

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Petitions Concerning the Commission's Rule on  
Opt-out Notices on Fax Advertisements

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

Junk Fax Prevention Act of 2005

CG Docket No. 02-278

CG Docket No. 05-388

**COMMENTS OF ROBERT BIGGERSTAFF ON THE PETITIONS CONCERNING THE  
COMMISSION'S RULE ON OPT-OUT NOTICES ON FAX ADVERTISEMENTS**

**INTRODUCTION**

**"Permission-based" faxes are not "solicited" faxes.**

As a threshold matter, the nine Petitions on which the Commission has invited comments<sup>1</sup> each use the term "solicited faxes" yet this term is undefined. It appears this term is intended to refer to fax advertisements that are sent based on the sender obtaining "express invitation or permission" ("EIP") to send those faxes as opposed to faxes sent based on the exemption for an "established business relationship." This is both confusing and improper nomenclature.

Faxes sent with EIP are not all "solicited." I have personally encountered vendors I do business with who require that I grant them "prior express invitation or permission" for

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-out Notices on Fax Advertisements*, DA 14-120 at n.1 (Jan. 31, 2014) (listing the nine petitions).

future faxes as a condition of doing business. While it can be said I reluctantly acquiesced to these demands in some cases in order to do business with these vendors, I emphatically do not want these faxes, and they are by no means “solicited.” Some fax senders have buried EIP in boilerplate terms of use on a website or other adhesive documents in a manner where they incorrectly believe they have obtained valid EIP. Those faxes are by no means “solicited.” Faxes sent to wrong numbers, even where the sender believes it obtained EIP from the recipient, are certainly not “solicited” by those recipients. In addition, the Commission itself has made a similar (and proper) distinction and treated “solicited” and “permission” as separate concepts in the context of faxes.<sup>2</sup>

The text of the TCPA itself refers to a fax advertisement sent within the exception for an “established business relationship” (“EBR”) as a fax “based” on the EBR.<sup>3</sup> Consequently the term “EBR-based” fax is widely used to denote such transmissions.<sup>4</sup> The same construction applies to faxes sent based on “express invitation or permission” — such faxes should be called “permission-based faxes” or “EIP-based faxes” rather than “solicited” faxes.<sup>5</sup> This also represents the usage in the marketing industry generally (e.g. permission-

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<sup>2</sup> 2003 TCPA Order, 18 FCC Rcd 14014 (2003) ¶189 (“The record in this proceeding reveals consumers and businesses receive faxes they believe they have neither solicited nor given their permission to receive.”)

<sup>3</sup> § 227(b)(1)(C)(ii)(II).

<sup>4</sup> See, e.g. Kennedy, Charles H., *The Business Privacy Law Handbook* (AR Tech House, 2008) p.148; *Advertising Faxes to Customers Lawful until July 2005*, Privacy In Focus - Wiley Rein LLP, <<http://www.wileyrein.com/publications.cfm?sp=articles&newsletter=4&id=2500>> (last visited Feb. 3, 2014); *Communications Law Bulletin, October 2008*, <<http://www.mofo.com/communications-law-bulletin-october-2008-10-30-2008/>> (last visited Feb. 3, 2014).

<sup>5</sup> Use of the term “permission-based” faxes also predates the use of other terms. See, e.g., *Fax Bill Would Cancel Written-Permission Rule*, DIRECT MARKETING NEWS, dated June 17, 2004, available at <<http://www.dmnews.com/fax-bill-would-cancel-written-permission-rule/article/84509/>> (last visited Feb. 3, 2014); FaxBack, Inc., *Consensual Fax Strategies for happy customers and FCC compliance* (FaxBack, Inc. 2005) available at <<http://www.faxback.com/>

based marketing) and the fax-broadcasting industry specifically.<sup>6</sup> This avoids the misconception in the Petitions that all permission-based fax advertisements are “solicited” when they clearly are not.

**TO IMPLEMENT A SYSTEM OF PERMISSION-BASED FAXES, RULES FOR GRANTING, PROVING, AND REVOKING PERMISSION ARE NECESSARY.**

**Revocation of consent is not a universally understood concept.**

The notion that when a consumer grants consent to receiving marketing materials the consumer retains the unilateral right to revoke that consent, is not a universally understood concept. When a consumer says “stop” that overrides everything else that has transpired previously. It took the Supreme Court of Ohio to tell the local newspaper that when a subscriber said stop making calls to his home to sell additional services, the newspaper had to abide by that request.<sup>7</sup> It took the Third Circuit Court of Appeals to tell Dell that when a customer orally revokes consent for robocalls to his cell phone, that Dell has to actually stop.<sup>8</sup> Other advertisers have said it even more directly, claiming that once given, consent can *never* be revoked.<sup>9</sup> In what can only be described as a Kafkaesque interpretation in a TCPA case in Virginia, AT&T argued the TCPA “only required the

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resources/WhitePapers/ConsensualFaxWhitepaper.pdf>.

<sup>6</sup> See, e.g. Protus IP Solutions, *The New Age of Fax*, <[http://www.protus.com/company/media\\_coverage/article.asp?mc=4](http://www.protus.com/company/media_coverage/article.asp?mc=4)> (last visited Feb. 3, 2014).

<sup>7</sup> *Charvat v. Dispatch Consumer Servs., Inc.*, 769 N.E.2d 829 (Ohio, 2002).

<sup>8</sup> *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265 (3d Cir. 2013).

<sup>9</sup> *Munro v. King Broad. Co.*, 2013 TCPA Rep. 2677, 2013 WL 6185233 at \*2 (W.D. Wash. Nov. 26, 2013).

company to keep a do-not-call list, it does not require [the company] to follow it."<sup>10</sup> These examples are only the tip of the iceberg and amply demonstrate the need for Commission interpretative guidance on the issue of "express invitation or permission," how it can be effectively revoked, and what requirements an advertiser relying on EIP must adhere to.

**Many details are necessary to flesh out implementation of the fax advertising provisions of the TCPA.**

The Commission's rules are the authoritative and unifying source for the TCPA's application and operational details. The principal rationale underlying this concept "is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details."<sup>11</sup>

It is, of course, impossible to eliminate every vestige of ambiguity from a statute like the TCPA. But the Commission has clarified many important details implementing the fax advertising provisions of the TCPA, such as establishing the burden of proof for the EBR and EIP exemptions on the sender;<sup>12</sup> permitting businesses to ignore opt-out requests that are not made by the method(s) set out in the opt-out notice;<sup>13</sup> and that the sender is liable for violations of the facsimile advertising rules, including failure to honor opt-out requests.<sup>14</sup> The Commission also defined terms it used in its fax advertising rules such as

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<sup>10</sup> Stephen Dinan and Margie Hyslop, *States Trying to Restrict Telemarketers*, THE WASH. TIMES, Feb. 3, 2000 at C3.

<sup>11</sup> *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 441-42 (7th Cir. 1994), *aff'd* 516 U.S.152 (1996).

<sup>12</sup> *2006 JFPA Order*, 21 FCC Rcd 3787 ¶36 (2006).

<sup>13</sup> *Id.*, ¶34.

<sup>14</sup> *Id.*, ¶39.

“sender.”<sup>15</sup> The TCPA itself contains a number of undefined terms, some of which the Commission has also defined and others it has not. For example, the Commission defined the term “established business relationship.” One of the terms that the Commission chose not to explicitly define is “express invitation or permission” (“EIP”). The Commission also chose not to implement a time limit on EIP but also determined that an opt-out request is equally unlimited in time.<sup>16</sup> These logical outgrowths are all necessary and proper elements of the Commission’s implementation of the TCPA’s fax advertising provisions. Those fax advertising provisions depend on the operational details of EIP.

Most importantly, the Commission held that once given, EIP can be revoked at will by the consumer. As discussed above, however, this issue is not a universally understood concept. Even the existence of the TCPA’s fax advertising protections are unknown to many consumers who receive those fax advertisements. I frequently meet people who complain about receiving unwanted fax advertisements, but who are completely unaware of the TCPA, the JFPA, or their rights under the law to stop those faxes. I myself still feel besieged by unwanted faxes at times (along with unwanted text messages and robocalls) despite the eight years in which the JFPA has been operative.

Faxes without an opt-out notice or with a non-compliant notice are particularly vexing. Not only have you wasted your resources, including time, to deal with the fax, but now if you want to try to contact the sender, you have to read their advertising to find contact information and that generic contact information is not guaranteed to reach someone who even knows what to do with a do-not-fax request. A non-compliant request

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<sup>15</sup> 47 C.F.R. 64.1200(f)(8).

<sup>16</sup> *2008 Order on Reconsideration*, 23 FCC Rcd 15059 ¶17 (2008).

always raises questions. Was part of the notice intentionally omitted, hoping people would not know their rights, or was it negligence, which bodes poorly for both the sender's diligence in complying with the TCPA in the first place and the likelihood that an opt-out request will actually be honored. Both are infuriating.

My experience has been that fax advertisements lacking a fully compliant opt-out notice— particularly the ones that leave off the statement that failure to comply within 30 days is unlawful—are predominantly the hallmark of marginal entities pushing the likes of bogus credit repair and time shares who often claim you “opted-in” by visiting some website or entering a contest. Most assuredly, such marginal entities with questionable wares would be the beneficiaries of, and widely exploit, any lessening of the current fax provisions in the Commission's rules. However, one positive since the Commission's rules were announced in 2006, is that many faxes have contained fully compliant opt-out notices and the EIP operational implementation is understood by many more consumers due to the rule.

**Without an opt-out notice on permission-based faxes, there is no way to opt-out.**

As part of its implementation of the fax advertising provisions of the TCPA, the Commission accepted the request of industry groups<sup>17</sup> and fax broadcasters when it

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<sup>17</sup> For example, in comments filed on the Commission's JFPA rulemaking, the National Federation of Independent Businesses (“NFIB”) argued:

The sender should only be required to honor a request made by the method prescribed in the opt-out notice. If a recipient contacts the sender by another means then the sender should not be liable if the recipient continues to receive faxes. While this may not be a problem with smaller businesses, an organization such as NFIB, with offices in all 50 states and numerous points of contact with the membership, could not guarantee that a request would be honored if it did not go to the specific contact point.

*Comments of NFIB on Rules and Regulations Implementing the TCPA, Docket 05-338 (Jan. 18, 2006)*

declared that in order for an opt-out request to be valid, it must be made in compliance with the instructions in the opt-out notice on the fax.<sup>18</sup> This demonstrates the absolute necessity of the Commission's rule that permission-based advertising faxes must contain an opt-out notice. Without such a notice, consumers receiving permission-based fax advertisements would have no way to legally enforce their right to stop such faxes.

This also demonstrates that the Commission's decision to require opt-out notices on permission-based fax advertisements is a logical outgrowth of the implementation of the fax advertising provisions of subsection 227(b). Subsection 227(b) requires that EIP function as an exemption to the general prohibition on fax advertisements. No one can deny that EIP is a core concept in the operation of subsection 227(b). Nor can anyone deny that establishing the contours of how EIP is to be defined and details of how it is to operate is an integral part of the Commission's implementation of subsection 227(b).

## DISCUSSION

### What is "substantial compliance?"

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p.5. Similar requests were also filed by companies including National Automobile Dealers Association ("NADA") (Jan. 18, 2006) and CBS Corporation ("CBS"). Even the U.S. Small Business Administration Office of Advocacy gave an *ex parte* presentation to the Commission on March 13, 2006 advocating the same provision.

<sup>18</sup> 2006 JFPA Order at ¶34. As one industry litigation group put it:

The FCC's decision [2006 JFPA Order] includes a long sought-after clarification that senders will not be required to honor opt-out requests unless those requests are submitted in compliance with the opt-out notice included with the fax.

*FCC Adopts Commercial Fax Rules*, Covington & Burling Communications and Media E-Alert (dated April 7, 2006) available at <<http://www.cov.com/files/Publication/a83e13d7-e243-4a5a-b043-e80265cfb4f1/Presentation/PublicationAttachment/02605fe3-a85c-4db4-b559-f5f12f7f240a/oid60846.pdf>>. I note that the same firm, Covington and Burling, represents at least three of the Petitioners who now seeks to vitiate the requirement of an opt-out notice on permission-based faxes. If successful, this one-two punch would establish a "Hotel California" for EIP where once given it could *never* be enforceably withdrawn as long as an opt-out notice was removed from all the permission-based fax advertisements.

The Commission should be very skeptical of those advancing the notion that “substantial compliance” with the opt-out notice rules should be treated like actual full compliance with those rules. As a threshold question, what does “substantial compliance” mean? The opt-out notice requirements have only 6 simple elements—four are content requirements and two are positional. The content requirements are:

- Both a fax and voice number available 24-hours a day.
- A cost-free method if neither the fax nor phone number are toll free.
- Statement that the recipient may make a request to the sender of the advertisement not to send any future advertisements and that failure to comply within the shortest reasonable time or 30 days is unlawful.
- Instructions on how to make an opt-out request.

The positional requirements are:

- Clear and conspicuous (separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax).<sup>19</sup>
- On the first page of the advertisement.

All of these elements are appropriate and necessary minimums. Indeed, the Commission gave great latitude to fax advertisers by declining to adopt more specific requirements.<sup>20</sup>

But that latitude did not extend to choosing which elements to comply with, but rather only as to how to satisfy each element.

The Commission’s rule is reasonable and appropriate. First, it makes sense to use the same notice elements on all fax advertisements, rather than have different requirements for EBR-based fax advertisements versus permission-based fax

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<sup>19</sup> The Commission has clarified that to qualify as “clear and conspicuous” the notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax. *2006 JFPA Order*, ¶26.

<sup>20</sup> *2006 JFPA Order*, ¶25.

advertisements.<sup>21</sup> Second, these are the same content and positional elements that Congress selected. Third, the Commission expressly found that these elements, and the clarifications made by the Commission, were proper “so that facsimile recipients have the information necessary to avoid future unwanted faxes.”<sup>22</sup> Informing them of not just the mechanism, but that they have a legally enforceable right and that compliance is mandatory, both further that goal.

Besides being specified by Congress, the value and appropriateness of each of these six elements is self-apparent. Each is uniquely helpful to consumers and the public. If “substantial compliance” is quantitative, which of the six elements should be optional? If an element is indeed optional, then why require it at all? Or does “substantial compliance” mean meeting any five of the six?

If “substantial compliance” means having all the content elements “somewhere” on the page, but not placing them in a clear and conspicuous notice at the top or bottom of the page, this categorically fails because it would leave consumers without the ability to make an *enforceable* opt-out request under the Commission’s 2006 JFPA Order which specified that opt out requests are only enforceable if made in the manner specified in the opt-out notice.<sup>23</sup> Ergo there must be such a “notice” and not merely miscellaneous pieces of information scattered about a fax that the recipient must find like a scavenger hunt.

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<sup>21</sup> See, e.g., *Forest Petition* at 4, stating that fax transmissions sent by Petitioner were allegedly sent with *both* prior invitation or permission of the recipient and a business relationship with the recipient. This illustrates the confusion that would result if there were different notice requirement for EBR-based fax advertisements versus permission-based fax advertisements.

<sup>22</sup> *2006 JFPA Order* at ¶25.

<sup>23</sup> *2006 JFPA Order* at ¶34.

Finally, including a compliant opt-out notice is simple. Even months before the rule went into effect, I personally saw compliant opt-out notices on faxes and multiple sources of industry guidance informing fax senders of all the opt-out notice rules, including the requirement of a compliant opt-out notice on permission-based faxes.<sup>24</sup> Even before the rule went into effect on August 1, 2006, many fax advertisers have had no problem including proper notices for the last 8 years. It is unclear why these nine Petitioners failed their duty to the public to comply with a simple regulation that so many other advertisers seemed to be able to comply with. I also wonder what it says to all of the competitors of Petitioners who have not been negligent and who fully complied with the Commission's TCPA regulations from the start.

### **Waivers**

It appears that the entities seeking waivers rely heavily on the sheer number of violations of the Commission's rules they have committed by highlighting the resulting potential liability as the justification for the waivers they seek. Yet this result seems directly related to the fact that these entities utilize extensive fax advertising campaigns, with at least three using the same fax broadcaster (Peer Group.) Since fax advertising seems to be such an integral part of their business models, I would expect them to have had

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<sup>24</sup> See, e.g., *FCC Adopts Commercial FAX Rules*, Nat'l Ass'n of Wholesale Distribs. News, <[http://www.naw.org/nawnews/news\\_article.php?articleid=491](http://www.naw.org/nawnews/news_article.php?articleid=491)> (last visited Feb. 4, 2014) (Published in June 2006, advising that new FCC rules "specify the content and placement of the required notice that must appear on all faxed advertisements"); K&L Gates, *FCC Adopts New Junk Fax Rule* ("The Junk Fax Rule states that even if the recipient of a fax advertisement has provided the sender prior express invitation or permission, the advertisement must contain an opt-out notice complying with the requirements described above.") available at <<http://www.klgates.com/files/tempFiles/e76a313f-19e3-40ad-aab3-44cf5613808d/MBC0506.pdf>>; *New "Junk Fax" Rules Take Effect August 1, 2006*, Pillsbury Winthrop Shaw Pittman LLP (dated July 2006) ("the sender must provide a notice on the first page of any facsimile advertisement informing the recipient of his/her/its right to "opt out" of future facsimile advertisements.") available at <<http://www.pillsburylaw.com/siteFiles/Publications/45B78698527086709236960714D29149.pdf>>;

competent counsel to aid them in complying with a very simple and well publicized Commission rule requiring an opt-out notice on permission-based fax advertisements. Fax advertising is a cost-shifted advertising medium, and like other cost-shifted advertising is highly regulated. Failure to exercise even a modicum of due diligence in complying with a very simple regulation should not be rewarded. Indeed, granting these petitions sends a message that if you commit a lot of violations, the sheer size of your potential liability will get you off the hook. This is a textbook example of a moral hazard that should not be encouraged.

Notably absent from all the Petitions is any explanation as to *why* any Petitioner failed to comply with the rules and why they have waited seven years to ask for a waiver. This failure is discussed *infra*, but as a threshold matter, how can Petitioners ask for a waiver without even explaining why they failed to comply in the first place and why it took them seven years to seek a waiver?

***Reliance on Rath Microtech is Misplaced***

Six of the nine petitions attempt to support their request for a waiver by citing *Rath Microtech Complaint Regarding Electronic Micro Sys., Inc.*<sup>25</sup> However, the fact pattern, and the law, of *Rath Microtech* bears no resemblance to the instant matter. A number of differences are immediately apparent:

<b><i>Rath Microtech</i></b>	<b>The nine instant petitions</b>
EMS claimed that the violation was not the result of lack of care or negligence because it relied on the expertise of Rockford Engineering Services to test the equipment.	None of the Petitioners argue they relied on expertise of others or that their failures were due to anything other than their own negligence in determining what the Commission’s rules require.

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<sup>25</sup> 16 FCC Rcd 16,710 (2001).

EMS took immediate remedial action.	None of the Petitioners identify any remedial action taken.
There was no evidence to indicate that EMS's violation was willful or repeated.	Petitioners violations appear to be repeated violations, and appear to be due to negligence which the FCC has declared to constitute willfulness.
Without the waiver, many innocent purchasers of EMS's noncompliant equipment would be put to time and expense to remove and replace the violative EMS phones.	The waiver benefits only Petitioners, and not the general public.
<i>Nortel</i> test was applicable.	<i>Nortel</i> test is not applicable.
The existence of the EMS telephones in the elevators was "clearly" in the public interest.	There is no "public interest" in omitting the compliant opt-out notices.

Moreover the "improper labeling" which the Petitioners cite to that was excused by the Commission in *Rath Microtech*, was the label on a *single* telephone.<sup>26</sup>

One final issue regarding *Rath Microtech* compared to the instant petitions is that EMS did not attempt to justify a waiver for the express purpose of avoiding a private civil suit. Indeed, it appears that a waiver has never been granted by the Commission where the express purpose the waiver was sought was to insulate repeated FCC violations from a private civil action. The Commission should not create a precedent of granting waivers that are sought for the express purpose of picking winners or losers in civil suits.

***The requests for waivers all fail mandatory legal elements of a waiver request.***

Petitioners expertly parrot the language of prior matters before the Commission regarding some of the elements that must be proven to qualify for a discretionary waiver.

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<sup>26</sup> "EMS admits that [one] telephone was not properly labeled, but explains that it was a single occurrence." *Id.*, ¶12.

However, they seem to have failed to *understand* those requirements—in particular the requirement that the waiver itself must be in the public interest. "To make this public interest determination, the waiver cannot undermine the purpose of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule."<sup>27</sup> Petitioners consistently get the logic backwards and suggest (repeatedly) that “public interest” is *not* served by subjecting the petitioner to the private right of action in the TCPA. Besides the mere conclusory nature of such claims, whether public interest is or is not served by *denying* the waiver and letting the regulations function as written is not the test. It is a petitioner’s burden to show that *granting* the waiver is *affirmatively* in the stronger public interest than letting the rule operate as written. Petitioners have only identified their own private pecuniary interests that will be furthered by such waivers (i.e. escaping a private lawsuit). There is a strong presumption that allowing the Commission’s rules to operate as written is in the public interest. Having failed to identify and prove a qualifying public interest that would be served by granting the discretionary waivers, the Petitions for waivers must fail as a matter of law.

As explained earlier, there were—and still are—numerous sources that informed businesses of the Commission’s JFPA rule requirements, including the requirement for opt-out notices on permission-based fax advertisements. Not to mention the Commission’s own publications and the Federal Register notices. The Petitions reveal that each Petitioner is a business that failed to comply with a clear and unambiguous Commission rule. Interestingly, none of the Petitions indicate *why* any particular Petitioner failed to follow the rule. Were they ignorant of the rule? Were they aware of it but misunderstood it? Did

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<sup>27</sup> *In the Matter of Curtiss-Wright Controls Inc.*, 27 FCC Rcd. 234 ¶8 (2012).

they rely on others, such as an attorney, to guide their compliance? This lack of explanation is fatal. "When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action."<sup>28</sup> None of the Petitions have meet this standard.

Before any noncompliance is excused, it is important to understand the root cause of the noncompliance because excusing the noncompliance is in fact excusing the root cause. By failing to specify the cause of their noncompliance, Petitioners leave the Commission to speculate as to that cause, which is improper. The Commission should not speculate as to any basis used to grant a waiver. It is a petitioner's duty to plead all the information necessary to demonstrate a waiver is warranted. The only "cause" Petitioners seem to identify is the actions brought by consumers who are merely applying the Commission's rule as written. But those consumer actions are not the "cause" of the Petitioners' violations of the Commission's rules.

When a waiver request provides inadequate information "then our inquiry need go no further because the petitioner has failed in its obligation to plead with particularity the facts and circumstances warranting its requested relief."<sup>29</sup> Accordingly, these Petitions do not warrant further consideration.

On their face, the Petitions reveal that the failures of each Petitioner are apparently either due to negligence, or due to willful indifference to a plainly-worded Commission rule. It is well settled in recent Commission jurisprudence that "mistakes or negligence by

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<sup>28</sup> *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

<sup>29</sup> *In the Matter of Section 68.4(a) of the Comm'ns Rules Governing Hearing Aid-compatible Telephones*, 23 FCC Rcd. 3352 (2008) ¶7.

employees or third party contractors are not grounds for waiver of Commission rules.”<sup>30</sup> As stated earlier, other fax advertisers easily complied with the rules. This dichotomy—where a petitioner fails to comply with a rule without a satisfactory explanation while others have complied with the same rule—militates against granting the relief sought.<sup>31</sup>

Some Petitioners, like Perdue Pharma, suggest that partially complying with the Commission’s rule “fulfill[s] the purposes of the TCPA: protecting consumers and businesses from unsolicited faxes and ensuring that fax advertisers provide effective opt-out mechanisms.” This conclusory statement ignores the elements that Congress and the Commission decided are necessary to effectuate the right to opt-out. It is not up to a Petitioner to decide what is necessary to fulfill the purpose of the statute when Congress and the Commission have already decided those elements.

### **No evidence of Burdensomeness**

While Petitioners repeatedly use the word “burdensome” they identify no actual burden in complying with the rule, much less quantify that burden. They simply state in a conclusory fashion that “requiring strict compliance” is burdensome. It is unclear whether they mean the “burden” is including *any* opt-out notice, or whether the burden is in including a *compliant* opt-out notice. If the former, then the burden they complain of is moot since most Petitioners claim that they did include a (noncompliant) opt-out notice on their faxes. If the latter, then there is even less burden to simply add a fax number or a sentence of text to the notice they were going to place on the fax anyway, or to place the

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<sup>30</sup> *Universal Service Contribution Methodology Petition for Waiver of Universal Service Fund Rules by Outfitter Satellite, Inc.*, DA 13-1917 (FCC Sep. 17, 2013).

<sup>31</sup> *In re Matter of TWG LLMDS, LLC*, 27 FCC Rcd. 15023 ¶12 (2012)(“WG has not provided a satisfactory explanation as to why it was unable to obtain B Block equipment when other licensees did build in a timely fashion.”)

notice in the proper spot on the first page of the fax.

What Petitioners seem to feel is a “burden” is not the rule itself, but rather the consequences of their own negligence. Complying with rule itself is a trivial burden if any burden at all. The Commission should ask each Petitioner two questions: 1) are your permission-based fax advertisements now fully compliant with the opt-out notice rule and if so when did they become fully complaint; and 2) what was the burden imposed by coming into compliance and how was that burden different (quantitatively and qualitatively) from the burden from complying with the notice requirements for EBR-based faxes? This would reveal any actual “burden” potentially relevant to the waiver requests.

### **Straw Men and False Dichotomies Persist**

Petitioners insist on perpetuating the fiction that the Commission’s JFPA Order is inconsistent. For example, Staples asserts:

As the Eighth Circuit recognized, the Junk Fax Order is inherently contradictory. On the one hand, the Commission declared that the Rule should be interpreted “to allow consumers to stop unwanted faxes in the future” even if the sender had previously “obtained permission” from the recipient. On the other hand, the Commission declared that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”

As has been repeatedly pointed out by comments on this docket, there is no contradiction. The statement that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements” describes the statutory language of the JFPA, and *not* the Commission’s rules.

I encourage the Commission to take this opportunity to explicitly clarify the context of the two supposedly “contradictory” statements and put that matter to rest once and for all.

## RESPONSES TO SPECIFIED QUESTIONS IDENTIFIED BY THE COMMISSION

### Specific Issues common to all petitions

#### Statutory Authority

*The Commission lacked the statutory authority to adopt the rule.*

*Section 227 of the Communications Act of 1934, as amended, was not the rule's statutory basis.*

The requirement for an opt-out notice on permission-based fax advertisements was not adopted as merely a “good idea” in general. As demonstrated above, the rule requiring an opt-out notice on permission-based fax advertisements is an important element and logical outgrowth of the Commission’s implementation of the EIP exemption in subsection 227(b). It balances the perpetual time frame of EIP and the decision (sought by the industry) that opt-out request are not effective unless they are made in accordance with the instructions in the opt-out notice (also sought by the industry). That notice must be present in order to withdraw EIP and enforce that withdrawal. As discussed earlier, the rule challenged by these Petitions is an integral part of the Commission’s implementation of the EIP exception in subsection 227(b). It is a logical outgrowth that flows directly from subsection 227(b) no less than the allocation of burden of proof to prove that EIP was obtained, or the burden on a recipient that an opt-out request must comply with the instructions in the notice to be legally enforceable. The Commission has statutory authority for the rule, and subsection 227(b) provides it.

#### Retroactive Waiver Requests

*A waiver “would serve the public interest by avoiding an abuse of the private right of action created by the TCPA” (Forest and Gilead)*

As explained earlier, Petitioners identify no public interest, but rather their own

pecuniary interest without any explanation of the root cause of their failure to comply with the Commission's rules. They have neither explained what "an abuse of the private right of action" means nor have they articulated any objective way to measure it. The Commission should not be left to "guess" at what was intended by this Petition.

*A waiver is justified because requiring strict compliance with respect to solicited faxes would be "inequitable, unduly burdensome, and contrary to the public interest."  
(Walburg)*

As explained earlier, Walburg identifies no actual public interest, but rather its own pecuniary interest without any explanation of the cause of its failure to comply with the Commission's rules. There is no burden except the one it has caused itself.

*A limited waiver should be granted for faxes "sent pursuant to the recipients' prior express invitation or permission ... each of which included a demonstrably effective opt-out notice on the first page describing cost-free opt-out mechanisms." (Purdue Pharma)*

As explained earlier, the opt-out notices lacked mandatory elements. Despite the conclusory claim that they are "demonstrably effective", they failed the minimum requirements. By definition, such a notice could not be "effective" much less "definitively effective" in informing recipients that failure of Purdue Pharma to comply with an opt-out request is unlawful.

*Prime Health maintains that "[w]here, as here, recipients of fax advertisements explicitly agreed to receive them, had the means and ability to revoke their consent at any time, and never expressed any interest or desire to do so, requiring strict compliance with Section 64.1200(a)(3)(iv) would be both tremendously burdensome and inequitable."*

*TechHealth similarly states that it "sent fax advertisements to business partners that had consented to receiving communications from TechHealth" and that "those recipients knew how to reach TechHealth and could have easily requested that TechHealth stop sending faxes. ... Under such circumstances, the goal of allowing consumers to stop unwanted faxes would not have been furthered by including opt-out notices on the faxes..." (TechHealth)*

TechHealth’s claim that “recipients knew how to reach TechHealth” is both conclusory and meaningless. Knowing how to “reach” an advertiser is not the same as knowing both 1) specific instructions to request that the faxes stop and that 2) failure of the advertiser to comply with such a request is unlawful. Congress and the Commission wanted people to be affirmatively provided *both* of those things—not just “how to reach” an advertiser. TechHealth’s proposition was expressly raised and argued against by NFIB which noted a do-not-fax request sent to a general contact number can not be relied on for being properly processed.<sup>32</sup>

TechHealth’s faxes had no opt-out information at all, much less a distinguishable opt-out notice at the top or bottom of the page. They simply said “Call us toll free today! 1-800-574-6786 ext. 1237” as part of the sales pitch, not as part of any instructions for stopping the faxes.<sup>33</sup>

Similarly, Prime Health’s faxes had no opt-out information at all.<sup>34</sup> Like TechHealth, Prime Health leaps to the conclusory claim that every recipient “had the means and ability to revoke their consent at any time, and never expressed any interest or desire to do so.” I have been aware of a number of instances where someone tried and failed to stop unwanted faxes, but faxes themselves had only generic contact information and no opt-out instructions. Did that happen in TechHealth’s or Prime Health’s faxes? Those Petitioners simply can’t know what opt-out attempts failed due to lack of clear opt-out notices and

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<sup>32</sup> See *infra*, note 17, citing *Comments of NFIB on Rules and Regulations Implementing the TCPA*, Docket 05-338 (Jan. 18, 2006) p. 5.

<sup>33</sup> See exhibit to the Complaint in *Critchfield Physical Therapy, P.C. v. Techhealth, Inc.*, No.: 4:12-cv-00268 (E.D. Mo.)

<sup>34</sup> See exhibit to the Complaint in *Milwaukee Occupational Medicine S.C. v. Prime Health Services, Inc., Milwaukee County*, Case No. 12-CV-8086 (Wis. County Cir. Ct).

what recipients who would have used the opt-out notice simply gave up because no opt-out notice was present.

### **Other Issues**

*Purdue Pharma asks the Commission to confirm that “substantially compliant” opt-out notices satisfy the Commission’s rules.*

As discussed earlier, what is “substantial compliance” and what elements of the opt-out notice are optional? Congress itself defined the opt-out notice elements for EBR-based fax advertisements, and the Commission applied the same notice elements to permission-based fax advertisements. Presumably since they are mandated by the statute for EBR-based fax advertisements, each of the elements is equally mandatory for a compliant notice on an EBR-based fax ad. Since the Commission adopted the entire notice requirement from EBR-based fax advertisements for permission-based fax advertisements, why is any one element less mandatory than another?

*Staples requests that the Commission initiate a rulemaking to repeal section 64.1200(a)(3)(iv), arguing that it reflects “poor policy that unfairly threatens companies and individuals with massive liability for the transmission of solicited fax ads.”*

Staples advances no objective criteria for identifying a “poor” public policy other than pecuniary interests of people sending fax advertisements. On the contrary, sound public policy is frequently at odds with a particular company’s pecuniary interests—or even those of an entire industry. Indeed, regulation of cost-shifted advertising mediums (such as faxes, e-mail, text messages, etc.) are a textbook example where public interest is quite different from the pecuniary interests of the advertisers.

### **CONCLUSION**

None of the nine Petitions meet their burden of persuasion. Nor do they even meet

their burden of pleading the necessary facts with proper particularity for the Commission to consider them. They identify neither an objective standard nor facts sufficient for granting the relief sought which is understandable because the purpose of each one is merely to avoid a private civil lawsuit. The Commission should decline the invitation to set a new precedent in granting any waiver which was sought for the express purpose of choosing winners or losers in a private lawsuit. Petitioners have not provided *any* explanation for why they failed to comply with such a simple and well publicized rule. Indifference, lack of concern, and laxity regarding compliance with the Commission's rules are not acceptable excuses.

Each of the nine Petitions should be denied in their entirety.

Respectfully submitted, this the 14<sup>th</sup> day of February, 2014.

*/s/ Robert Biggerstaff*