Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of:	)	
	)	CG Docket No. 02-278
Junk Fax Prevention Act of 2005	)	
	)	CG Docket No. 05-338
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS OF ALL GRANITE & MARBLE CORP. IN SUPPORT OF PETITIONS FOR DECLARATORY RULING

Joshua C. Dickinson
Shilee T. Mullin
Spencer Fane Britt & Browne LLP
12925 West Dodge Road, Suite 107
Omaha, NE 68154
Telephone: (402) 965-8600
Fax: (402) 965-8601
E-mail: jdickinson@spencerfane.com;
smullin@spencerfane.com

Counsel for All Granite & Marble Corp.

Dated: February 21, 2014

Petitioner All Granite & Marble Corp. (hereinafter "All Granite"), through counsel, respectfully submits these Reply Comments in response to the comments to the Federal Communications Commission's ("FCC") Public Notice[1] seeking comment on Petitions concerning the FCC's rule on opt-out notices on fax advertisements.

I. Introduction and Summary

All Granite has filed a Petition for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(4)(iii) and (iv) and/or for Waiver, CG Docket Nos. 02-278, 05-338 ("Petition"), which is one of the petitions for which the FCC has sought comment. To reiterate, All Granite is a small business—a business that fabricates and installs natural stone countertops in the eastern part of the United States. All Granite is not in the business of advertising and, as such, like many small businesses, had no occasion to review the detailed requirements for fax advertisements contained in the United States Code or the Federal Communications Commission's rules prior to being hauled into court for sending one fax.

In that lawsuit, the plaintiff seeks to certify a class action under the Telephone Consumer Protection Act ("TCPA"). American Tile and Marble Co. v. All Granite & Marble Corp., No. 13-cv-00089 (D.Neb.). The single fax appended to plaintiff's complaint stated at the bottom of the first and only page, "To unsubscribe send fax back to (860) 760-6834 or email to ls@marble.com." The plaintiff does not allege that it received any other faxes from All Granite or that it attempted to utilize the opt-out mechanism without success. Discovery to date reveals that the purported class may include 1,266 persons/entities, and that ***at a minimum***, 857 or 67.7% of them asked or agreed to receive promotional materials, including the faxes at issue.

[1] See Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket No. 02-278, CG Docket No. 05-338, DA 14-120 (Jan. 31, 2014).

Meaning that, a majority of the purported class *expressly agreed to receive the promotional materials at issue*.[2]

The plaintiff seeks, at a minimum, statutory damages, which are $500 per fax, and damages for willful violation, which is $1,500 per fax, on behalf of the purported class, which could total $1,870,500; all based on the single fax appended to plaintiff's complaint. The plaintiff has two theories of liability—one of which being that the fax at issue was unsolicited and the other that the FCC's Rule requires an extensive opt-out notice on every fax, *even where the fax was solicited*. For this second theory of liability, the harm to recipients of the faxes who expressly agreed to receive them is nonexistent.

All Granite has reviewed the comments in support of and in opposition to the petitions set forth in the Public Notice and submits the following comments in reply.[3]

II. Argument

First, the majority of the comments in opposition misapprehend the Petitions and the relief the Petitioners seek. Second, of the handful of comments in opposition that address the substance of the Petitions, they inaptly assert that Congress provided the FCC with authority to promulgate the Rule with respect to permission-based faxes.[4]

A. The Ruling And Waivers Sought Via the Petitions Pertain *Only* To Faxes Sent With The Recipient's Permission or At the Recipient's Invitation

Of the Commenters that oppose the Petitions, they generally do so because they assert that they receive many "junk advertisements from companies with which they have no business

[2] Of course, the declaratory ruling, rulemaking, and/or waiver would have no impact on unsolicited faxes sent without an established businesses relationship with the recipient.

[3] The instant Reply addresses not all of the comments to the Public Notice, but rather some of the more thematic comments. In so doing, All Granite does not concede any of the arguments made in its Petition and does not concur in any way with any of the comments in opposition to its Petition.

[4] E.g., Comment from Bellin & Associates LLC.

relationship and for which they have not granted permission."[5] They lament that they receive numerous *unwanted* faxes and try to opt-out to no avail.[6] Such comments disregard that those types of faxes are not the subject of the Petitions or Public Notice. The types of faxes that are the subject of the Petitions are "***fax advertisements sent to a consumer who has provided prior express invitation or permission***," Public Notice at p.1.

Issuance of the declaratory ruling, rulemaking, and/or waiver sought in the Petitions has absolutely no impact on the opt-out requirements for unsolicited faxes. It will still be unlawful for any person to send an unsolicited fax advertisement, unless the sender complies with Section 227(b)(1)(C). It will still be unlawful for any person to transmit an unsolicited fax advertisement without the detailed opt-out language, even if the sender has an existing business relationship with the recipient. Id. Instead, adoption of the relief sought applies *only* where a fax recipient invited the sender to transmit the fax or granted the sender permission to do so. For example, in All Granite's circumstance, this would mean honoring the consumer's express agreement to receive any promotional materials regarding All Granite's service.

Some Commenters in opposition retort that the Petitioners, and other fax senders, feign permission and, thus, the Petitions should be denied.[7] Not only are such comments speculative and baseless, but feigned permission is an issue—an evidentiary issue—that is properly addressed on a case-by-case basis by the courts.[8]

---

[5] E.g., Comment from John P. Lowry.

[6] E.g., Comment from Sandy Moriarty.

[7] E.g., Comment from National Association of Consumer Advocates.

[8] One commenter asserted that the fax supplied by All Granite is generic, and not specifically addressed to anyone, which is not true and irrelevant. See Comment from National Association of Consumer Advocates at p.2.

B. The Rule Exceeds the FCC's Statutory Authority and Is Arbitrary and Capricious

The principal argument that several Commenters in opposition rely upon to support their argument that the FCC had authority to issue the opt-out regulation as to faxes sent *with* prior express invitation or permission, is that Congress required the FCC to provide, by rule, that recipients may opt-out of receiving "*future* unsolicited fax advertisements."[9] These Commenters argue that the phrase "future unsolicited fax advertisements" "indicates that Congress was contemplating situations in which, *in the past*, a recipient may have consented to receiving fax advertisements, but then decides not to continue to consent to receiving faxes in the future."[10] This argument completely disregards the plain language of the TCPA.

This construction of the phrase "future unsolicited fax advertisement" is contrary to the plain language of the TCPA. The TCPA defines the term "unsolicited advertisement." It means "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). Per the TCPA, "unsolicited advertisements" are prohibited *unless* the sender has an existing business relationship, the sender obtained the fax numbers through voluntary communication or a directory (inter alia), and the advertisement contains an opt-out notice. 47 U.S.C. § 227(b)(1)(C). Which means that senders *may* transmit unsolicited fax advertisements if they comply with the statutory requirements for doing so. Clearly, Section 227(b)(2)(E) provides a mechanism by which those with an existing business relationship with the sender may cease receiving such unsolicited faxes. 47 U.S.C. § 227(b)(2)(E). Accordingly, reading Section 227(b)(2)(E) with a view to its place in the overall

---

[9] E.g., Comments from Bellin & Associates LLC at p.5.

[10] Id..

statutory scheme, which is a fundamental canon of statutory construction[11], makes it abundantly clear that Section 227(b)(2)(E) does not pertain to faxes sent with prior express invitation or permission. As it states, it pertains to "unsolicited advertisements." Nor is there any other statutory delegation to issue regulations pertinent to *solicited faxes*. Michigan v. EPA, 268 F.3d 1075, 1081 (D.C.Cir. 2001).

Also, one opposing Commenter suggests that the FCC had authority to adopt the Rule because the FCC is merely *filling a gap* and there is no Congressional intent *to prohibit* the FCC from issuing it.[12] This rationale is contrary to precedent and the principles of administrative law. See Ethyl Corp. v. E.P.A., 51 F.3d 1053, 1060 (D.C. Cir. 1995). First, courts refuse to "presume a delegation of power merely because Congress has not expressly withheld such power." Id. (citing cases). The D.C. Circuit has reasoned "were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well." Id. (emphasis in original).

Second, the notion that the FCC is merely filling a gap is intellectually dishonest and inconsistent with Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In Chevron, the Supreme Court reasoned that "[t]he power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." 467 U.S. at 843. In National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C.Cir.), cert. denied, 484 U.S. 869 (1987), the D.C. Circuit explained how this delegation of discretionary authority occurs, stating, "[w]hen Congress leaves gaps . . . , either explicitly by authorizing the agency to

[11] Bennett v. Merit Sys. Prot. Bd., 635 F.3d 1215, 1218 (Fed. Cir. 2011)

[12] Comments from John P. Lowry at p.2.

adopt implementing regulations, or implicitly by enacting an ambiguously worded provision that the agency must interpret, it has explicitly or implicitly delegated to the agency the power to fill those gaps." Id. at 1569.

Here, Congress has neither explicitly or implicitly delegated discretionary authority to the FCC to issue any regulations pertinent to *solicited faxes*. As several Commenters recognize, Section 227(b)(2) does not direct the FCC to adopt implementing regulations for *solicited faxes* nor is it ambiguously worded.[13] Rather, that Section unambiguously expresses Congress's intent that the FCC prescribe regulations (as pertinent to faxes) that "provide that a notice contained in an unsolicited advertisement complies with the requirements [of the TCPA]" and that provide "that a request not to receive future unsolicited advertisements to a telephone complies with the requirements [of the TCPA]," 47 U.S.C. § 227(b)(2)(D) & (E) (emphasis added). Thus, to suggest that the FCC may fill a gap by issuing the Rule because the TCPA does not *negate* the existence of the power to do so, "is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." Ethyl Corp., 51 F.3d at 1060 (citing cases).

C. The FCC Should Grant a Waiver Because Good Cause Exists

Some Commenters in opposition speciously argue that the FCC should not issue a waiver because the Petitioners have not demonstrated that "special circumstances" exist for a waiver, nor can the FCC conclude that a waiver would serve the public interest, inter alia.[14] The special circumstances are abundantly clear—the Rule is invalid. No documentary or evidentiary support is needed to substantiate that "special circumstance." Moreover, a waiver would serve the public interest because agencies cannot promulgate rules—rules that subject persons and entities to

[13] See Comments From Ada, Inc. at p. 4; and Comments of Merck & Co., Inc. in Support of Petitions for Declaratory Ruling at pp.5-6.

[14] E.g., Comments from Bellin & Associates LLC at p.32.

massive liability without the ability to challenge the validity of the rule in such proceedings—that are in excess of an agency's authority.[15] See Motion Picture Ass'n of Am., Inc. v. F.C.C., 309 F.3d 796, 801 (D.C. Cir. 2002) ("An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."). Also, as one Commenter noted, public policy supports a waiver because the Rule was adopted without any prior notice.[16]

And, one opposing Commenter's argument that a waiver would reward entities that have violated the law, while leaving entities that did not violate the law open to liability is simply nonsensical.[17] First, All Granite did not violate the law (the Rule) because the Rule is invalid. Second, if a fax advertisement was sent to a consumer who provided prior express invitation or permission and included the opt-out notice set forth in Rule 64.1200(a)(4)(iv), clearly, that sender is not "open to liability," as the Commenter argues.[18]

Thus, All Granite supports a broad, retroactive waiver for all affected parties.

III. Conclusion

For the reasons set forth above, as well as in its Petition, All Granite asks that the FCC grant relief in connection with Rule 64.1200(a)(4)(iv) in any of the forms set forth in its Petition.[19]

---

[15] Also, as one Commenter noted, public policy supports repeal of the Rule because it is obscure, as it appears in the Code of Federal Regulations and not in the TCPA and, moreover, what ordinary person would anticipate that a customer's explicit request for a fax advertisement could lead to class litigation? Comment from Howmedica Ostenonics Corp. at pp.4-5.

[16] Comments from Ada, Inc. at p.7.

[17] E.g., id. at p.33.

[18] Id.

[19] All Granite also asks, to the extent that the FCC determines that substantial compliance is sufficient, that the FCC determine that its opt-out notice was substantially compliant to satisfy the FCC's Rule.

DATED this 21st day of February, 2014.

ALL GRANITE & MARBLE CORP.,
Petitioner

By: s/ Shilee T. Mullin

Joshua C. Dickinson
Shilee T. Mullin
Spencer Fane Britt & Browne LLP
12925 West Dodge Road, Suite 107
Omaha, NE 68154
Telephone: (402) 965-8600
Fax: (402) 965-8601
E-mail: jdickinson@spencerfane.com;
smullin@spencerfane.com

Counsel for All Granite & Marble Corp.