

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

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

**REPLY COMMENTS OF DOUGLAS PAUL WALBURG,  
RICHIE ENTERPRISES, LLC, AND FUTUREDONTICS, INC.**

Samuel L. Feder  
Caroline M. DeCell  
JENNER & BLOCK LLP  
1099 New York Avenue NW  
Washington, DC 20001  
(202) 639-6000 – Telephone  
(202) 639-6066 – Fax

*Counsel for Douglas Paul Walburg, Richie Enterprises, LLC, and Futuredontics, Inc.*

February 21, 2014

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Douglas Paul Walburg, Richie Enterprises, LLC, and Futuredontics, Inc. (collectively “Petitioners”) respectfully submit these reply comments in response to the Public Notice issued on January 31, 2014, in the above-captioned dockets.<sup>1</sup>

**INTRODUCTION AND EXECUTIVE SUMMARY**

Petitioners—two of which are small businesses—face the threat of crippling liability based on a confusingly worded regulation promulgated with no notice that it might be applied to faxes sent with the prior express consent or permission of their recipients (“solicited faxes”) and in clear tension with the governing statute. That regulation, Section 64.1200(a)(4)(iv), has given rise to considerable controversy, as evidenced in court decisions and numerous petitions before this Commission.<sup>2</sup> Petitioners therefore asked the Commission to issue a declaratory ruling

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<sup>1</sup> 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 Nos. 02-278, 05-338, DA 14-120 (rel. Jan. 31, 2014) (“*Public Notice*”).

<sup>2</sup> See, e.g., *Nack v. Walburg*, 715 F.3d 680, 684 (8th Cir. 2013) (noting a “direct contradiction” within the order adopting the rule), *petition for cert. filed*, 82 U.S.L.W. 3248 (Oct. 15, 2013) (No. 13-486); *Nack v. Walburg*, No. 4:10CV00478, 2011 WL 310249, at \*4 (E.D. Mo. Jan. 28, 2011) (“Reviewing the regulation as a whole, the provision in question . . . purports, on its face,

explaining that Section 64.1200(a)(4)(iv) does not apply to solicited faxes and/or that the statutory basis for the regulation is not 4 U.S.C. § 227(b).<sup>3</sup> Petitioners alternatively requested that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) with respect to solicited faxes.<sup>4</sup>

Many comments submitted in response to the Public Notice support Petitioners' requests for relief.<sup>5</sup> The comments opposing Petitioners' requests, virtually all of which were submitted by plaintiffs or plaintiffs' attorneys,<sup>6</sup> rely predominantly on a mischaracterization of the faxes at issue and fail to address Petitioners' primary arguments for granting the requested relief. Furthermore, opposing commenters ignore the plain inequity of subjecting small businesses to crippling liability on the basis of a confusingly worded regulation with uncertain statutory foundations, promulgated without notice as to the scope of its applicability. This inequity

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to apply only to unsolicited faxes.”), *rev'd* by 715 F.3d 680 (8th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3248 (Oct. 15, 2013) (No. 13-486); *Public Notice* at 1 n.1 (citing the numerous petitions filed at the Commission).

<sup>3</sup> See *Petition, In re Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013) (“Walburg Pet.”); *Petition, In re Petition of Futuredontics, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Oct. 18, 2013) (“Futuredontics Pet.”) (collectively “Petitions”).

<sup>4</sup> Futuredontics Pet. 13–14; Walberg Pet. 13–15.

<sup>5</sup> See *Comments of Anda, Inc.*, CG Docket Nos. 02-278, 05-338 (filed Feb. 14, 2014); *Comments of Staples, Inc. and Quill Corporation*, CG Docket Nos. 02-278, 05-338 (filed Feb. 14, 2014); *Comments of Merck & Co. in Support of Petitions for Declaratory Ruling*, CG Docket Nos. 02-278, 05-338 (filed Feb. 14, 2014).

<sup>6</sup> See *Comments of Michael Nack on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (filed Feb. 14, 2014) (“Nack Comments”) (submitted by plaintiff); *TCPA Plaintiffs' Comments on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (filed Feb. 14, 2014) (“TCPA Plaintiffs Comments”) (submitted by plaintiffs' attorneys); *Comments of Bellin & Associates LLC*, CG Docket Nos. 02-278, 05-338 (filed Feb. 13, 2014) (“Bellin Comments”) (submitted by plaintiffs' attorneys).

constitutes good cause for granting a retroactive waiver.<sup>7</sup> While the declaratory relief Petitioners requested remains justified for the reasons stated in their Petitions, a retroactive waiver that absolves Petitioners of liability for transmitting solicited faxes would fully resolve this controversy. Petitioners therefore focus these reply comments primarily on their request for a retroactive waiver.

## ARGUMENT

### I. Opposing Comments Mischaracterize The Fax Advertisements At Issue.

Commenters who oppose granting Petitioners relief rely primarily on a mischaracterization of the faxes at issue, arguing at length that the faxes addressed by the Petitions were unwanted and sent without permission. Those claims are both wrong and irrelevant to the relief Petitioners seek.

Contrary to opposing commenters' claims, Petitioners face massive liability for sending *solicited* faxes. As the Eighth Circuit explained in *Nack v. Walburg*, for example, commenter Michael Nack's claims are based "upon the receipt of one fax advertisement" from Petitioner Walburg, which plaintiff's "agent *undisputedly consented* to receive."<sup>8</sup> Accordingly, the court recognized, Nack's putative class action "does not base claims upon any party's receipt of an *unsolicited* fax advertisement."<sup>9</sup> Petitioners Futuredontics and Richie Enterprises have presented evidence that the faxes sent to the named plaintiffs in the lawsuits against them were similarly solicited.

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<sup>7</sup> See 47 C.F.R. § 1.3 ("Any provisions of the rules may be waived by the Commission . . . on petition if good cause therefor is shown.").

<sup>8</sup> 715 F.3d at 682 (emphasis added).

<sup>9</sup> *Id.* Moreover, despite commenter Nack's claims, there is no evidence that he was unaware that he could revoke his agent's consent or that Petitioner Walburg failed to honor any such request in a timely way.

To be sure, plaintiffs in some class actions dispute whether the faxes at issue were in fact solicited. But Petitioners *seek relief only for solicited faxes*.<sup>10</sup> Granting the Petitions would in no way impede plaintiffs' ability to contest whether or not a particular fax was solicited or otherwise affect claims based on unsolicited faxes. Thus, opposing commenters' allegations that consent to receive a fax is often erroneously or fraudulently claimed are irrelevant at best. Where a recipient's consent is erroneously or fraudulently claimed, the fax qualifies as unsolicited, and liability for sending that fax would be unaffected by the relief sought here.<sup>11</sup>

## **II. Petitioners Have Shown Good Cause For A Retroactive Waiver, And A Waiver Is In The Public Interest.**

As noted above, Petitioners' request for a declaratory ruling explaining that Section 64.1200(a)(4)(iv) does not apply to solicited faxes or, alternatively, that the statutory basis for the regulation is not 4 U.S.C. § 227(b) remains justified for the reasons stated in their Petitions. Nonetheless, a retroactive waiver of Section 64.1200(a)(4)(iv) absolving Petitioners of liability with respect to solicited faxes would fully address the concerns raised in their Petitions. The unique circumstances presented in the Petitions clearly justify such a waiver, and opposing commenters have offered no meaningful response.

To begin with, prior to Section 64.1200(a)(4)(iv)'s promulgation, no notice was given that the Commission was considering regulating solicited faxes. Since its enactment in 1991, the governing statute (the Telephone Consumer Protection Act or "TCPA") has prohibited the sending only of an "unsolicited advertisement" by fax, defining an "unsolicited advertisement"

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<sup>10</sup> See *Futuredontics* Pet. 2; *Walburg* Pet. 2.

<sup>11</sup> For this reason, opposing comments' arguments for applying a lower level of scrutiny in addressing Petitioners' First Amendment challenge are also misplaced. Neither the content nor the transmission of the faxes at issue is deceptive, so intermediate scrutiny remains the appropriate standard. *Cf.* *Bellin* Comments at 7–8; *TCPA* Comments at 26.

as “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.*”<sup>12</sup> Likewise, the 2005 amendment to the TCPA (the Junk Fax Prevention Act of 2005 or “JFPA”) did not by its terms reach solicited faxes. That enactment merely amended the TCPA to permit the transmission of unsolicited faxes to a person with whom the sender has an established business relationship (“EBR”) so long as such an advertisement contains an “opt-out” notice.<sup>13</sup> Importantly, however, the TCPA, as amended, imposes no such condition on the transmission of fax advertisements to recipients *with* their prior express consent. Consistent with this statutory framework, the Notice of Proposed Rulemaking that led to Section 64.1200(a)(4)(iv)’s promulgation affirmatively indicated it would be limited to unsolicited faxes.<sup>14</sup>

Even after the Section 64.1200(a)(4)(iv)’s adoption, whether the regulation applies to solicited faxes is at best unclear. Section 64.1200(a)(4)(iv) references recipients that have agreed to receive faxes, but is embedded in the middle of a sentence expressly limited to *unsolicited* faxes.<sup>15</sup> The Order adopting Section 64.1200(a)(4)(iv) is equally confusing. The Order makes almost no mention of the rule propounded in Section 64.1200(a)(4)(iv)—there is just one short paragraph mentioning the new rule and absolutely no explanation or discussion of the basis for

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<sup>12</sup> 47 U.S.C. § 227(a)(5), (b)(1)(C) (emphasis added).

<sup>13</sup> *Id.* § 227(b)(1)(C)(i)–(iii); see *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19,758, 19759–60 (2005) (“*JFPA NPRM*”) (explaining regulatory background of EBR provision). Congress left the definition of an unsolicited advertisement largely unchanged, simply adding a clause to clarify that express permission could be given “in writing or otherwise.”

<sup>14</sup> See *JFPA NPRM*, 20 FCC Rcd at 19,767–68 ¶¶ 19–20 (proposing adoption of rules requiring “senders of unsolicited facsimile advertisements to include” an opt-out notice).

<sup>15</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

that rule, other than that an opt-out notice is required “to allow consumers to stop unwanted faxes in the future.”<sup>16</sup> But elsewhere the Order states that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”<sup>17</sup> It is therefore unsurprising that courts construing the rule have reached different results as to whether it applies to solicited faxes.<sup>18</sup>

Given this history, even sophisticated regulated entities accustomed to parsing regulations would be hard pressed to understand that the Commission’s opt-out-notice rule might be applied to solicited faxes. But the defendants being sued for sending solicited faxes are not such entities. For example, Petitioners Walburg and Richie Enterprises are small, family-owned businesses. And none of the Petitioners provides FCC-regulated services or otherwise deals with FCC regulations.

In such circumstances, it is grossly inequitable to subject Petitioners to multimillions of dollars in liability for what amounts—at most—to an unknowing, technical violation of a confusingly worded rule with uncertain statutory foundations. This liability arises from the TCPA’s statutory damages provision,<sup>19</sup> not from any harm actually suffered by a fax recipient. And there is no evidence that the plaintiffs in these class actions suffered any harm whatsoever. Indeed, to be even affected by the relief Petitioners seek, a fax recipient must have expressly

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<sup>16</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3812 ¶ 48 (2006) (“*JFPA Order*”).

<sup>17</sup> *Id.* at 3809–10 ¶ 42 n.154; *see Nack*, 715 F.3d at 684.

<sup>18</sup> *See, e.g., Nack v. Walburg*, 2011 WL 310249, at \*4 (“Reviewing the regulation as a whole, the provision in question . . . purports, on its face, to apply only to unsolicited faxes.”); *see also Physician’s Healthsource, Inc. v. Purdue Pharma, L.P.*, No. 3:12-cv-1208, 2014 WL 518992, at \*3 (D. Conn. Feb. 3, 2014); *Raitport v. Harbour Capital Corp.*, No. 09-cv-156-SM, 2013 WL 4883765, at \*1 (D.N.H. Sept. 12, 2013).

<sup>19</sup> 47 U.S.C. § 227(b)(3)(A) (providing private right of action).

requested or consented to receive the faxes at issue.<sup>20</sup> Yet the potential magnitude of this statutory liability could force Petitioners' businesses to close. Denial of a waiver would thus visit economic injustice on Petitioners as well as their customers, a result that is plainly inequitable, unduly burdensome, and contrary to the public interest.<sup>21</sup>

### CONCLUSION

For the reasons stated above and in the Petitions, the Commission should issue a declaratory ruling clarifying (1) that Section 64.1200(a)(4)(iv) of the Commission's rules applies only to unsolicited fax advertisements and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(4)(iv) of the Commission's rules. Alternatively, the Commission should grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any fax sent with the recipient's prior express consent.

Respectfully submitted,

/s/ Samuel L. Feder  
Samuel L. Feder  
Caroline M. DeCell  
JENNER & BLOCK LLP  
1099 New York Avenue NW  
Washington, DC 20001  
(202) 639-6000 – Telephone  
(202) 639-6066 – Fax

*Counsel for Douglas Paul Walburg, Richie Enterprises, LLC, and Futuredontics, Inc.*

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<sup>20</sup> See *In re Rath Microtech Complaint Regarding Elec. Micro Sys., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16,710, 16,715 ¶ 20 (2005) (granting a conditional retroactive waiver upon the showing that complainant had not been harmed by improper labeling).

<sup>21</sup> 47 C.F.R. § 1.925(b)(3)(iii).