

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Petition for Declaratory Ruling to Clarify That)	
47 U.S.C. § 227(b) Was Not the Statutory Basis)	
for Commission’s Rule Requiring an Opt-Out)	
Notice for Fax Advertisements Sent with)	
Recipient’s Prior Express Consent)	

ORDER

Adopted: May 2, 2012

Released: May 2, 2012

By the Acting Chief, Consumer & Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, we dismiss a petition by Anda, Inc. to issue a declaratory ruling clarifying the statutory basis for a Commission rule on fax advertisements.¹ The rule requires fax advertisements sent with the prior express consent of the recipient to include certain notice and contact information, which permits the recipient to opt out of any future fax transmissions.² We find that the Petition identifies no controversy to terminate or uncertainty to remove, a condition precedent to the Commission issuing a declaratory ruling.³ We also conclude that, to the extent that the Petition challenges the Commission’s authority to issue the rule itself, such challenge is time-barred by the Communications Act of 1934, as amended (the Act) and the Commission’s rules.

II. BACKGROUND

2. In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) to address the growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy.⁴ In relevant part, the TCPA prohibits the use of any telephone fax

¹ We use “fax” in this order to mean “facsimile.”

² See *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Petition for Declaratory Ruling, filed Nov. 30, 2010 (Petition).

³ See 47 C.F.R. § 1.2.

⁴ The TCPA is codified at 47 U.S.C. § 227.

machine, computer, or other device to send an “unsolicited advertisement” to a telephone fax machine.⁵ In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited fax advertisements by fax machines.⁶

3. In 2005, Congress enacted the Junk Fax Prevention Act, which amended the fax advertising provisions of the TCPA.⁷ In general, the Junk Fax Prevention Act: (1) codified an established business relationship (EBR) exemption to the prohibition on sending unsolicited fax advertisements;⁸ (2) provided a definition of an EBR to be used in the context of unsolicited fax advertisements;⁹ (3) required the sender of a fax advertisement to provide specified notice and contact information on the fax that allows recipients to “opt-out” of any future fax transmissions from the sender;¹⁰ and (4) specified the circumstances under which a request to “opt out” complies with the Act.¹¹ On April 5, 2006, the Commission adopted a Report and Order and Third Order on Reconsideration amending the rules concerning fax transmissions as required by the Junk Fax Prevention Act and addressing certain issues raised in petitions for reconsideration of its 2003 Report and Order concerning the Commission’s fax advertising rules.¹²

4. On November 30, 2010, Anda, Inc. (Petitioner) filed a request for declaratory ruling asking the Commission to clarify the statutory basis for the Commission’s rule requiring opt-out notice for fax advertisements sent with the recipient’s prior express consent.¹³ Specifically, the Petitioner contends that: (1) the Commission “arguably lacked authority altogether to adopt a rule requiring an opt-out notice on fax advertisements sent with the recipient’s express prior consent,” or (2) alternatively, section 227(b) of the Act is not the statutory basis for the rule.¹⁴ In particular, the Petition contends that section 227 authorizes the Commission to adopt restrictions only with respect to unsolicited fax advertisements, which are defined to exclude any fax advertisement sent with the recipient’s prior express invitation or permission.¹⁵ Petitioner requests that the Commission clarify the statutory basis because section

⁵ 47 U.S.C. § 227(b)(1)(C).

⁶ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); *see also* 47 C.F.R. § 64.1200(a)(3).

⁷ *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act), codified as part of 47 U.S.C. § 227.

⁸ *Id.* sec. 2(a).

⁹ *Id.* sec. 2(b).

¹⁰ *Id.* sec. 2(c).

¹¹ *Id.* sec. 2(d).

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3788 at para. 1 (2006) (*Junk Fax Order*). A summary of the Report and Order was published in the Federal Register at 71 FR 25967 (May 3, 2006).

¹³ *See generally* Petition.

¹⁴ *Id.* at 8-15.

¹⁵ *See, e.g., id.* at 3-4.

227(b)(3) creates a private right of action that permits suits in state court based on a violation of section 227(b) or the regulations prescribed under that subsection.¹⁶ Petitioner represents that it was, at the time of filing, subject to such a lawsuit in which a class of plaintiffs seeks monetary damages under section 227(b) for alleged violations of the opt-out notice requirement for faxes allegedly sent at the request of the recipient.¹⁷

III. DISCUSSION

5. We dismiss Petitioner's request for a declaratory ruling to clarify the statutory basis for the Commission's rule requiring an opt-out notice for fax advertisements sent with the recipient's prior express consent. The Commission may issue a declaratory ruling "terminating a controversy or removing an uncertainty."¹⁸ We conclude that Petitioner raises no issue of controversy or uncertainty and, thus, Anda's petition for declaratory ruling is not properly before the Commission. Petitioner asks the Commission to clarify the statutory basis for the rule at issue. The rule itself, the requirements of which are clearly set forth in section 64.1200(a)(3)(iv) of the Commission's rules,¹⁹ was adopted by the Commission in the *Junk Fax Order*. The *Junk Fax Order* cited the statutory provisions, including section 227 of the Act, that provide the Commission authority for the rules adopted in that *Order*.²⁰ Thus, there is no controversy or uncertainty regarding the statutory basis for the Commission's authority to adopt the rule and thus no need to issue a declaratory ruling on that matter.

6. Second, to the extent that Petitioner questions the Commission's statutory authority to adopt such a requirement, we find that it is an improper collateral challenge to the rule that should have been presented in a timely petition for reconsideration of the Commission's *Junk Fax Order* rather than a request for clarification.²¹ Section 405(a) of the Act and section 1.429(d) of the Commission's rules require that petitions for reconsideration of a Commission rulemaking action be filed within 30 days of the date of public notice of such action.²² The Commission action at issue here was taken in early 2006, when the *Junk Fax Order* was adopted by the Commission and published in the Federal Register.²³ The Petition, however, was not filed until November 30, 2010, over four years later. Therefore, Petitioner's

¹⁶ *Id.* at 13 (citing 47 U.S.C. § 227(b)(3)).

¹⁷ *Id.* at 13-14.

¹⁸ 47 C.F.R. § 1.2; *see also* 5 U.S.C. §554 (e).

¹⁹ 47 C.F.R. § 64.1200(a)(3)(iv) ("[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").

²⁰ *Junk Fax Order*, 21 FCC Rcd at 3817, para. 64.

²¹ *See generally* Petition at 8-15.

²² *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d).

²³ *See supra* n.12. *See also* Consumer & Governmental Affairs Bureau Announces August 1st Effective Date of Amended Facsimile Advertising Rules, CG Docket Nos. 02-278, 05-338, Public Notice (rel. July 27, 2006) (announcing approval of Office of Management and Budget and Federal Register Publication to make the amended facsimile rules effective as of Aug. 1, 2006).

apparent challenge to the validity of the rule itself is time-barred by the Act and Commission rules.²⁴

7. While we dismiss the petition on procedural grounds, we also take this opportunity to note that we find unpersuasive Petitioner's argument that the TCPA could not have given the Commission authority to adopt the rule. Section 227 defines an unsolicited advertisement as certain advertising material "transmitted to any person without that person's prior express invitation or permission" when there is no EBR, but the statute does not define "prior express invitation or permission."²⁵ The *Junk Fax Order* thus properly addressed how such prior express permission can be obtained from, and revoked by, a consumer in that context.²⁶ Among other things, the Commission held that "express permission need only be secured once from the consumer in order to send facsimile advertisements to that recipient *until the consumer revokes such permission by sending an opt-out request to the sender.*"²⁷ Further, the Commission required 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 to allow consumers to stop unwanted faxes in the future."²⁸ The content of the required notice is designed both to ensure that the consumer has the necessary contact information to opt out of future fax transmissions (*i.e.*, revoke prior permission to send such fax advertisements) and to ensure that the fax sender can account for all such requests and process them in a timely manner by ensuring that consumers use the contact information specified by the sender on the opt-out notice.²⁹ The *Junk Fax Order* thus specifically tied the opt-out notice requirement to the purposes of section 227. Moreover, because any challenge to our statutory authority is time-barred,³⁰ we decline to go beyond what the Commission has already stated in that regard.

²⁴ We have previously dismissed as untimely a petition for declaratory ruling that sought reconsideration of a Commission action more than 30 days after public notice of the action. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; National Association of Professional Insurance Agents Request for Declaratory Ruling*, Order, 22 FCC Rcd 4922 (CGB 2007).

²⁵ 47 U.S.C. § 227(a)(5). In 2005, this definition was revised to clarify that prior express invitation or permission could be given by oral or written means. *Junk Fax Prevention Act*, Sec. 2(g).

²⁶ *See Junk Fax Order*, 21 FCC Rcd at 3811-12, paras. 45-48. As the Supreme Court has held, "agencies have authority to fill gaps where the statutes are silent." *Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327, 339 (2002).

²⁷ *Id.* at 3812, para. 46 (emphasis added).

²⁸ *Id.* at 3812, para. 48. *See also* 47 C.F.R. §§ 64.1200(a)(3)(iii), (iv).

²⁹ *Junk Fax Order*, 21 FCC Rcd at 3805-06, para. 34; *see also* 47 C.F.R. § 64.1200(a)(3)(v)(B).

³⁰ *See supra* para. 6.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to sections 227 and 405 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 227 and 405; 5 U.S.C. § 554(e); and sections 1.2, 1.429 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 1.429, and 64.1200 and the authority delegated in sections 0.141 and 0.361, 47 C.F.R. §§ 0.141, 0.361, that the Petition for Declaratory Ruling filed by Anda, Inc. on November 30, 2010, IS DISMISSED for the reasons set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief
Consumer & Governmental Affairs Bureau