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September 25, 2013

**VIA ELECTRONIC DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TWA325  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation  
CG Docket No. 02-278 and CG Docket No. 05-338**

Dear Ms. Dortch:

As counsel for Westfax, Inc. (“Westfax”), I exchanged emails with John B. Adams from the Consumer and Governmental Affairs Bureau (“Bureau”). The subject matter of the emails was the Bureau’s inquiry into whether Westfax wants to proceed with its Petition (as referenced below) given the court’s reversal of its order referenced in the Petition. I advised the Bureau that Westfax does wish to proceed.

Pursuant to the permit-but-disclose proceedings rules of 47 CFR 1206(b) the following brief ex parte presentation is made and disclosed and filed electronically in the above reference docket. The purpose of the filing is to update, discuss and clarify the pending Westfax, Inc. Petition for Consideration and Clarification CG Docket No. 02-278 and CG Docket No. 05-338 both of which were filed September 25, 2009 (“Petition”). Once again, I encourage the Commission to promptly review and clarify the straightforward issues raised in the Petition with clear and simple findings.

Please contact me directly with any questions. Thank you.

The 2009 Petition requested the Federal Communications Commission (“FCC”) pursuant to 47 C.F.R. Section 1. 429 to review, consider and clarify certain aspects of its facsimile advertising rules pursuant to its exclusive authority to rule, interpret, regulate and enforce the Telephone Consumer Protection Act of 1991 (“TCPA”) and the Junk Fax Prevention Act of 2005 (“JFPA”). This letter further focuses the issues raised in the Petition.

It has been four (4) years since the Petition was filed. New technology has progressed unabated and pushed the 1990’s facsimile to “dinosaur” status in the technology world. The “electronic fax” has for the most part replaced the traditional fax. J2’s electronic fax service is called “eFax” and numerous other companies offer the same electronic fax services under different brand names. Open Text sells millions of a computer hardware product it calls Right Fax. Right Fax is installed on the user’s LAN and performs the same function and service as the third party intermediaries do. Nonetheless, common sense and common practice have not been sufficient to identify and treat the electronic fax as what it actually is – an email and distinguish it from a fax. A whole ocean of emails engulfs the lake of facsimiles the TCPA regulates.

Notwithstanding the Court’s reversal of its initial Order in J2 Global Communications, Inc. v. Protus IP Solutions (2010 WL 9446806 (C.D. Cal.)) that J2 had standing as “an entity injured by unsolicited fax advertisements” based up J2 being “the recipient” via interception of unsolicited fax advertisements directed to its customers, the issues raised in the Petition were not decided and are more ripe than ever on the 4<sup>th</sup> anniversary of date the Petition was filed.

In the J2 case referred to above, Judge Pregerson agreed with both J2 and Protus that only the “recipient” of an unsolicited fax has standing to sue under the TCPA. The Court then correctly construed the meaning of the phrase “the recipient” as used throughout the TCPA and found that J2, an unknown intermediary, was not the recipient of unsolicited facsimile advertisement sent through the Protus network that J2 directed to its customers. The Court found J2’s argument that it was the recipient of every fax directed to its customers because J2’s servers qualify as “telephone facsimile machines” absurd because

every fax advertisement would be unsolicited because a sender would never know that an intermediary like J2 had been hired to intercept the fax and even where the addressee had expressly requested that the sender transmit the fax.

The J2 case clarified the meaning of “the recipient”, fax servers and standing and correctly found that under the TCPA “the recipient” is the person to whom the unlawful phone call or unsolicited fax advertisement is directed. Unknown intermediaries like J2, that intercept on their fax servers, convert to a digital image, and transmit the image as an email that are sent to others, are not “the recipients”. Finally, the Court noted its decision was consistent with the decisions of other federal district courts.

In the J2 case, the Court repeated what J2 and Protus stated (but made no finding that):

1. Protus and J2 both offer fax-to-email conversion (“eFax” and “myFax”);
2. The eFax and myFax services allow their customers to receive faxes via email;
3. Each company’s customers select or are assigned a fax number through which the customer can receive faxes;
4. When a fax is sent to a J2 or Protus customer at her designated fax number, J2 or Protus will intercept the fax, reformat and convert it to an electronic image, and forward it to the customer via email (emphasis added);
5. J2 argues that a recipient of an email cannot bring a claim under the TCPA and its customer is forwarded the fax advertisement as an email;

Fax-to-email conversion services and other means to convert faxes to emails existed in 2009. These services are now commonly used by millions of customers. The number of customers using these services continues to grow. The traditional fax from the sender to the recipient’s fax machine is rapidly declining and a distinct minority of existing faxes sent and received.

The generic term “electronic fax” (e.g. eFax) means a facsimile message converted to an email. A facsimile transmission is received on a fax server. Once a telephone call is placed, the sending machine and receiving fax server communicate with one another or

“handshake”. If a connection is established, the document is transmitted from the sending machine to the fax server. After the transmission, the fax server reformats and converts the message into a digital image file that is then sent as an email attachment via the Internet to the recipient.

“electronic faxes” changed the traditional sender – sending telephone facsimile machine - telephone line – recipient telephone facsimile machine – recipient TCPA model to a sender – telephone facsimile machine – telephone line - intermediary carrier fax server (fax converted to pdf file) - Internet – email to efax carrier’s customer (recipient) model.

### **Revised Requests for Consideration and Clarification**

1. An “electronic fax” (for example an eFax) is an email.
2. The TCPA, JFPA and the facsimile advertising rules do not apply to emails, including specifically “electronic faxes”.
3. The recipient of an electronic fax does not have a cause of action under the TCPA or JFPA.

None of the issues Congress took into account in drafting the TCPA, including the “interference, disruptions and expense” resulting from junk faxes, due to the costs associated with the fax advertisements or the disruption when a facsimile machine is receiving a fax, because it may require several minutes or more to process and print the advertisement are applicable to electronic faxes. Facsimile messages may shift the advertising costs of paper and toner to the recipient, but not email messages. Email does not tie up lines and printers so the recipients’ requested faxes and emails are not timely received.

Applying the TCPA to electronic faxes makes no sense. The House Report findings and the TCPA / JFPA predate the electronic fax.

4. What is the definition of a “the recipient”.

Although the J2 case construes the phrase “the recipient” the FCC has not defined or explained the phrase “the recipient”. The FCC should adopt the Court’s construction of the phrase “the recipient” as part of its definitions.

5. The “opt-out” provisions of the JFPA have had the intended beneficial effect they were designed to generate. Westfax no longer requests a “safe harbor” opt-out request that complies with the JFPA.
6. Is a third party, including a fax broadcaster, retained to accept opt-out requests for the sender who has its contact information and/or cost-free numbers to accept opt-out requests on a customer’s facsimile advising the customer on how to comply with the facsimile advertising rules and/or is the fax broadcaster “highly involved” solely as a result of providing such services.

Westfax continues to request clarification that third parties, including fax broadcasters, who are retained to accept opt-out requests, are not deemed to be giving any advise on how to comply with the facsimile advertising rules, such services are not an example of any “involvement” and such services do not create any TCPA and JFPA liability for such third party service provider.

**Respectfully submitted,**

**/s/ William B. Hayes**

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