrong key.

I urge the Commission to clarify that any cost-free notification mechanism, in particular any telephone number (toll-free or otherwise) used for requesting that further junk fax transmissions cease, does not qualify as such under the TCPA/JFPA if that number can be used for <u>both</u> removal and consent. This leads to much mischief and hampers enforcement of consumer rights. An automated system for removal can always provide a pre-recorded message giving a separate telephone number to call to provide consent, but it must be different from the "opt-out" number so as to foreclose this particular brand of mischief. This is particularly necessary since the caller of a toll-free telephone number never receives a record of the call, nor generally has a record of the content of the call.

Toll-free telephone numbers are the anoymous junk fax advertisers' best friend. They make it doubly hard to determine who and where the advertiser is operating from, and they provide the caller no record of the call for evidentiary purposes. Many junk fax advertisers, particularly the constant Florida travel junk, change toll-free numbers constantly, renting them by the week from brokers, etc., so as to make discovery of the actual subscribers incredibly difficult. I urge the Commission to require that any toll-free telephone contact number for the purposes of "removal" always be accompanied by a non-toll-free telephone number so that the recipient has a choice of bearing the cost of the call or not. If I wish to pay for the call, it should be my prerogative. This is especially important with respect to the "manufactured EBR" problem, *supra*. Additionally, the local number as well as the toll-free number should be required on any ad that is otherwise anonymous by not providing the legal name of the sender and the state that name is registered in.

Should the Commission exempt small businesses from placing a toll-free "remove" number on their faxes, the Commission must make clear that some telephone number must be provided, toll-free or not.

Problem 4

My company's website has, since prior to the enactment of the JFPA, expressly notified any and all viewers of that web page that my company fax machine is not available for the receipt of any unsolicited fax advertisements, whether an EBR exists or not.[1] The notice I fashioned and published on my website essentially states:

Fax: (303) xxx-xxxx
No advertisements permitted!
Any implicit permission to send advertisements to our fax machine on the basis of an Existing or Established Business Relationship, as provided in 47 U.S.C. Sec. 227, C.R.S. Sec. 6-1-702, or any related statute, is revoked.

The Commission must clarify whether such a notice properly serves to protect my company's fax number from being "published" for the purposes of the TCPA/JFPA exemption. If not, what notice would suffice? This is an area that will require great care in regulating, particularly since the Commission's own rules require the disclosure of fax numbers on all faxes transmitted, whether they contain advertisements or not.

Problem 5

I urge the Commission to adopt rules that unambiguously state that a Do Not Fax request constitues a revocation of any implied consent on the basis of an EBR as a defense against subsequent junk faxes.

1. <http://www.mathemaesthetics.com/ContactInfo.html>

Conversely, do not allow an advertiser or fax blaster to create an EBR by subterfuge, simply by calling my small business and inquiring about my products. While this may be a two-way communication, it cannot constitute an EBR that rises to the threshold of statutory exemption. It must be the fax owner that creates that EBR.

Problem 6

I urge the Commission to adopt rules that facilitate any large business or entity (such as the Colorado Attorney General's office, *supra*) in its effort to remove blocks of fax telephone numbers from an advertiser or fax blaster's list. Remove or "opt-out" requests must be available for not just individual telephone numbers, but for ranges of telephone numbers as well.

The TCPA cannot and does not "permit" unsolicited fax ads sent on the basis of EBR

It is essential that the Commission not make the mistake that a great many people—especially fax advertisers and unfortunately some in the legal profession—make with respect to understanding the law of prohibition. The principle is this: an exemption from a statutory liability does not constitute permission to engage in acts that are otherwise prohibited under the statute, or any other statute (or constitution, *infra*). It is the sum of all possible and pertinent prohibitions that determine whether a given act is implicitly "permitted". Put a different way, compliance with just one element of a set of elements that define a prohibited act does not and cannot constitute permission to engage in acts prohibited by the remaining elements of that prohibition. For example, compliance with child-seat safety laws (i.e. strapping one's infant into a special seat) does not constitute statutory "permission" to drive in violation of other laws governing reckless (but not wreckless) driving. If a state law prohibits robbing a bank, and a federal law prohibits robbing a bank with a gun or a mask, an unmasked robber who brandishes only a baseball bat is of course still liable for robbing a bank, even though they "complied with" (i.e. didn't violate) that federal law.

The Commission would do a tremendous service to everyone attempting to enforce the TCPA by making it crystal clear that the JFPA does not legalize or permit unsolicited fax ads sent on the basis of an EBR without express consent. The JFPA simply exempts from federal statutory liabil-

ity those junk faxes sent on the basis of a bona fide EBR. This is a completely different kettle of fish. Just because an unsolicited fax ad is transmitted on the basis of even a bona fide EBR (i.e. complying with the terms of the exemption) doesn't necessarily make the act lawful. Other statutes and rights may still serve to protect the recipient from what is still a form of theft (for instance, there is currently no EBR exception in California state law). This is particularly important to clarify since the TCPA's savings clause at 47 U.S.C. § 227(e) expressly saves from field preemption those substantive state rights that are stronger ("more restrictive") than federal law. Now that Congress has weaked the TCPA, such a clarification becomes vitally important.

For instance, in my own state, the Constitution of the State of Colorado, at Article II, § 14, protects private property from private takings without consent of the property owner. Thus, *regardless* of any EBR or toll-free "opt-out" mechanism or other compliance with an exemptive element of federal law, an <u>unsolicited</u> fax ad plainly violates a fax machine owner's state constitutional rights: the recipient would have a common law cause of action for conversion, trespass-to-chattels, etc.. This was true prior to the TCPA's passage in 1991, and has always remained true. Indeed, every unsolicited fax violates most municipal anti-graffiti ordinances. These are typically generally worded to prohibit the non-accidental application of any contrast medium whatsoever to any property whatsoever without consent of the property owner. Fax toner is by definition a contrast medium, and fax paper is indisputedly property, usually private property. Junk faxes are simply "telegraffiti", writings accomplished at a distance electronically, non-consensually using the recipient's mechanisms and supplies.

If the Commission makes the mistake of using language that says or implies "junk faxes are permitted on the basis of an EBR", it will *incentivize* the violation of fax machine owners' many other statutory and common law rights, and will make the problem <u>significantly</u> worse. This is precisely what happened over the course of six years (1998-2004) in Colorado, after our state passed a law that said that anyone who sends unsolicited fax ads without a toll-free remove number on them was liable for violating the Colorado Consumer Protection Act. The law did not say "junk faxes are permitted in Colorado unless there's a toll-free number." It simply laid out a set of elements that constituted a state statutory prohibition. Because so many people misunderstood this state law, it enabled the junk fax explosion. Indeed, it proved such a terrible mistake that the

legislature repealed that law in 2004. Now Congress has made the exact same mistake at a national level. I therefore urge the Commission to carefully word its *dicta* and decisions to always talk about exemptions from TCPA statutory liability. Never use terms that expressly or impliedly denote or connote permission to send unsolicited faxes.

In particular, in furtherance of this goal, I request the Commission to expressly determine or clarify that 47 U.S.C. § 414 applies not just to other federal causes of action, but also to all possible state, municipal, or other legal remedies, both at common law as well as statutory. The language at 47 U.S.C. § 414 is quite general and appears not to be limited to federal causes of action. Nonetheless, the Commission should make this expressly and unambiguously clear in furtherance of protecting all of fax machine owner's varied consumer rights.

Finally, I urge the Commission to own up to the mistake it made by overstepping the TCPA's statutory bounds with respect to EBR prior to the JFPA. Judges throughout the country should not have to be briefed on the nuances of the *Chevron* doctrine with respect to federal regulatory decisions. Prior to the JFPA, the TCPA never had an EBR exemption. The FCC was without authority to create one, which means that one never existed in the first place. An FCC correction of its past misleading pronouncements on this subject will go a long way towards keeping judges from being fooled by fax advertising defendants who regularly argue that an EBR exemption to junk faxes existed prior to 2005.

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Respectfully submitted,

/s/

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