

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling and/or Waiver of)	CG Docket No. 02-278
Power Liens, LLC)	
)	CG Docket No. 05-338
)	
)	

**PETITION OF POWER LIENS, LLC FOR DECLARATORY RULING AND/OR
WAIVER OF SECTION 64.1200(a)(4)(iv) OF THE COMMISSION'S RULES**

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**DECLARATORY RULING AND/OR WAIVER
OF SECTION 64.1200(a)(4)(iv) OF THE COMMISSION’S RULES**

Pursuant to Sections 1.2 and 1.3 of the Rules¹ of the Federal Communication Commission (the “Commission” or “FCC”), Power Liens, LLC (“Power Liens” or “Petitioner”) respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of its Rules² (the “Rule” or “Regulation”) applies to unsolicited facsimile advertisements, only.³ Alternatively, Power Liens requests that the Commission issue a declaratory ruling clarifying the statutory basis for the Rule, which requires that facsimile advertisements sent with prior express consent of the recipient include the same detailed opt-out notice that is required for *unsolicited* facsimile advertisements sent in the context of an established business relationship (“EBR”).⁴ Specifically, Power Liens requests that the Commission declare that it based Section 64.1200(a)(4)(iv)⁵ on statutory authority other than 47 U.S.C. § 227 (b), as that provision authorizes the Commission to adopt opt-out notice rules only for *unsolicited* advertisements. Clarification of the Commission’s Rule in either regard is consistent with the plain language and purpose of the Telephone Consumer Protection Act (“TCPA”)⁶ and will provide much needed guidance to courts and litigants.

In the event that the Commission declines to issue either declaratory ruling, Power Liens respectfully requests that it be granted a retroactive waiver of Section 64.1200(a)(4)(iv) for any

¹ 47 C.F.R. §§ 1.2, 1.3; 5 U.S.C. § 554 (e).

² 47 C.F.R. § 64.1200(a)(4)(iv).

³ 47 U.S.C. § 227 (a)(1)(5).

⁴ 47 C.F.R. § 64.1200(a)(4)(iv).

⁵ *Id.* § 64.1200(a)(4)(iv).

⁶ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

facsimile Power Liens has sent with the recipient's prior express invitation or permission. Enforcement of this Section against Power Liens—a small business—could, potentially, subject it to millions of dollars in statutory damages, penalizing it for providing information pertaining services to persons that specifically requested, or agreed, to receive it via facsimile. In contrast, enforcement of this Section does nothing to further the goals of the Act—the regulation of *unsolicited* facsimile advertisements—but merely provides persons who agreed to receive fax advertisements an avenue for obtaining a monetary reward based on a technicality in the law.

To the extent that the Commission makes a determination that a declaratory ruling, waiver or “other relief” is appropriate for unsolicited facsimile advertisements sent within the context of an established business relationship, Power Liens prays that it receive the benefit of that relief on the bases described in this petition.

I. BACKGROUND.

Power Liens is a small, two-year old startup that provides a service to personal injury and workers' compensation attorneys by compiling and updating a free on-line directory of physicians who have worked on personal injury and workers' compensation liens. To create and maintain this product, Power Liens' representatives speak with physicians' offices to ascertain whether they are appropriate candidates—and have an interest—for inclusion in the directory. In the event an office agrees to be included in the directory, it provides Power Liens with additional information to complete the office's listing *and* permission to send that office future communications regarding the directory via facsimile.

Power Liens has now been sued under the TCPA by a physician’s office that had decided to be part of its directory; and, had agreed to receive follow-up communications via facsimile.⁷ That plaintiff seeks damages, on behalf of itself and a putative class, for receipt of a facsimile seeking additional information which Power Liens intended to use to update the listing and directory—a facsimile which that office had specifically and expressly agreed to receive when it chose to be listed as part of Power Liens’ service.⁸ Plaintiff’s lawsuit seeking crippling damages threatens the very existence and survival of Power Liens.

A. The Telephone Consumer Protection Act Of 1991 Authorized The Commission To Regulate Unsolicited Fax Advertisements, Only.

Congress has consistently declined to impose restrictions on advertisements sent with the recipient’s express consent. Indeed, since the enactment of first laws governing fax advertisements in 1991,⁹ Congress has chosen to prohibit the use of a telephone facsimile machine to send an “*unsolicited advertisement*” to another fax machine, only.¹⁰ Congress defined an “unsolicited advertisement” 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.”¹¹ There have been no amendments to this definition—which expressly excludes from the TCPA’s restrictions any fax advertisements sent *with* the recipient’s “prior express invitation or permission.”

⁷ *Florence Mussat, M.D., S.C. v. Power Liens, LLC*, Case No. 13-cv-7853 (N.D.Ill.). The parties dispute, *inter alia*, whether the fax was sent with plaintiff’s prior express permission or invitation. However, this factual dispute will be resolved by the Court and does not impact the question of law raised by in this and other petitions.

⁸ *Id.*

⁹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

¹⁰ 47 U.S.C. § 227 (b)(1)(C).

¹¹ 47 U.S.C. § 227 (a)(5).

The Commission's 1992 order implementing the TCPA expanded the safe harbor of "express" consent contained within the Act, concluding that faxes sent pursuant to an EBR "can be deemed to be invited or permitted by the recipient" and excluded from the prohibition on unsolicited advertisements.¹² In 2003 the Commission reversed course and concluded that its 1992 order was incompatible with the statutory requirement of "express" consent. Accordingly, consistent with the statutory scheme embodied in the TCPA, the Commission required that the sender of a fax advertisement first obtain the recipient's prior express permission in writing.¹³ However, in response to reconsideration requests, the Commission delayed the effective date of its ruling and provisionally allowed the EBR rule to remain in effect; this deferral was subsequently extended due to Congressional intent to amend the statute to permit the sending of fax advertisements based on such implied consent.¹⁴

B. The Junk Fax Prevention Act Of 2005 Authorized Unsolicited Fax Advertisements Pursuant To An EBR But Required Opt-Out Notices.

In 2005, Congress enacted the Junk Fax Prevention Act ("JFPA").¹⁵ The JFPA amended the rules regarding unsolicited faxes; however, the law governing faxes sent with the recipient's express permission remained, materially, unchanged. Of significance, JFPA restored the EBR exemption to the prohibition on unsolicited faxes.¹⁶ Congress realized, however, that recognizing a recipient's "implied" consent through an EBR might still subject some recipients to unwanted

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 1 54 (1992).

¹³ *Id.* ¶ 187.

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Reconsideration, 18 FCC Rcd 16972 1111 5-6 (2003). See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 20125 (2004); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 20 FCC Rcd 11424 (2005).

¹⁵ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

¹⁶ *Id.* § 2(a).

faxes. Consequently, as an additional measure of protection, against potentially unwanted faxes, Congress required that advertisers provide EBR recipients with an easy, cost-free way to terminate the EBR and opt out of future unsolicited faxes. Specifically, part of the JFPA, now codified at 47 U.S.C. § 227(b)(2)(D), Congress required *unsolicited* fax advertisements sent pursuant to an EBR must provide an “opt-out” notice on the fax that would inform recipients how to contact the sender and stop future faxes.¹⁷ Congress expressly limited these opt-out notice requirements to “*unsolicited* advertisement[s]” sent pursuant to an EBR.¹⁸ Critically, it did not impose any opt-out notice requirement for faxes sent *with* the recipient’s express consent; indeed, Congress made no amendments to the law regarding such fax advertisements. Congress had no reason to be concerned that recipients who *opted in, i.e.*, provided their express consent, to such advertising needed special notices informing them how to *opt-out*.

In December 2005, the Commission issued a Notice of Proposed Rulemaking to implement the JFPA (“NPRM”).¹⁹ The proposed rules included a renewed recognition of the EBR provision,²⁰ an updated definition of EBR to match the new statute,²¹ and “specific [opt-out] notice requirements on unsolicited facsimile advertisements” as set forth in the JFPA.²² Regarding these opt-out notice requirements, the NPRM proposed adopting new rules that tracked the statutory language—including by “requir[ing] senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of

¹⁷ *Id.* § 2(c).

¹⁸ *Id.* § 2(c)(3)(D)(emphasis added).

¹⁹ *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 19758 (2005) (“*JFPA NPRM*”).

²⁰ *Id.* ¶ 9.

²¹ *Id.* ¶ 14.

²² *Id.* ¶ 20.

the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender.”²³ Additionally, Commission sought comment on a number of supplemental rules surrounding the opt-out notice requirement.²⁴ The Commission did *not* solicit comments on, or contemplate, extending the opt-out notice requirement to fax advertisements sent with the recipient’s express permission.

Nevertheless, when the Commission adopted its final opt-out notice rules in April 2006, it included a requirement—without discussion, analysis, or citation to the JFPA—that “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice and contact information...”²⁵ Under the text of the new regulation, “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.”²⁶ This new rule was mentioned as an afterthought—as part of a paragraph devoted mainly to the unrelated issue of the legal status of consent obtained prior to the new rules’ effective date.²⁷ Yet, it imposed a new and unprecedented requirement on *solicited* fax advertisements. The Commission’s also failed to identify a specific source of statutory authority for this unprecedented regulation, but merely appended a list of various statutory provisions to the end of its order.²⁸

²³ *Id.* ¶¶ 19, 20 (emphasis added).

²⁴ *See, e.g., id.* ¶ 22 (proposing a possible exemption for “certain classes of small business senders”).

²⁵ *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 1 48 (2006) (“*JFPA Order*”).

²⁶ 47 C.F.R. § 64.1200(a)(4)(iv).

²⁷ *JFPA Order* ¶ 48.

²⁸ *See id.* ¶64 (locating authority for all rules adopted in the order under “sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended”).

This expansion of the opt-out notice rule greatly increases the potential exposure of companies advertising via fax—and expands liability beyond that contemplated by the Act. Yet, despite the absence of any statutory basis for this Rule, parties are authorized to bring an action for damages based on a violation of the opt-out notice requirement for solicited faxes alone;²⁹ and, courts have permitted such suits.³⁰ Indeed, Power Liens is now facing a suit of this type and, despite having received express consent, could be liable for statutory damages that could put this young start-up company out of business.

II. ARGUMENT.

A. The Commission Should Issue A Declaratory Ruling That Section 64.1200(a)(4)(iv) Does Not Apply To Faxes Sent With “Prior Express Invitation or Permission.”

A declaratory ruling clarifying that Section 64.1200(a)(4)(iv) does not apply to facsimiles sent with the “prior express invitation or permission” is required, now, to protect the goals for at least three reasons: (i) the plain language of the Rule and the Commission’s orders implementing the rule is unclear and, as currently implemented, inconsistent with the statute; (ii) application of Section 64.1200(4)(iv) to faxes sent with the “prior express invitation or permission” of the recipient exceeds the grant authority under the JFPA and the Communications Act.; and, (iii) reading the provision to reach solicited faxes would violate the First Amendment.

I. Section 64.1200(a)(4)(iv) And The Commission’s Implementing Order Are Ambiguous And Conflict With The Act.

The FCC should clarify that Section 64. 1200(a)(4)(iv) and the Commission’s implementing order do not apply to facsimiles sent with prior express permission because the

²⁹ 47 U.S.C. § 227(b)(3).

³⁰ See e.g., *Bais Yaakov of Spring Valley v. Alloy, Inc.*, 936 F. Supp. 2d 272, 287, 297 (S.D.N.Y. 2013); *Spine & Sports Chiropractic, Inc. v. ZirMed, Inc.*, 3:13-CV-00489-TBR, 2014 WL 2946421, *19 (W.D. Ky. 2014), citing *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir.2013); *Clearbrook v. Rooflifters, LLC*, 08C3276, 2010 WL 2635781, *4 (N.D. Ill. 2010);

language of the rule is unclear in its scope, and these rules, on their face and as currently applied, cannot be interpreted in a manner that is consistent, either internally or with the TCPA.

The Act and the Commission’s rules are confined, squarely, to *unsolicited* facsimile advertisements. The Act prohibits “any person...” from “us[ing] to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, *an unsolicited advertisement*...unless the unsolicited advertisement is from a sender with an established business relationship with the recipient” and complies with the notice requirements.³¹ Even when enacting the JFPA, Congress confined its legislation to codify[ing] an [established business relationship], exemption to the prohibition against *unsolicited* facsimile advertisements.”³²

For its part, the Commission’s rules provide that “no person or entity...may use a telephone facsimile machine, computer, or other device to send an *unsolicited advertisement* to a telephone facsimile machine, unless ...”³³ Yet, although the Act and the Commission’s own rule regulates *unsolicited* advertisements, only, the Commission then includes an independent and additional penalty for “[a] facsimile advertisement that is sent to a recipient *that has provided prior express invitation or permission to the sender* must include an opt-out notice that complies with the requirements in paragraph a(4)(iii) of this section”³⁴ This additional, independent prohibition has no basis in the statute or any other provision of the Commission’s rules—all of which are limited to unsolicited advertisements. The Commission’s order implementing Section 64.1200(a)(4)(iv) also contributes to the confusion. This Order plainly states the requirement to provide an opt-out notice “only applies to communications that constitute unsolicited

³¹ 47 U.S.C. § 227 (b)(1)(C) (emphasis added).

³² *Biggerstaff v. F.C.C.*, 511 F.3d 178, 182 (D.C. Cir. 2007), *citing* 47 U.S.C. § 227(b)(1)(C)(i)(emphasis added).

³³ 47 C.F.R. § 64.1200(a)(4) (emphasis added).

³⁴ *Id.* § 64.1200(a)(4)(iv) (emphasis added).

advertisements.”³⁵ Despite this unequivocal statement, the Commission subsequently provides—within the same order—that: “entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-out notice.”³⁶

In light of these conflicting statements within the Commission’s own Rules—and the clear inconsistency with the Act itself—any conclusion that Section 64.1200(a)(4)(iv) governs *solicited* faxes is untenable. Accordingly, the Commission should interpret Section 64.1200(a)(4)(iv) to apply to unsolicited faxes, only.

2. The Commission Lacks Authority To Apply Section 64.1200(a)(4)(iv) To Faxes Sent With Prior Express Consent.

Congress expressly limited Section 227(b) of the TCPA to unsolicited advertisements; and, in doing so, thus restricted the Commission’s jurisdiction to promulgate new regulations.³⁷ Indeed, the Commission’s powers and responsibilities to administer the junk faxing provisions of the Act are finite, precise and limited to regulating *unsolicited* advertisements.³⁸ That Congressional restriction of agency power is clear in the text of the statute. Specifically with regard to creating rules pertaining to the opt-out requirements, Congress explicitly directs the Commission—and delegates it the authority—to regulate opt-out requirements for *unsolicited* advertisements.³⁹ Expanding a defendant’s liability to encompass faxes sent *with express permission* has no relation to this directive; and, there is no evidence of any Congressional intent to empower the Commission to so expand liability under the Act.

³⁵ *JFPA Order* ¶ 42, n.54.

³⁶ *Id.* ¶ 48.

³⁷ 47 U.S.C. §227(b)(1)(C), (D).

³⁸ *Id.*

³⁹ *Id.*

Indeed, the Commission itself has acknowledged that the TCPA’s scope is limited to unsolicited fax advertisements, recognizing that it “amend[s] the Commission’s rules on unsolicited facsimile advertisements as required by the [JFPA].”⁴⁰ Given the absence of any express grant of jurisdiction from Congress, the Commission did not have the power to create a new prohibition with regard to *solicited* faxes.⁴¹ An agency’s “power to execute laws does not include the power to revise clear statutory terms” and an agency must operate “within the bounds of reasonable interpretation” when it interprets ambiguous statutory language.⁴² The Commission has never been empowered—by the TCPA or the JFPA—to adopt opt-out notice rules for solicited facsimiles. Consequently, Section 64.1200(a)(iv)(4) does not properly apply to faxes sent with “prior express invitation or permission.”

3. Applying Section 64.1200(a)(4)(iv) To Faxes Sent With Express Consent Implicates First Amendment Concerns.

Requiring opt-out language on faxes sent with the prior express consent of the recipient—as Section 64.1200(a)(4)(iv) purportedly contemplates—runs contrary to the First Amendment. This unconstitutional result creates an independent basis for the Commission to declare that the Regulation applies to unsolicited fax advertisements and not those sent with the permission, or at the request, of the recipient.

The Supreme Court has established that lawful and truthful commercial speech may be subject to regulation only where the government can show that the proposed restriction directly

⁴⁰ See, e.g., *JFPA Order*, 21 FCC Red at 3788-89, 3791, ¶ 1-3, 7; 21 FCC Red at 3810, ¶ 42 n.154; *JFPA NPRM*, FCC Red at 19,758, ¶ 1.

⁴¹ *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462, 122 S. Ct. 941, 956 (2002) (“Congress...did not delegate authority to the Commissioner to develop new guidelines or to assign liability in a manner inconsistent with the statute”); *Federal Maritime Comm’n v. Seatrain Lines, Inc.*, 411 U.S. 726, 744, 93 S.Ct. 1773 (where there are “specific grants of ... authority” courts should not “construe ambiguous provisions” to expand an agency’s authority); see also *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 998 (D.C. Cir. 2013).

⁴² *Util. Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2442, 189 L. Ed. 2d 372 (2014) (“an agency interpretation that is ‘inconsisten[t] with the design and structure of the statute as a whole,’ does not merit deference”), citing *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. —, —, 133 S.Ct. 2517, 2529 (2013).

advances a substantial government interest and that the rule “is not more extensive than is necessary to serve that interest.”⁴³ The Commission cannot demonstrate that Section 64.1200(a)(4)(iv), as applied to advertisements sent with the express consent of the recipient, satisfies this test.⁴⁴ Indeed, the government’s interest is with regard to this Regulation is weak given that the consenting customer has already agreed to receive the advertisement and therefore has a simple and effective method of communicating an opt-out request to the sender. And even assuming that the same government interest articulated in the context of unsolicited faxes could support the application of Section 64.1200(a)(4)(iv) to faxes sent with express consent, the opt-out requirement is not a critical component of furthering that interest.

B. In The Alternative, The Commission Should Clarify That The Opt-Out Notice Requirement For Faxes Sent With Prior Express Consent Was Not Adopted Pursuant To Section 227(b) Of The Act.

In the alternative, to resolve this uncertainty, the Commission should clarify that legal basis of its opt-out notice requirement for solicited fax advertisements is not Section 227(b) of the TCPA. Indeed, under the APA, the Commission should have done so when it first adopted the rule in 2006. Section 553 of the APA requires an agency engaging in rulemaking to include a “reference to the legal authority under which the rule is proposed” in its notice of proposed rulemaking,⁴⁵ and to provide “a concise general statement of [the rule’s] basis and purpose” when adopting a final rule.⁴⁶ These requirements are designed not only to ensure that the agency acts pursuant to specific statutory authorization, but also “to assist judicial review [and] to

⁴³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of NY.*, 447 U.S. 557, 566 (1980).

⁴⁴ See, e.g., *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (careful cost and benefit analysis required before speech rights can be burdened); *Edgefield v. Fane*, 507 U.S. 761, 770-71 (1993) (government bears burden to develop record sufficient to justify state interest).

⁴⁵ 5 U.S.C. § 553(b)(2).

⁴⁶ *Id.* § 553(c).

provide fair treatment for persons affected by a rule.”⁴⁷ Especially now that courts are misapprehending the actual basis for Section 64.1200(a)(3)(iv) of the Commission's rules—thus threatening to expose senders of solicited faxes to crushing liability—the Commission must move swiftly to identify the proper legal basis as required under the APA.

Although Commission’s authority to adopt this rule is questionable, at best, one thing is clear: it could not have relied on Section 227(b)(2) as the statutory basis for the Rule. The Commission had an obligation to say as much in its order adopting the rule in 2006, and to point affirmatively to the correct source of authority “to assist judicial review [and] to provide fair treatment for persons affected by [the] rule.”⁴⁸ Thus, at a bare minimum, the Commission must now fulfill its obligation under Section 553 of the APA by clarifying that the rule is based on some grant of authority other than Section 227(b)(2).

As discussed above, the rule simply does not align with the text, legislative history, or purpose of Section 227(b). Section 227(b) contains no language authorizing the Commission to adopt rules regarding faxes sent with the recipient’s express consent, and certainly does not instruct the Commission to require an opt-out notice in such cases. Such a rule also is not rationally related to the interests animating the enactment of Section 227(b). As explained above, Congress enacted Section 227(b)(2) because it recognized that recipients receiving faxes pursuant to an EBR but without express consent—and in many cases without significant contact with the sender—needed an easy way to “stop future unwanted faxes sent pursuant to such relationships.”⁴⁹ An EBR provides a reasonable basis for inferring that a business will be willing

⁴⁷ *Home Box Office Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

⁴⁸ *Id.*

⁴⁹ Senate Report at 7.

to receive faxes from an advertiser with whom it has an existing relationship, that inference may turn out to be unwarranted in some instances, and those businesses may not know how to halt fax transmissions absent an opt-out notice. By contrast, when a sender relies on express consent rather than an EBR, there is no need to provide the recipient with a detailed opt-out notice: just as it had the ability to opt-in, a recipient possesses the power to opt-out.

Nevertheless, absent the Commission’s guidance, at least one court has proceeded under the incorrect assumption that the rule was properly promulgated pursuant to Section 227(b), and others may reach the same conclusion. That assumption is not only wrong, for the reasons just discussed, but also dangerous, as it could expose legitimate senders of solicited faxes to significant liability that Congress plainly never intended to authorize. In particular, Section 227(b)(3) creates a private right of action that permits suits in state court based on “a violation of this subsection *or the regulations prescribed under this subsection.*”⁵⁰ Accordingly, it opens the floodgates to countless private actions—by plaintiffs who suffered no actual harm but seek statutory damages—for violations of a rule that Congress never contemplated.”⁵¹

C. In the Alternative, The Commission Should Grant Power Liens a Retroactive Waiver.

If the Commission declines to issue either of the declaratory orders requested in this Petition, Power Liens respectfully requests that the Commission nonetheless grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any fax Power Liens sent—with the express consent or invitation of the recipient—after the effective date of the regulation. Neither the Commission’s goals nor the public interest are served by subjecting this small business to a potentially multi-

⁵⁰ 47 U.S.C. § 227(b)(3) (emphasis added).

⁵¹ *Id.* § 227(b)(3)(B).

million dollar lawsuit from a plaintiff who have suffered no actual harm; and, who *agreed* to receive the fax of which it now complains.

Section 1.3 of the Commission’s rules permits the Commission to grant a waiver for good cause shown, and the Commission should grant a waiver if, after considering all relevant factors, a waiver is in the public interest.⁵² Among other things, a waiver is appropriate where “[t]he underlying purpose of the rule(s) would not be served” or “unique or unusual factual circumstances” mandate a waiver to avoid an application of the rule that would be “inequitable, unduly burdensome or contrary to the public interest.”⁵³ Here, a waiver is appropriate for both reasons.

The Commission has articulated a single purpose for Section 64.1200(a)(4)(iv): an opt-out notice is required “to allow consumers to stop *unwanted* faxes in the future.”⁵⁴ The fax advertisement at the center of the lawsuit against Power Liens, however, was sent with the plaintiff’s “prior express permission” and as part of their ongoing relationship. Moreover, the advertisement provided plaintiff with a means to reach Power Liens in the event it no longer wished to communicate with it via fax—indeed the fax included a toll free number and an email address. There are no allegations that any recipient was unaware that it could opt out or that any opt out request was not honored in a timely way. Thus, even assuming that the goal of Section 64.1200(a)(4)(iv) is to allow consumers to easily revoke prior express consent to receive fax advertisements, that goal would not be served by applying the rule to Power Liens in these circumstances.

⁵² 47 C.F.R. § 1.3; *In re Rath Microtech Complaint Regarding Electronic Micro Sys., Inc.*, Memorandum Opinion and Order, 16 FCC Red 16,710, 16,714, ¶ 15 (2001).

⁵³ 47 C.F.R. § 1.925(b)(3)(i)-(ii).

⁵⁴ JFPA Order ¶ 48 (emphasis added).

Yet, requiring strict compliance with Section 64.1200(a)(4)(iv) with respect to faxes sent by Power Liens with the recipients' consent would be inequitable, unduly burdensome, and contrary to the public interest. Power Liens is facing a, potentially, multi-million dollar class action lawsuits for an alleged failure to include appropriate opt-out notices on faxes sent to a plaintiff who suffered no actual harm. Requiring strict compliance with Section 64.1200(a)(4)(iv) would be tremendously burdensome and inequitable: the recipients of these fax advertisements had 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. Strict compliance would also be contrary to the public interest, as exposing fax senders to massive class action liability for engaging in consensual communications with their customers would work an economic injustice on small businesses and the consumers that they serve.

As a final matter, to the extent that the Commission determines that any declaratory ruling, waiver, or other relief may be warranted for fax advertisements that are sent without the "prior express invitation or permission" of the recipient but are sent to a recipient with whom the sender has an established business relationship, Power Liens respectfully requests that it be granted such relief on the bases described in this Petition.

III. CONCLUSION.

For the foregoing reasons, Power Liens respectfully requests that the Commission 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. Failure to do so not only would be inconsistent with the language of the TCPA, and the Commission's duties under Section 553 of the APA, but would also expose legitimate senders of solicited fax advertisements to class action lawsuits seeking massive damages that Congress did not intend to authorize. In the absence of such a ruling, the Commission should grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any fax sent by Power Liens with the recipient's prior express consent.

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