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

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

# REPORT AND ORDER AND THIRD ORDER ON RECONSIDERATION

**Adopted: April 5, 2006** **Released: April 6, 2006**

By the Commission:

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## I. INTRODUCTION

1. In this Order, we amend the Commission's rules on unsolicited facsimile advertisements as required by the Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act).[1] Specifically, we (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements; (2) provide a definition of an EBR to be used in the context of unsolicited facsimile advertisements; (3) require the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender; and (4) specify the circumstances under which a request to "opt-out" complies with the Act. We believe these rules balance the interests of entities that send facsimile advertisements with those of persons that wish to avoid such messages. In addition, we take this opportunity to address certain issues raised in petitions for reconsideration of the 2003 Report and Order[2] concerning the Telephone Consumer Protection Act's (TCPA)[3] facsimile advertising rules.

## II. BACKGROUND

### A. Telephone Consumer Protection Act of 1991

2. On December 20, 1991, Congress enacted the TCPA to address a 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 facsimile machine, computer, or other device to send an "unsolicited advertisement" to a telephone facsimile machine.[5] An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any

[1] *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act). Section 2(h) of the Junk Fax Prevention Act requires the Commission to issue regulations to implement these amendments no later than April 5, 2006.

[2] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*).

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

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

[5] 47 U.S.C. § 227(b)(1)(C).

property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[6] The TCPA also requires those sending any messages via telephone facsimile machines to identify themselves to message recipients.[7] The TCPA did not expressly exempt persons with whom the sender has an EBR or tax exempt nonprofit organizations from the prohibition on sending unsolicited facsimile advertisements, although it did create such exemptions from the definition of "telephone solicitation."[8]

## B. TCPA Orders

3. In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited facsimile advertisements by facsimile machines.[9] The Commission's rules on unsolicited facsimile advertisements incorporated the language of the statute virtually verbatim.[10] The Commission stated that "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition" on unsolicited facsimile advertisements.[11] The Commission concluded, however, that facsimile transmissions from persons or entities that have an EBR with the recipient can evidence the necessary invitation or permission of the recipient to receive the facsimile advertisement.[12] The Commission defined the term "established business relationship" to mean:

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[13]

4. On July 3, 2003, the Commission revised many of its telemarketing and facsimile

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[6] 47 U.S.C. § 227(a)(4).

[7] Specifically, the TCPA provides that the facsimile include "in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual." 47 U.S.C. § 227(d)(1)(B).

[8] *See* 47 U.S.C. § 227(a)(3).

[9] *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.

[10] *See, e.g.*, 47 C.F.R. § 64.1200(a)(3) (no person or entity may "[u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."); 47 C.F.R. § 64.1200(f)(10) (the term "unsolicited advertisement 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").

[11] *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n.87.

[12] *Id.*

[13] *1992 TCPA Order*, 7 FCC Rcd at 8771, para. 35.

advertising rules under the TCPA.[14] The Commission reversed its prior conclusion that an EBR provides companies with the necessary express permission to send facsimile advertisements to their customers.[15] Instead, the Commission concluded that the recipient's express permission must be in writing and include the recipient's signature.[16] The Commission also revised the definition of an EBR, in the context of telephone solicitations, to limit the duration of that exception to 18 months after the recipient's last purchase or transaction, or three months after the recipient's last application or inquiry.[17] Following the release of the *2003 TCPA Order*, several entities filed petitions for reconsideration, most of which were related to the Commission's facsimile advertising rules.[18]

5. On August 18, 2003, the Commission issued an *Order on Reconsideration* that delayed, until January 1, 2005, the effective date of the requirement that the sender of a facsimile advertisement first obtain the recipient's prior express permission in writing.[19] Comments filed after the release of the *2003 TCPA Order* indicated that many organizations needed additional time to secure this prior written permission.[20] On October 3, 2003, the Commission released an order staying the 18-month and three-month time limitations imposed on the duration of the EBR as applied to the sending of unsolicited facsimile advertisements pending either a decision on this issue on reconsideration or January 1, 2005.[21] On October 1, 2004 and June 27, 2005, the Commission further delayed the effective date of these requirements.[22]

### C. Junk Fax Prevention Act of 2005

6. On July 9, 2005, Congress enacted the Junk Fax Prevention Act of 2005 which amends

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[14] *See supra*, n.2.

[15] *2003 TCPA Order*, 18 FCC Rcd at 14127-28, para. 189.

[16] *Id.* at 14128-29, para. 191. *See also* 47 C.F.R. § 64.1200(a)(3)(i).

[17] *Id.* at 14079, para. 113. *See also* 47 C.F.R. § 64.1200(f)(3). Prior to the *2003 TCPA Order*, the EBR definition applied to both telephone solicitations and unsolicited facsimile advertisement transmissions and contained no expiration date.

[18] Petitioners described a variety of specific types of communications and asked whether they are covered by the TCPA's facsimile advertising prohibition. *See* Appendix C for a list of petitions filed.

[19] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order on Reconsideration, 18 FCC Rcd 16972, 16974-75, paras. 5-6 (2003) (*Order on Reconsideration*).

[20] *Id.* at 16974, para. 5.

[21] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 18 FCC Rcd 19890 (2003) (*EBR Duration Order*).

[22] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 20125 (2004) and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, FCC 05-132 (rel. June 27, 2005) (*Stay Order*). In an Order adopted on December 9, 2005, the Commission further delayed the effective date of the written permission requirement until the conclusion of this rulemaking proceeding to implement the Junk Fax Prevention Act. *See infra*, n.31.

the facsimile advertising provisions of the TCPA.[23] In general, the Junk Fax Prevention Act: (1) codifies an EBR exemption to the prohibition on sending unsolicited facsimile advertisements;[24] (2) provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements;[25] (3) requires the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender;[26] and (4) specifies the circumstances under which a request to "opt-out" complies with the Act.[27] In addition, the Junk Fax Prevention Act authorizes the Commission to: (1) determine the "shortest reasonable time" that a sender must comply with a request not to receive future facsimile advertisements;[28] (2) consider exempting certain classes of small business senders from the requirement to provide a "cost-free" mechanism for a recipient to transmit an opt-out request;[29] and (3) consider whether to allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the "opt-out" notice otherwise required by the Junk Fax Prevention Act.[30]

7. On December 9, 2005, the Commission released a Notice of Proposed Rulemaking proposing modifications to the Commission's rules on unsolicited facsimile advertisements to implement the amendments required by the Junk Fax Prevention Act.[31]

## III. DISCUSSION

### A. Established Business Relationship Exemption

8. Section 2(a) of the Junk Fax Prevention Act amends section 227(b)(1)(C) of the Act by adding an EBR exemption to the prohibition on sending unsolicited facsimile advertisements. Specifically, section 2(a) provides that it shall be unlawful for any person within the United States or any

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[23] *See supra*, n.1.

[24] Junk Fax Prevention Act, Sec. 2(a).

[25] Junk Fax Prevention Act, Sec. 2(b).

[26] Junk Fax Prevention Act, Sec. 2(c).

[27] Junk Fax Prevention Act, Sec. 2(d). In addition, the Junk Fax Prevention Act requires the Commission to submit an annual report to Congress regarding enforcement of the rules relating to the sending of unsolicited facsimile advertisements. Junk Fax Prevention Act, Sec. 3. The Junk Fax Prevention Act also requires the Comptroller General of the United States to conduct a study regarding complaints received by the Commission concerning unsolicited facsimile advertisements. *See* Junk Fax Prevention Act, Sec. 4.

[28] Junk Fax Prevention Act, Sec. 2(c).

[29] *Id.*

[30] Junk Fax Prevention Act, Sec. 2(e).

[31] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Notice of Proposed Rulemaking and Order, FCC 05-206 (rel. December 9, 2005) (*JFPA NPRM*). In the Order, the Commission delayed the effective date of the written permission requirement at 47 C.F.R. § 64.1200(a)(3)(i) until the conclusion of the rulemaking.

person outside the United States if the recipient is within the United States:

> (C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless –
>
> (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
>
> (ii) the sender obtained the number of the telephone facsimile machine through –
>
> > (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or
> >
> > (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment; and
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> (iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E).[32]

### 1. Established Business Relationship with Recipient

9. In the *JFPA NPRM*, the Commission proposed amending its rules in accordance with the specific requirements in section 2(a) of the Junk Fax Prevention Act regarding the express recognition of an EBR exemption.[33] The Commission also sought specific comment on whether to establish parameters defining what it means for a person to provide a facsimile number "within the context of [an] established business relationship" and what it means for a person to voluntarily agree to make a number available for public distribution.[34] In addition, the Commission proposed removing section 64.1200(a)(3)(i) of the Commission's rules, which requires the recipient to obtain a signed, written statement indicating the recipient's consent to receive facsimile advertisements from the sender.[35]

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[32] Junk Fax Prevention Act, Sec. 2(a).

[33] *JFPA NPRM*, para. 9.

[34] *JFPA NPRM*, para. 10.

[35] *JFPA NPRM*, para. 9.

10. As noted in the *JFPA NPRM*, Congress concluded that an unsolicited advertisement from a sender with an EBR to the recipient will not be governed by the general prohibition found in section 227(b)(1)(C) of the TCPA.[36] Instead, the Junk Fax Prevention Act permits the sending of fax advertisements if there exists an EBR between the sender and recipient and certain other conditions are met regarding how the facsimile number was obtained.[37]

11. In compliance with the requirements of the Junk Fax Prevention Act, we now amend section 64.1200(a)(3) of the Commission's rules to expressly recognize an EBR exemption from the prohibition on sending unsolicited facsimile advertisements.[38] The majority of commenters agree that incorporating such an exemption is necessary to ensure that the Commission's rules are consistent with the amended federal statute.[39] Industry commenters contend that faxing continues to be a preferred method of communication by many businesses and that an EBR exemption will allow companies to communicate effectively with their customers.[40] For example, commenters note that fax advertisements are routinely sent from real estate professionals to home buyers, from telephone directory publishers to advertisers, and from food service distributors to restaurants.[41] According to these commenters, such advertisements are sent based on legitimate EBRs between the senders and recipients.[42] Although some oppose an EBR exemption for fax advertising,[43] the Commission's mandate is to implement the statute as enacted by Congress. Moreover, the opt-out requirements in the statute will permit consumers to prevent future unwanted faxes—even those from companies with which they conduct business.

12. To ensure that the EBR exemption is not exploited, we conclude that an entity that sends a facsimile advertisement on the basis of an EBR should be responsible for demonstrating the existence of the EBR.[44] The entity sending the fax is in the best position to have records kept in the usual course of

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[36] *Id.*

[37] Junk Fax Prevention Act, Sec. 2(a).

[38] We correspondingly remove section 64.1200(a)(3)(i) from the Commission's existing rules, as facsimile senders will now be permitted to send facsimile advertisements to recipients with which they have an EBR without first securing the recipient's written permission. *See* S. REP. NO. 109-76 at 8 ("This legislation is designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established business relationship without the burden of collecting prior written permission to send these recipients commercial faxes").

[39] *See, e.g.*, ASTA Comments at 6; MFC Comments at 2; NAW Comments at 3-6; NEPA Comments at 2; PRC Comments at 2; SHRM Comments at 3; Westfax Comments at 1-2.

[40] *See, e.g.*, NAEDA Comments at 1; ABM Comments at 3.

[41] NAR Reply Comments at 2; YPA Comments at 1; IFDA Comments at 1.

[42] *Id.*

[43] *See, e.g.*, McKenna Reply Comments at 4 (transmitting unsolicited fax ads constitutes a conversion of, use of, and destruction of the recipient's property, no different from other forms of dominion or occupation); Biggerstaff Comments at 10; Hallikainen Comments at 1 (supports an opt-in approach to faxing).

[44] NNA Comments at 8 (asserting that if a recipient takes action against a sender it believes to have sent an unsolicited fax outside of the context of an EBR, the burden would be on the sender to prove the relationship); Texas OPC Reply Comments at 3 (the burden of proving the existence of an EBR should rest upon the party (continued....)

business showing an EBR, such as purchase agreements, sales slips, applications and inquiry records.[45] We emphasize that we are not requiring any specific records be kept by facsimile senders.[46] Should a question arise, however, as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient.

### 2. Recipient's Facsimile Number

13. As set forth in the Junk Fax Prevention Act, an EBR alone does not entitle a sender to fax an advertisement to an individual consumer or business. The telephone facsimile number must also be provided voluntarily by the recipient.[47] Specifically, under the new rules, any person sending a fax advertisement under the EBR exemption must have obtained the facsimile number directly from the recipient within the context of the EBR, or ensure that the recipient voluntarily agreed to make the number available in a directory, advertisement, or site on the Internet which is accessible to the public. In accordance with the Junk Fax Prevention Act, an exception to this requirement will apply if the EBR was formed prior to July 9, 2005.[48]

#### a. Facsimile Number Obtained Directly From Recipient

14. The provision of a telephone facsimile number to a business or other entity reflects a willingness to receive faxes from that entity. Accordingly, it would be permissible for the sender to fax an advertisement to a recipient that had provided a facsimile number to the sender, for example, on an application, information request, contact information form, or membership renewal form.[49] It also would be permissible for the recipient to provide to the sender its facsimile number orally over the telephone or through a website maintained by the fax sender. In circumstances such as these, we conclude that the consumer has provided the facsimile number in the context of an established business relationship with

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seeking to profit from the fax); McKenna Comments at 3. *But see* Everett Labs Comments at 6 (fax recipients who claim to be aggrieved should have the burden of disproving the existence of an EBR).

[45] *See* AGs Comments at 9; Lorman Ed Services Comments at 17 (normal business records should suffice); AFSA Comments at 4 (as result of an EBR, there may be any number of documents, applications, agreements, and other communications exchanged between the parties). *But see* American Bankers Assoc Comments at 4 (the costs of maintaining evidence of an EBR could be enormous). We agree with ABA that digitized documents would be acceptable if they established the existence of the EBR.

[46] *See* CBS Reply Comments at 4 (the sender should have the flexibility to demonstrate the existence of an EBR through the presentation of records that it chooses to retain rather than be subject to extensive recordkeeping requirements).

[47] *See* Junk Fax Prevention Act, Sec. 2(a); *see also supra*, para. 8. *See* EPIC Comments at 1 (Commission should recognize that a person has voluntarily agreed to make a number available for public distribution only where that person has explicitly stated that they wish to receive unsolicited commercial messages).

[48] *See* Junk Fax Prevention Act, Sec. 2(a).

[49] *See* Lorman Ed Services Comments at 16 (suggesting a recipient's seminar registration form, product order form or warranty card should all count as voluntarily providing the number in the course of an EBR). Similarly, a business card containing a fax number that is provided by the recipient to the sender would permit the sending of a facsimile advertisement.

the fax sender.[50] In the event a recipient complains that its facsimile number was not provided to the sender, the burden rests with the sender to demonstrate that the number was communicated in the context of the EBR.

### b. Facsimile Number Obtained from Directory, Advertisement or Internet Site

15. The Junk Fax Prevention Act requires that, if the sender relies on an EBR and obtains the facsimile number from a directory, advertisement or site on the Internet, the sender must ensure that the recipient voluntarily agreed to make the number available for public distribution.[51] Commenters contend that it would be unduly burdensome for senders of facsimile advertisements to verify that a consumer voluntarily agreed to make the facsimile number public in every instance.[52] We agree. Therefore, we determine that a facsimile number obtained from the recipient's *own* directory, advertisement, or internet site was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile number in question.[53] For instance, if the sender obtains the number from the recipient's own advertisement, that advertisement would serve as evidence of the recipient's agreement to make the number available for public distribution.[54] On the other hand, if the sender obtains the number from sources of information compiled by third parties—*e.g.*, membership directories, commercial databases, or internet listings—the sender must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient.[55] We agree that membership directories requiring a fee to use are limited in

[50] *See infra*, paras. 37-40 on third parties acting as agents for the sender.

[51] Junk Fax Prevention Act, Sec. 2(a). *See also* EPIC Comments at 1 (the mere presence of a fax number in a directory should not constitute the voluntary agreement for dissemination to senders).

[52] *See, e.g.*, NNA Comments at 8; NAR Comments at 3-4 (asserting that any rules must allow senders to obtain facsimile numbers from public sources to whom persons have made their fax numbers publicly available); Everett Labs Comments at 5-6.

[53] *See* AHLA Comments at 3; NIADA Comments at 2; Reed Elsevier Comments at 8. *But see* EPIC Comments at 1 (the Commission should recognize that a person has voluntarily agreed to make a number available for public distribution only where that person has explicitly stated that they wish to receive unsolicited commercial messages); Texas OPC Comments at 4 (voluntary agreement to receive fax advertisements should not be found unless the website also contains a statement expressly indicating this).

[54] Another example might be a number obtained from the recipient's own letterhead or fax cover sheet. *See* NFIB Comments at 4; Lorman Ed Services Comments at 17; Reed Elsevier Comments at 8 (for a fax number listed in a directory, which an individual reasonably can assume is public, senders can assume that such number has voluntarily been provided for public distribution). *But see* Texas OPC Reply Comments at 4 (no consent can be inferred from the mere fact that the recipient's fax number appears on a website).

[55] *See* AGs Comments at 10 (a doctor who publishes her fax number in a medical society directory should not be deemed to have made the number publicly available if there is no reasonable expectation that the directory is intended for use by third parties for marketing purposes); Lorman Ed Services Comments at 17-18; Biggerstaff Comments at 15 (explaining that list brokers mine for numbers, combining lists of numbers from multiple sources and then reselling those lists in directories); EPIC Comments at 2; NAW Comments at 4-5 (noting that some Senators and their staff raised concerns during the JFPA legislative process that a mass retailer would be permitted to purchase a bulk fax list and fax advertisements to every number on it under the EBR exemption because everyone has purchased something at a Wal-Mart, but opposing a requirement that businesses verify fax numbers from a legitimate public source). *But see* American Bankers Assoc Comments at 3 (opposing a requirement that (continued....)

distribution and, as such, the information included within the directory is made available to subscribers and purchasers, not to the general public.[56] We also reiterate that senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number. The fact that the facsimile number was made available in a directory, advertisement or website does not alone entitle a person to send a facsimile advertisement to that number.

### c. Established Business Relationship Formed Prior to July 9, 2005

16. Finally, as the Commission noted in the *JPFA NPRM*, the Junk Fax Prevention Act provides a third avenue for the sender to obtain the facsimile number.[57] Pursuant to the statute, the amended rules shall provide that if the EBR was in existence prior to July 9, 2005, and the sender also possessed the facsimile number before July 9, 2005, the sender may send facsimile advertisements to that recipient without demonstrating how the number was obtained or verifying it was provided voluntarily by the recipient.[58] We emphasize that, to fall within this exception, a valid EBR must have been formed between the sender and recipient before July 9, 2005. For example, a business that sold a product to a consumer in 2004 and secured that consumer's facsimile number in 2004, would be permitted to fax an advertisement to the consumer regardless of how the facsimile number was obtained. We agree with those commenters that contend it would be burdensome for senders to prove a facsimile number was in their possession prior to July 9, 2005.[59] Therefore, we adopt a presumption that if a valid EBR existed prior to July 9, 2005, the sender had the facsimile number prior to that date as well.[60] In the event the recipient alleges a violation of these provisions, the sender will need to provide proof that the EBR existed prior to July 9, 2005.[61]

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senders verify a list of compiler's data as voluntary); ASTA Comments at 6 (there are no apparent practical steps that can be expected beyond a simple inquiry of the directory vendor).

[56] *See* Biggerstaff Comments at 16; *see also* ABM Comments at 6 (fax number in association directories that are for use only by members ought not be considered to have been provided by the facsimile machine owners for the purpose of making them publicly available. A sender should be required to ascertain whether or not the fax number was intended by the owner to be made public).

[57] Junk Fax Prevention Act, Sec. 2(a) (". . . except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment . . .").

[58] Junk Fax Prevention Act, Sec. 2(a). *See also* Commission's amended rule at 47 C.F.R. § 64.1200(a)(3)(ii)(C).

[59] *See* ABA Comments at 3; NNA Comments at 9; YPA Comments at 3; Staples Comments at 3 (it is unlikely that either a sender or recipient will be able to produce paper records, documenting the date on which a fax number was obtained or provided).

[60] This presumption could be rebutted, for example, with evidence that the recipient did not use the facsimile number before July 9, 2005. *See* AFSA Comments at 3; YPA Comments at 3; NNA Comments at 3; Staples Comments at 1 (Commission should establish a rebuttable presumption that a sender acquired a recipient's fax number prior to July 9, 2005); DMA Comments at 9 (the issue of what is voluntary will arise only where there is *already* an EBR between the sender and recipient).

[61] *See* CTTC Comments at 1 (a reasonable person could expect a solicitor will be able to access a file or record on someone to establish the existence of the EBR); NIADA Comments at 3.

## B. Definition of Established Business Relationship

17. As noted in the *JFPA NPRM*, the Junk Fax Prevention Act includes a definition of an EBR to be used in the context of unsolicited facsimile advertisements.[62] The statute provides that "[t]he term 'established business relationship, . . . shall have the meaning given the term in section 64.1200 of title 47 . . . as in effect on January 1, 2003, except that such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber. . ..''[63] The January 1, 2003 definition did not include any time limitations on the EBR.[64] The Junk Fax Prevention Act, however, authorizes the Commission to limit the duration of the EBR in the context of unsolicited facsimile advertisements after a 3-month period beginning from the date of enactment of the statute.[65] Therefore, the Commission sought comment in the *JFPA NPRM* on whether to limit the EBR.[66] We specifically sought comment on whether it is appropriate to limit the EBR duration for unsolicited facsimile advertisements in the same manner as telephone solicitations.[67]

### 1. EBR Definition

18. Based on the record,[68] and in accordance with the Junk Fax Prevention Act, we adopt as part of the Commission's rules the following definition of an EBR for purposes of sending unsolicited facsimile advertisements:

For purposes of paragraph (a)(3) of this section, the term established business

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[62] *JFPA NPRM*, para. 12.

[63] Junk Fax Prevention Act, Sec. 2(b).

[64] In 2003, the Commission limited the duration of the EBR for telephone solicitations to 18 months following a purchase or transaction and three months after an application or inquiry. *See 2003 TCPA Order*, 18 FCC Rcd at 14079, para. 113.

[65] Junk Fax Prevention Act, Sec. 2(f). ("[The Commission] may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines; (II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers; (III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and (IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and (ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of enactment of the Junk Fax Prevention Act of 2005").

[66] *JFPA NPRM*, para. 16.

[67] *JFPA NPRM*, para. 17. *See also* 47 C.F.R. § 64.1200(f)(3) (limiting the duration of the EBR for telephone solicitations to 18 months following a purchase or transaction and three months after an application or inquiry).

[68] NEPA Comments at 4; NNA Comments at 10, Lorman Ed Services Comments at 8-9; CBA Comments at 6.

> relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[69]

19. This definition extends the EBR exemption to faxes sent to both business and residential subscribers. Once established, the EBR will permit an entity to send facsimile advertisements to a business or residential subscriber until the subscriber "terminates" it by making a request not to receive future faxes.[70] This definition also clearly contemplates that the EBR could be formed by any of the following: an inquiry, application, purchase or transaction by the business or residential subscriber.[71] Consistent with the legislative history of the TCPA, an inquiry by a consumer could form the basis of the EBR.[72] However, the definition makes clear that the inquiry or application must be about products or services offered by the entity. Thus, we conclude that an inquiry about store location or the identity of the fax sender, for instance, would not alone form an EBR for purposes of sending facsimile advertisements.[73] Merely visiting a website, without taking additional steps to request information or provide contact information, also does not create an EBR.[74]

20. In addition, we conclude that the EBR exemption applies only to the entity with which the business or residential subscriber has had a "voluntary two-way communication." It would not extend to affiliates of that entity, including a fax broadcaster which is retained to send facsimile ads on behalf of that entity.[75] While the fax broadcaster may transmit an advertisement on behalf of an entity that has an EBR with the recipient, it is not permitted to use that same EBR to send a fax advertisement on behalf of another client.[76] We find that, unlike the national do-not-call registry, which allows

[69] *See* amended rule at 47 C.F.R. § 64.1200(f)(5).

[70] We note that the act of terminating the EBR exemption will only terminate the relationship for purposes of receiving communications constituting "unsolicited advertisements." A fax regarding collection of a debt that does not contain an advertisement will not be subject to the facsimile advertising rules. *See* ACA Comments at 9-11. *See also* ABM Comments at 13 (opt-out should terminate EBR). *But see* SIA Comments at 2-3 (an opt-out request should not terminate the EBR as a recipient may choose to opt out from certain types of advertisements but remain on the list for other advertisements).

[71] *See* AGs Comments at 9 (should limit the EBR to these specific actions by the consumer).

[72] *See* H.R. REP. NO. 102-317 at 14-15 (1991) (noting that if an investor had written to a mutual fund or responded to an ad requesting additional information, the fund's manager could make follow-up calls).

[73] *See* Sutton Comments at 1 (the Commission should clarify that efforts to discover the identity of junk faxers do not create an EBR exemption for future unwanted faxes).

[74] *See* Biggerstaff Comments at 34.

[75] *See* AGs Comments at 11. *See also* Texas OPC Comments at 5 (the EBR exception should only apply when the seller is the party claiming the EBR. The EBR should not be transferable).

[76] *See* AGs Comments at 11; Biggerstaff Comments at 24; Fax Ban Coalition Reply Comments at 9 (no legal basis to distinguish between a fax physically transmitted by an employee of the sender and the same fax that is physically transmitted by a transmitting service used by the sender).

consumers to avoid most unwanted telemarketing calls by registering a telephone number once every five years, the Junk Fax Prevention Act requires a consumer to opt-out of unwanted fax advertisements from each entity with which the consumer has an EBR. We believe that to permit companies to transfer their EBRs to affiliates would place an enormous burden on consumers to prevent faxes from companies with which they have no direct business relationship.

### 2. Limits on Duration of Established Business Relationship

21. Industry commenters overwhelming oppose limiting the duration of the EBR.[77] They argue that any time limits on the EBR would interfere with routine business transactions, would unduly burden senders, and would not provide a corresponding benefit to recipients, particularly in light of the Junk Fax Prevention Act's opt-out notice requirements.[78] Specifically, these commenters maintain that keeping records of an EBR that is limited in duration would involve significant costs to businesses that send faxes to their customers.[79] In addition, many of these commenters maintain that Congress required the Commission to first review complaints filed under the new rules before taking action to limit the duration of the EBR.[80] These commenters disagree as to what limits might be appropriate should the Commission determine to limit the EBR.[81] They argue that business-to-business relationships do not fall into predictable cycles, and that an 18-month limit might make sense for one business, but would be inadequate for another.[82]

22. Other commenters urge the Commission to limit the EBR, arguing that the shifting of costs to a recipient that must deal with unsolicited facsimile advertisements weighs in favor of imposing

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[77] *See, e.g.*, YPA Comments at 4; CTTC Comments at 1; ABA Comments at 4; Westfax Comments at 4; NFIB Comments at 2; Lorman Ed Services Comments at 13 (arguing that limits on the EBR would severely reduce the number of consumers to whom sending educational seminar notification and reminders could be sent); ACB Comments at 2 (maintaining that every bank or mortgage broker that sends faxes with advertising content will have to keep detailed and continuously updated records of their customers' last inquiries and transactions); NADA Comments at 1-2 (indicating that unlike telemarketing calls, most faxes are sent between businesses); NAR Comments at 1-2. *But see* AGs Comments at 11.

[78] Lorman Ed Services Comments at 10; NNA Comments at 10 (would require burdensome recordkeeping and involve substantial costs); NADA Comments at 2.

[79] *See, e.g.*, AFSA Comments at 3; NAW Comments at 6-11, NFIB Comments at 3-4; NNA Comments at 10-11.

[80] *See* IFDA Comments at 3; Huntington Natl Bank Comments at 2; ABM Comments at 8; YPA Comments at 4; SBA Advocacy Comments at 7; NEPA Comments at 5; NAWD Comments at 7; ACA Comments at 9.

[81] YPA Comments at 4 (18 months for transactions and three months for inquiries is too short); NEPA Comments at 6 (Commission should not limit the EBR more narrowly for fax communications than for telephone solicitations); Lorman Ed Services Comments at 15 (a five-year limit would be appropriate); ATA Comments at 3 (to the extent the Commission imposes limits, it should enact the same limits that it imposed for telephone solicitations); SIA Comments at 2 (18/3-month limits would provide uniformity in telemarketing and fax regulation).

[82] *See, e.g.*, NNA Comments at 11-12; CTTC Comments at 2; Lorman Ed Services Comments at 15; ARTBA Comments at 2.

limits on the EBR.[83] They support varying time limits.[84]

23. As required by the Junk Fax Prevention Act, we intend to closely monitor implementation of the new EBR exemption and opt-out policies adopted herein.[85] Within one year of the effective date of this Order, the Commission will evaluate its complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements, and whether such complaints involve facsimile advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.[86]

### C. Notice of Opt-Out Opportunity

24. Section 2(c) of the Junk Fax Prevention Act adds language to the TCPA that requires senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender.[87] In accordance with the Junk Fax Prevention Act, we amend our rules to require that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements.[88] This notice must include a domestic contact telephone number and a facsimile machine number for the recipient to transmit such a request to the sender and, as discussed below, at least one cost-free mechanism for transmitting an opt-out request.[89] We emphasize that including an opt-out notice on a facsimile advertisement alone is not

[83] AGs Comments at 12; Texas OPC Reply Comments at 3; PRC Comments at 3; EPIC Comments at 4.

[84] AGs Comments at 12 (limits should be shorter than 18/3); Strang Comments at 4 (supports one month for inquiries and six months for purchases); PRC Comments at 3 (does not believe 18/3-month limits strike a good balance, as unwanted faxes are more intrusive than unwanted telephone calls because faxes come all through the night); Worsham Comments at 1 (12 months from purchase; one month from inquiry); SHRM Comments at 8 (supports a limit on the EBR of 30 months for professional and trade associations); HPC Comments at 3 (18/3-month limits are appropriate).

[85] *See* Junk Fax Prevention Act, Sec. 2(f); *see also supra*, n.65.

[86] *See* Junk Fax Prevention Act, Sec. 2(f). We note, however, that because the Commission's facsimile advertising rules recognize an EBR exception, it is reasonable to expect that many such recipients of facsimile advertisements from senders with whom they have an EBR would not file complaints with the Commission.

[87] Junk Fax Prevention Act, Sec. 2(c) ("[The Commission] shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement; (ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful[.]"). *See also* S. REP. NO. 109-76 at 8 ("The Committee . . . added the requirement that every unsolicited facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations…").

[88] Amended rule at 47 C.F.R. § 64.1200(a)(3)(iii) and (iv).

[89] *See* NAA Comments at 13 (supports the requirement to include both a telephone number and facsimile number). *See also* S. REP. NO. 109-76 at 12 ("Section 2(c) would also require that the telephone and fax numbers, and the cost-free mechanism, provided to a recipient must permit an individual or business to make an opt-out request at any time").

sufficient to permit the transmission of the fax; an EBR with the recipient must also exist.

### 1. Clear and Conspicuous

25. In the *JFPA NPRM*, we sought comment on whether it was necessary to set forth in our rules the circumstances under which the opt-out notice will be considered "clear and conspicuous."[90] Some commenters argue that as long as the notice is on the first page and is apparent to a reasonable consumer, the Commission should not further define what will be considered "clear and conspicuous."[91] Others urge the Commission to provide specific guidance to ensure consumers are aware of their opt-out rights and sending parties have standards by which they can comply with the law.[92] We are persuaded that rules specifying the font type, size and wording of the notice might interfere with fax senders' ability to design notices that serve their customers.[93] However, we make some additional determinations about the opt-out notice so that facsimile recipients have the information necessary to avoid future unwanted faxes.

26. Consistent with the definition in our truth-in-billing rules, "clear and conspicuous" for purposes of the opt-out notice means a notice that would be apparent to a reasonable consumer.[94] We also conclude that the notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax.[95] Many facsimile advertisements today contain text covering the entire sheet of paper, making it difficult to see an opt-out notice that is placed amongst the advertising material. Thus, the notice must be distinguishable from the advertising material through, for example, use of bolding, italics, different font, or the like. We clarify that, in accordance with the Junk Fax Prevention Act, if there are several pages to the fax, the first page of the advertisement must contain the opt-out notice.[96]

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[90] *JFPA NPRM*, para. 20.

[91] YPA Comments at 6; *see also* American Bankers Assoc Comments at 4; NFIB Comments at 4-5; SBA Advocacy Comments at 7; Westfax Comments at 11; NAR Comments at 8; MFC Comments at 13 (suggesting the Commission use standards similar to the CAN-SPAM rules – "clearly legible, use sufficiently large type, and be placed so as to be readily apparent to a customer").

[92] Strang Comments at 5; Texas OPC Comments at 7; NIADA Comments at 5 (should do so in such a way that entities retain the flexibility to determine how to meet the clear and conspicuous standard); AGs Comments at 12; EPIC Comments at 5.

[93] *But see* Strang Comments at 2 (should specify the exact wording, location on the page, and font type and size to be used).

[94] *See* amended rule 47 C.F.R. § 64.1200(f)(2). *See also* truth-in-billing requirements at 47 C.F.R. § 64.2401(e).

[95] *See* S. REP. NO. 109-76 at 12 ("...[S]ection 2(c) would require that the opt-out notice complies with the current provisions of Section 227(d)...which require that any unsolicited fax being sent contain in the margins at the top or bottom of each page the date and time it is sent, the identification of the sender of the message, and the telephone number of the sending machine"). *See also* Texas OPC Comments at 7. *But see* NNA Comments at 12 (suggesting that placing opt-out notices at the extreme top or bottom may cause the notice to be cut off during transmission).

[96] Junk Fax Prevention Act, Sec. 2(c). If a cover page accompanies the advertisement, we encourage senders to include the notice on the cover page as well. *See* Bank of America Comments at 3 (should interpret statutory phrase "first page of unsolicited advertisement" as the fax cover sheet or first page of fax message); Huntington (continued....)

### 2. Cost-Free Opt-Out Mechanism

27. The Junk Fax Prevention Act requires that the notice identify "a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement[.]"[97] In accordance with the statute, we amend the rules to require senders to identify a cost-free mechanism in their notices.[98] Industry members oppose a rule requiring the provision of a toll-free number, arguing that a toll-free number would be costly and answering the calls or setting up an automated system to do so would be overly burdensome, particularly for small businesses.[99] Of these commenters, some suggest that senders be permitted to provide a website address through which consumers can opt-out of future faxes.[100] Some consumer advocates contend that senders should be required to provide the toll-free telephone number, as many consumers do not have access to the Internet.[101]

28. In an effort to balance the needs of consumers who wish to opt-out of faxes with the interests of business, we find that a website address, email address, toll-free telephone number, or toll-free facsimile machine number will constitute "cost-free mechanisms" for purposes of our rules.[102] We also conclude that a local telephone number may be considered a cost-free mechanism so long as the advertisements are sent to local consumers for whom a call to that number would not result in long distance or other separate charges.[103] Senders of facsimile advertisements need make available only one of these mechanisms to comply with this requirement. A website or email address will allow businesses, particularly small businesses, to avoid excessive costs associated with maintaining a toll-free telephone number.[104] If a sender uses a website for receiving opt-out requests, it must describe the opt-out

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Natl Bank Comments at 4-5 (cover page, where used, should be considered the first page of the facsimile); CBS Corp Comments at 7 (if cover sheet used, notice should appear on cover sheet).

[97] Junk Fax Prevention Act, Sec. 2(c).

[98] *See* AGs Comments at 20 (to require a recipient to incur charges simply to request that no more fax ads be sent would shift additional costs onto the shoulders of recipients contrary to the purposes of the JFPA).

[99] *See, e.g.*, NNA Comments at 4; NFIB Comments at 5.

[100] *See* ASAE Comments at 6; DMA Comments at 10; ABA Comments at 2; ASAE Comments at 6.

[101] AGs Comments at 21; EPIC Comments at 6.

[102] *See* Comerica Comments at 1. *See also* Texas OPC Reply Comments at 10 (recipient must pay for a postcard and postage or paper, envelope and postage, which is not cost-free).

[103] NFIB Comments at 5. *See also* S. REP. NO. 109-76 at 10 (noting that the cost-free mechanism might include either a toll-free or a local telephone number).

[104] Given that we are not mandating that senders offer a toll-free telephone number for consumers to make opt-out requests, we find no reason to exempt small business from the cost-free mechanism requirement. As discussed above, businesses can use a website address or email address for receiving such requests. The record contains little empirical evidence that the costs associated with setting up a website or email address would be unduly burdensome to a small business given their revenues. *See* Junk Fax Prevention Act, Sec. 2(c) ("[The Commission may...subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders [from the requirement to provide a cost-free mechanism for a recipient to transmit an opt-out request], but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated (continued....)

mechanism and procedures clearly and conspicuously on the first page of the website.

29. As noted above, apart from the cost-free mechanism required by the statute, the opt-out notice must contain a domestic contact telephone number and facsimile machine number.[105] If the cost-free mechanism offered by the sender is either a domestic toll-free telephone number or toll-free facsimile machine number, the sender will be in compliance with both sets of requirements.[106] We agree with the Attorneys General commenters that the facsimile number should be a number that is separate and distinct from the telephone number to ensure consumers are less likely to find a busy line and can make opt-out requests without delay.[107] It is the responsibility of the sender to ensure that the number(s) are available to accept opt-out requests. In accordance with the statute, the new rules will require the sender to accept opt-out requests 24 hours, 7 days a week at the number(s), website or email address identified in the opt-out notice.[108]

### 3. Timeframe for Honoring Opt-Out Requests

30. The Junk Fax Prevention Act requires that the opt-out notice on the facsimile advertisement states that "failure to comply, within the shortest reasonable time, as determined by the Commission, with such a[n opt out] request . . . is unlawful."[109] In the *JFPA NPRM*, we sought comment on the "shortest reasonable time" within which a facsimile sender should comply with an opt-out request.[110] Of the comments filed, many were from businesses and trade organizations that support a period of 30 days within which senders must comply with opt-out requests.[111] Other commenters support a shorter period of time for honoring do-not-fax requests, such as 10 or 15 days, noting the costs associated with continuing to receive unwanted faxes after an opt-out request is made.[112] CTTC

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by such small businesses"). We also note that a third party could be retained to maintain any of these opt-out mechanisms, although the sender remains liable for ensuring that opt-out requests are honored timely. *See also* ABM Comments at 12; SBA Advocacy Comments at 9.

105 Junk Fax Prevention Act, Sec. 2(c).

106 Huntington Natl Bank Comments at 8.

107 AGs Comment at 19.

108 CTTC Comments at 2. *See also* amended rule at 47 C.F.R. § 64.1200(a)(3)(iii)(E).

109 Junk Fax Prevention Act, Sec. 2(c).

110 *JFPA NPRM*, para. 20.

111 American Bankers Assoc Comments at 5; NEPA Comments at 6; NNA Comments at 13; NFIB Comments at 6; NAR Comments at 8 (members might not have the resources to instantaneously incorporate consumer requests into do-not-fax lists); Westfax Comments at 12; SHRM Comments (supports 45 days); ABM Comments at 10; MFC Comments at 14 (supports 31 days, so that senders can remove numbers on a monthly basis).

112 Biggerstaff Comments at 19; AGs Comments at 16-17; Empire Comments at 2 (the time period should be ten business days); Strang Reply Comments at 3 (a do-not-fax request should be honored within seven days of receipt, but in no case should exceed 14 days); Sutton Comments at 7 (should be honored within 24 hours); EPIC Comments at 5 (senders should be able to honor within five days); Texas OPC Reply Comments at 6 (reasonable time would be 3-10 business days).

maintains that legitimate businesses that receive such requests will honor them immediately.[113]

31. In accordance with the Junk Fax Prevention Act, we conclude that senders must comply with an opt-out request within the shortest reasonable time of such request. Taking into consideration both large databases of facsimile numbers and the limitations on certain small businesses to remove numbers for individuals that opt-out, we conclude that a reasonable time to honor such requests must not exceed 30 days from the date such a request is made.[114] The record demonstrates that 30 days will provide a reasonable opportunity for persons, including small businesses, to process requests and remove the facsimile numbers from their lists or databases.[115] Consistent with our rules for company-specific do-not-call requests, facsimile senders with the capability to honor do-not-fax requests in less than 30 days must do so.[116] We believe that any period greater than 30 days will likely impose additional costs and burdens on consumers and businesses that have taken steps to avoid facsimile messages by making opt-out requests. We also conclude that the sender must remove the facsimile number from its fax lists within the 30-day period, regardless of whether it believes the number may be used by more than one individual.[117] We believe it is reasonable to presume that persons making opt-out requests on behalf of a business' facsimile machine are authorized to do so. Senders must honor such opt-out requests made by the business, even if doing so restricts faxes sent to all employees of that business. This determination is consistent with our findings in the do-not-call context in which a do-not-call request applies to all persons at the residence associated with that telephone number.[118]

32. We decline to limit the time period during which an opt-out request remains in effect as suggested by NFIB.[119] We recognize that, like telephone numbers, facsimile numbers change hands over time. However, as noted above, the national do-not-call registry requires consumers to re-register just once every five years to avoid most telemarketing calls. In the absence of a similar do-not-fax list, a consumer would need to make numerous—perhaps hundreds—of opt-out requests every five years to

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[113] CTTC Comments at 2. According to the Attorneys General commenters, the Federal Trade Commission is taking steps to shorten from 10 to 3 days its timeframe within which senders of commercial email messages must comply with opt-out requests from recipients under the CAN-SPAM Act. *See* AGs Comments at 16-17.

[114] *See* ASAE Comments at 5 (30 days is the shortest reasonable time as many associations are lightly staffed and depend upon the generosity of volunteers); NIADA Comments at 6; DMA Comments at 9 (supports 30 days).

[115] American Bankers Assoc Comments at 5; NEPA Comments at 6; NNA Comments at 13; NFIB Comments at 6; NAR Comments at 8 (members might not have the resources to instantaneously incorporate consumer requests into do-not-fax lists); Westfax Comments at 12; ABM Comments at 10; MFC Comments at 14 (31 days, which is the timeframe within which telemarketers must scrub their lists using the national do-not-call registry).

[116] *See* 47 C.F.R. § 64.1200(d)(3); *see also 2003 TCPA Order*, 18 FCC Rcd at 14069, para. 94.

[117] *See* American Bankers Assoc Comments at 5 (explaining that a business may need to investigate whether the opt-out request is for a fax number used by only one individual or if others use the number and whether the opt out is valid for all users).

[118] *See Consumer.net v. AT&T*, 15 FCC Rcd 281, 297 (1999). *See* DMA Comments at 6 (a fax sender should be permitted to rely on consent provided by any member of a business recipient's personnel with apparent authority to act on its behalf; senders should honor an opt-out request by an employee of a business with apparent authority to submit a request).

[119] NFIB Comments at 6. *See also* CBA Comments at 15.

avoid receiving unwanted faxes.[120] Instead, we conclude that a consumer who wishes to receive faxes at a new number or resume receiving faxes after previously opting out should notify the sender of such changes by giving prior express permission to the sender.[121] We also encourage facsimile senders to update their facsimile number databases, when consumers subsequently transact business, file applications or make inquiries.

### 4. Identification Requirements and Opt-Out Notice

33. As noted in the *JFPA NPRM*, the Commission's existing rules require senders of facsimile messages to identify themselves on the message, along with the telephone number of the sending machine or the business, other entity, or individual sending the message.[122] The TCPA also requires facsimile messages to include the date and time they are sent.[123] We sought comment on the interplay between this identification requirement and the opt-out notice requirement under the Junk Fax Prevention Act.[124] A few commenters identified additional burdens associated with complying separately with both requirements.[125] We conclude that senders that provide their telephone number and facsimile number as part of the opt-out notice will satisfy the Commission's identification rule so long as they also identify themselves by name on the facsimile advertisement.

## D. Request to Opt-Out of Future Unsolicited Advertisements

34. The Junk Fax Prevention Act requires that a request not to send future unsolicited facsimile advertisements meet certain requirements.[126] In accordance with the statutory provisions, we

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[120] *See supra*, para. 20.

[121] *See* AGs Comments at 23 (a do-not-fax request must be honored until the recipient gives express consent to receive solicitations).

[122] *JFPA NPRM*, para. 17. *See also* 47 C.F.R. § 68.318(d). We note that the "sender" of the facsimile advertisement is the person on whose behalf the advertisement is sent. Under the Commission's rules, the fax broadcaster must also identify itself if it demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent. *See* 47 C.F.R. § 68.318(d). Verizon urges the Commission to amend its current Caller Identification (Caller ID) rules to require that fax broadcasters transmit the same caller ID information that is currently required of telemarketers. Verizon alleges that there is a growing trend by fax broadcasters to engage in "caller ID spoofing," whereby they manipulate their caller ID data to disguise the true telephone number from which the calls have been placed. *See* Verizon Comments at 1. Although outside the scope of the NPRM, we will monitor caller ID spoofing to determine whether action is warranted to address the practice in the future.

[123] *See* 47 U.S.C. § 227(d)(1)(B).

[124] *JFPA NPRM*, para. 17.

[125] *See, e.g.*, Westfax Comments at 12.

[126] Junk Fax Prevention Act, Sec. 2(d) ("[The Commission] shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates; (ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and (iii) the person making the request has not, subsequent to (continued....)

adopt rules requiring that an opt-out request identify the telephone number or numbers of the facsimile machines or machines to which the request relates. In addition, the request must be made using the telephone number, facsimile number, website address or email address provided by the sender in its opt-out notice. Most commenters argue that permitting opt-out requests to be made through other avenues not identified in the notice will impair an entity's ability to account for all requests and process them in a timely manner.[127] As discussed above, the sender is required to include a telephone number and facsimile number on the advertisement, and if neither numbers are cost-free (*i.e.*, they are not 800 toll-free numbers or local numbers for local recipients), then the sender must have a website or email address to permit recipients to opt-out of future facsimile messages. Requiring recipients to use one of the methods identified on the facsimile should reasonably permit any consumer to avoid future facsimile messages from the sender. Under the new rules, the sender will be prohibited from sending facsimile advertisements to a person that has submitted a request that complies with these requirements.[128]

### 1. Interplay Between Established Business Relationship Exemption and Opt-Out Request

35. We agree with the majority of commenters that an opt-out request should be honored irrespective of whether the recipient continues to do business with the sender.[129] Therefore, our rules will reflect that a do-not-fax request will terminate the EBR exemption from the prohibition on sending facsimile advertisements.[130] This determination is consistent with the Commission's rules on telephone solicitations, whereby a telephone subscriber's seller-specific do-not-call request terminates any EBR exemption with that company even if the subscriber continues to do business with the seller.[131]

36. As set forth in the statute, a sender may resume sending facsimile advertisements to a consumer that has opted-out of such communications if that consumer subsequently provides his express invitation or permission to the sender.[132] Of the comments received on this issue, most agree that when a consumer has made an opt-out request of the sender, it should be up to the sender to demonstrate that the

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such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine").

[127] American Bankers Assoc Comments at 5; Westfax Comments at 9; Huntington Natl Bank Comments at 8; NIADA Comments at 8; YPA Comments at 6; NFIB Comments at 5; ARTBA Comments at 3. *But see* Biggerstaff Comments at 22 (maintaining that it would be inconsistent to prescribe only fixed and limited methods by which a fax advertiser must accept a do-not-fax request when there are no such restrictions in the telemarketing context). We encourage senders that are on actual notice of a recipient's opt-out request to honor the request even if not sent by the methods identified in the sender's opt-out notice.

[128] *See infra*, discussion on prior express invitation or permission, paras. 45-48. *See also* amended rule at 47 C.F.R. § 64.1200(a)(3)(vi).

[129] NAWD Comments at 11-12; NNA Comments at 15; Westfax Comments at 8; AGs Comments at 25; Biggerstaff Comments at 22; CTTC Comments at 1 (the act of opting out will not only stop unsolicited advertisements, it will effectively terminate the EBR for purposes of the TCPA); NIADA Comments at 7.

[130] *See* amended rule at 47 C.F.R. § 64.1200(a)(3)(vi).

[131] *See* 47 C.F.R. § 64.1200(f)(3)(i) and amended as 47 C.F.R. § 64.1200(f)(4)(i).

[132] Junk Fax Prevention Act, Sec. 2(d).

consumer subsequently gave his express permission to receive faxes.[133] As discussed in more detail below, our rules will permit such permission to be granted in writing or orally.[134] Senders that claim their facsimile advertisements are delivered based on the recipient's prior express permission must be prepared to provide clear and convincing evidence of the existence of such permission.

### 2. Third Parties and Fax Broadcasters

37. The record reveals that fax broadcasters,[135] which transmit other entities' advertisements to telephone facsimile machines for a fee, are responsible for a significant portion of the facsimile messages sent today.[136] The Commission sought comment in the *JFPA NPRM* on whether to specify that if the entity transmitting the facsimile advertisement is a third party agent or fax broadcaster, that any do-not-fax request sent to that agent will extend to the underlying business on whose behalf the fax is transmitted.[137] The majority of commenters maintain that a third party should not be responsible under the law for accepting and communicating opt-out requests to senders.[138] Some commenters argue that to hold third parties responsible for processing opt-out requests will unduly restrict any third party's ability to send faxes to consumers on behalf of other entities.[139]

38. We conclude that the sender—the business on whose behalf the fax is transmitted—is responsible for complying with the opt-out notice requirements and for honoring opt-out requests. Regardless of whether the sender includes its own contact information in the opt-out notice or the contact information of a third party retained to accept opt-out requests, the sender is liable for any violations of the rules. This determination is consistent with the Commission's telemarketing rules.[140] Third parties, including fax broadcasters, need only accept and forward do-not-fax requests to the extent the underlying business contracts out such responsibilities to them.

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[133] *See JFPA NPRM*, para. 25. *See also* AGs Comments at 22; B. Sachau Comments; NIADA Comments at 8; NAWD Comments at 13 (given the private right of action, it would be imprudent to rely on the recipient to prove that his opt-out had been superseded).

[134] *See* amended rule at 47 C.F.R. §64.1200(a)(3)(v)(C).

[135] The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee. *See* 47 C.F.R. § 64.1200(f)(4) and amended as (f)(6).

[136] *See* Biggerstaff Comments at 1-2; Texas OPC Comments at 15-17; Verizon Comments at 4.

[137] *JFPA NPRM*, para. 25.

[138] *See* American Bankers Assoc Comments at 5 (the question attempts to deputize broadcast fax companies as surrogates for a type of national do-not-fax list); NAWD Comments at 12; ABM Comments at 14; NFIB Comments at 7 (applying a do-not-fax request to third party senders could result in NFIB members not receiving vital information to which their membership entitles them); ASTA Comments at 11. *But see* AGs Comments at 25.

[139] American Bankers Assoc Comments at 5; NFIB Comments at 7. *But see* Strang Comments at 7 (a do-not-fax request to a fax broadcaster must apply to all customers of that broadcaster unless the consumer specifically asks for faxes from particular advertisers).

[140] *See* 47 C.F.R. § 64.1200(d)(3) ("...If [do-not-call] requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request").

39. We take this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent.[141] In most instances, this will be the entity whose product or service is advertised or promoted in the message. As discussed above, the sender is liable for violations of the facsimile advertising rules, including failure to honor opt-out requests. Accordingly, we adopt a definition of sender for purposes of the facsimile advertising rules.[142]

40. Under the current rules, a fax broadcaster also will be liable for an unsolicited fax if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile advertisements, and we will continue to apply this standard under our revised rules.[143] If the fax broadcaster supplies the fax numbers used to transmit the advertisement, for example, the fax broadcaster will be liable for any unsolicited advertisements faxed to consumers and businesses without their prior express invitation or permission.[144] We find that a fax broadcaster that provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules, also demonstrates a high degree of involvement in the transmission of those facsimile advertisements. In addition, we conclude that a highly involved fax broadcaster will be liable for an unsolicited fax that does not contain the required notice and contact information.[145] In such circumstances, the sender and fax broadcaster may be held jointly and severally liable for violations of the opt-out notice requirements. Based on our own enforcement experience, and the fact that highly involved fax broadcasters will have firsthand knowledge of the inclusion of the opt-out notice, we determine that such a fax broadcaster must, at a minimum, ensure that the faxes it transmits on behalf of each sender contain the necessary information to allow a consumer to opt out of a particular sender's faxes in the future. Otherwise, the consumer may have no means of stopping unwanted faxes transmitted by the fax broadcaster on behalf of various advertisers.

### E. Professional or Trade Organizations

41. The Junk Fax Prevention Act authorizes the Commission to consider exempting nonprofit organizations from the opt-out notice requirements discussed above.[146] Specifically, the statute

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[141] NAR Comments at 12 (asking the Commission to clarify the definition of "sender"); ABM Comments at 10 (a definition of "sender" would help distinguish between the business on whose behalf the fax is sent and a vendor who does nothing more than transmit a fax).

[142] *See* amended rule at 47 C.F.R. §64.1200(f)(8).

[143] *See* 47 C.F.R. § 64.1200(a)(3)(ii) and amended rule 47 C.F.R. § 64.1200(a)(3)(vii). *See also* 47 C.F.R. § 68.318(d) ("If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the number to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name.") *See also* AGs Comments at 29.

[144] 47 C.F.R. § 64.1200(a)(3)(ii).

[145] *See* amended rule at 47 C.F.R. § 64.1200(a)(3)(vii).

[146] Junk Fax Prevention Act, Sec. 2(e) ("[The Commission] may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—(i) by regulation issued after public comment; and (ii) if the (continued....)

provides that the Commission may, after receiving public comment, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the opt-out notice.[147] The statute requires that the Commission first determine that such notice is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements.[148] We sought comment on whether to allow such organizations to send faxes that do not contain the opt-out notice.[149] We asked how members would obtain the necessary information to stop unwanted faxes if the associations do not provide such information, and we asked what benefits there are to nonprofit organizations if they are exempt from the opt-out notice requirement.[150]

42. Most commenters that are themselves trade associations or professional organizations argue that they exist to serve their members, and that members of an association know how to contact those associations should they no longer wish to receive fax messages.[151] They contend that most trade associations have a membership or customer service department that can assist the member with an opt-out request.[152] Other commenters oppose an exemption for nonprofits, arguing that such organizations should have no difficulty including an opt-out notice on their facsimile advertisements.[153] We are not persuaded that consumers will have the necessary tools to easily opt-out of unwanted faxes from trade associations if the faxes received do not contain information on how to opt out. Moreover, we believe the benefits to consumers of having opt-out information readily available outweigh any burden in

(Continued from previous page)
Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements[.]").

[147] *Id.*

[148] Junk Fax Prevention Act, Sec. 2(e).

[149] *JFPA NRPM*, para. 27.

[150] *Id.*

[151] *See* IFDA Comments at 4; ABM Comments at 15-16; ASAE Comments a 7-9; DMA Comments at 1-3; State Broadcasters Comments at 6; ABA Comments at 2 (ABA members include a clear notice on the face of each facsimile about how to access ABA's website and then be directed to a separate webpage that allows members to opt-out of receiving future facsimile ads); ASAE Comments at 2 (urging the Commission to find that simply joining a nonprofit association constitutes prior express invitation or permission, making the Junk Fax Prevention Act provisions inapplicable).

[152] American Bankers Assoc Comments at 6; SBA Advocacy Comments at 9; NNA Comments at 16, NFIB Comments at 7; NADA Comments at 4 (an exemption would assist our compliance efforts and eliminate inadvertent violations of federal law when communicating with our members); SHRM Comments at 6.

[153] Biggerstaff Comments at 25; Hallikainen Comments at 1; Strang Comments at 8; Westfax Comments at 12-13 (the opt-out notice is easy to put into the content of any facsimile and should be included on all advertisements); Lorman Ed Services Comments at 1 (such an exemption would confuse and burden association members); Lorman Ed Services Reply Comments at 8 (consumers need to know they have the right to opt out; a notice does that); PRC Comments at 4 (to eliminate an opt-out choice entirely when a fax is sent by a nonprofit or trade association would deprive the recipient of any control).

including such notices.[154] Facsimile advertisements impose direct costs on consumers for paper, toner, and time spent sorting and discarding unwanted faxes. Should consumers not have access to opt-out contact information, they may be forced to incur unacceptable costs associated with faxes sent from nonprofit organizations. In addition, the record reveals that trade associations already have mechanisms in place through which members communicate with the organization.[155] Therefore, inclusion of an opt-out notice on their fax messages should not be burdensome.

43. While neither the TCPA nor its amendments carve out an exemption for nonprofits from the facsimile advertising rules, we agree with those petitioners that argue that messages that are not commercial in nature—which many nonprofits send—do not constitute "unsolicited advertisements" and are therefore not covered by the facsimile advertising prohibition.[156] We clarify that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as a request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA.[157] We emphasize that, under the Junk Fax Prevention Act, even unsolicited advertisements transmitted by tax-exempt nonprofit organizations may be sent to persons with whom the senders have an established business relationship, subject to the other statutory requirements.

## F. Unsolicited Advertisement

### 1. Definition

44. The facsimile advertising rules apply to a fax communication that constitutes an "unsolicited advertisement" as defined in the TCPA.[158] The Junk Fax Prevention Act amends the term "unsolicited advertisement" by adding "in writing or otherwise" before the period at the end of that section.[159] We proposed amending the Commission's rules to reflect the change in the statutory

[154] We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.

[155] DMA Reply Comments at 3; ABM Comments at 16.

[156] *See, e.g.,* ASAE Petition for Reconsideration, filed July 25, 2003; Consumer Electronics Association Petition for Reconsideration at 2-6, filed August 21, 2003; Independent Sector Comment at 2, filed August 25, 2003; Maryland Nonprofit Petition for Reconsideration at 2, filed August 25, 2003. We also emphasize that we are not carving out an exemption for tax-exempt nonprofits. Rather, consistent with the language of the TCPA, we do not intend for the clarifications in this Order to result in the regulation of noncommercial speech as commercial facsimile messages under the TCPA regulatory scheme.

[157] *See* American Dietetic Association Petition at 8, filed August 25, 2003; National Association of Business PACs Petition at 7-8, filed August 25, 2003. Under the Federal Election Commission's rules, when a person pays a political committee for a commercially available product or service, such as a dinner sponsored by a political campaign, the full purchase price of the item or service is considered a contribution to the campaign. *See* FEC Comments at 2-3, filed October 14, 2003. Therefore, the fact that a political message contains an offer to attend a fundraising dinner or to purchase some other product or service in connection with a political campaign or committee fundraiser does not turn the message into an advertisement for purposes of the TCPA's facsimile advertising rules.

[158] *See* 47 U.S.C. § 227(a)(4).

[159] Junk Fax Prevention Act, Sec. 2(g).

language.[160] No commenter opposed the modification. Accordingly, we amend our rules at 64.1200(f)(10) so that the definition reads as follows:

> The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission, in writing or otherwise.[161]

### 2. Prior Express Invitation or Permission

45. Several commenters ask the Commission to explicitly recognize that "prior express invitation or permission" to send a facsimile advertisement may be obtained by means other than a signed written statement.[162] CBA urges the Commission not to specify the various other means, for fear that the Commission might overlook certain legitimate methods and forms of permission.[163] We clarify that, as an initial matter, a sender that has an EBR with a consumer may send a facsimile advertisement to that consumer without obtaining separate permission from him.[164] In the absence of an EBR, the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement.[165] Prior express invitation or permission may be given by oral or written means, including electronic methods.[166] We expect that written permission will take many forms, including email, facsimile, and internet form. Whether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent.[167] It cannot be in the form of a "negative option."[168] However, a company that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company or organization.[169]

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[160] *JFPA NRPM*, para. 29.

[161] *See* amended rule at 47 C.F.R. § 64.1200(f)(13).

[162] *See* NEPA Comments at 9; NAR Comments at 16; Huntington Natl Bank Comments at 7.

[163] CBA Comments at 14-15; *see also* YPA Comments at 7.

[164] As discussed above, a sender that has received an opt-out request from a consumer must not continue to send facsimile advertisements regardless of whether there exists a business relationship between them.

[165] *See* 47 U.S.C. § 227(b)(1)(C) and (a)(4).

[166] As discussed above, we are removing the Commission's rule at section 64.1200(a)(3)(i) which requires the recipient to obtain a signed, written statement indicating the recipient's consent to receive facsimile advertisements from the sender. *See supra*, para. 11, n.38.

[167] AGs Comments at 28.

[168] A facsimile advertisement containing a telephone number and an instruction to call if the recipient no longer wishes to receive such faxes, would constitute a "negative option" as the sender presumes consent unless advised otherwise.

[169] Trade and membership organizations could do so on their membership renewal statements.

46. We are concerned that permission not provided in writing may result in some senders erroneously claiming they had the recipient's permission to send facsimile advertisements. Commenters that discussed this issue agree that a sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission.[170] Senders who choose to obtain permission orally are expected to take reasonable steps to ensure that such permission can be verified. In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given.[171] We strongly suggest that senders take steps to promptly document that they received such permission.[172] 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.

47. The record on the facsimile advertising rules has long reflected the fact that consumers incur costs for receiving fax communications.[173] Recipients assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions.[174] We therefore conclude that, in the absence of an EBR, facsimile requests for permission to transmit faxed advertisements would not be permissible, as they would impose costs on consumers who had not yet consented to receive such communications.[175]

48. Senders who claim they obtained a consumer's prior express invitation or permission to send them facsimile advertisements prior to the effective date of these rules will not be in compliance unless they can demonstrate that such authorization met all the requirements as adopted herein. In addition, 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.

### 3. "Transactional" Communications

49. We agree with those petitioners who argue that messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements for purposes of the TCPA's facsimile advertising rules.[176] For

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[170] Westfax Comments at 10; McKenna Comments at 2; YPA comments at 2 (maintaining that the Commission should be flexible as to the evidence necessary to prove the recipient granted permission to receive the fax).

[171] *See* Sauchau Comments; AGs Comments at 26.

[172] An example of such documentation could be the recording of the oral authorization. Other methods might include established business practices or contact forms used by the sender's personnel.

[173] *See 2003 TCPA Order*, 18 FCC Rcd at 14127-28, para. 189; *see also* AGs Comments at 4-5, 20; McKenna Reply Comments at 4; Biggerstaff Comments at 4-5.

[174] Biggerstaff Comments at 4-5; AGs Comments at 1 (describing the costs and time spent dealing with junk faxes).

[175] This finding is also consistent with our telemarketing and CAN-SPAM rules for wireless devices, which do not permit the calling or text messaging to obtain prior express permission.

[176] *See, e.g.*, Wells Fargo Petition for Reconsideration, filed August 25, 2003; Reed Elsevier Petition for Reconsideration, filed August 25, 2003; Proximity Marketing Request for Clarification, filed August 25, 2003; Financial Services Coalition Petition for Reconsideration at 6-7, filed August 25, 2003.

example, a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, is not an advertisement of the commercial availability of such items. Similarly, messages containing account balance information or other type of account statement which, for instance, notify the recipient of a change in terms or features regarding an account, subscription, membership, loan or comparable ongoing relationship, in which the recipient has already purchased or is currently using the facsimile sender's product or service, is not an advertisement. Communications sent to facilitate a loan transaction, such as property appraisals, summary of closing costs, disclosures (such as the Good Faith Estimate) and other similar documents are not advertisements when their purpose is to complete the financial transaction.[177] A travel itinerary for a trip a customer has agreed to take or is in the process of negotiating is not an unsolicited advertisement. Similarly, a contract to be signed and returned by the agent or traveler that is for the purpose of closing a travel deal is not an advertisement for purposes of the prohibition.[178] A communication from a trade show organizer to an exhibitor regarding the show and her appearance will not be considered an unsolicited advertisement, provided the exhibitor has already agreed to appear.[179] We also conclude that a mortgage rate sheet sent to a broker or other intermediary or a price list sent from a wholesaler to a distributor (*e.g.*, food wholesaler to a grocery store) for the purpose of communicating the terms on which a transaction has already occurred are not advertisements.[180] A subscription renewal notice would be considered "transactional" in nature, provided the recipient is a current subscriber and had affirmatively subscribed to the publication. Finally, a notice soliciting bid proposals on a construction project would not be subject to the facsimile advertising prohibition, provided the notice does not otherwise contain offers for products, goods, and services. Similarly, bids in response to specific solicitations would not be covered by the rules, as such communications are presumably to facilitate a commercial transaction that the recipient has agreed to enter into by soliciting the bids.

50. In order for such messages to fall outside the definition of "unsolicited advertisement," they must relate specifically to existing accounts and ongoing transactions. Messages regarding new or additional business would advertise "the commercial availability or quality of any property, goods, or services..." and therefore would be covered by the prohibition.[181] Thus, applications and materials regarding educational opportunities and conferences sent to persons who are not yet participating or enrolled in such programs are unsolicited advertisements and require the recipient's permission or the existence of an established business relationship before faxing the recipient such information.[182] Similarly, a rate sheet on financial products transmitted to a *potential* borrower or *potential* brokers

[177] *See* Financial Services Coalition Petition for Reconsideration at 4-7, filed August 25, 2003.

[178] However, we find that messages regarding travel deals, bonus commission offers and other promotional information are advertisements and would require the recipient's express permission in the absence of an established business relationship. *See* Travel Industry Group Petition for Reconsideration at 4, 6, filed August 25, 2003.

[179] *See, e.g.*, Reed Elsevier Petition for Reconsideration at 4, filed August 25, 2003.

[180] Commercial facsimile messages that advertise the commercial availability or quality of property, goods, or services, but purport to be "price sheets" or "rate sheets" in order to evade the TCPA rules, are nevertheless unsolicited advertisements, if not sent for the purpose of facilitating, completing, or confirming an ongoing transaction.

[181] *See* 47 U.S.C. § 227(a)(4).

[182] Such communications nevertheless could be sent to recipients with whom the sender has an EBR, so long as they also comply with the other statutory provisions, including the opt-out notice requirements.

would not be considered merely "transactional" in nature and would require the sender to either have an established business relationship with the recipient or first obtain express permission from the recipient.

51. In response to arguments that a *de minimis* amount of advertising information should not convert a communication into an "unsolicited advertisement,"[183] we conclude that a reference to a commercial entity does not by itself make a message a commercial message. For example, a company logo or business slogan found on an account statement would not convert the communication into an advertisement, so long as the primary purpose of the communication is, for example, to relay account information to the fax recipient.[184]

#### 4. Offers for Free Goods and Services and Informational Messages

52. We conclude that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition.[185] In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services."[186] Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR.

53. By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in a newsletter does not convert the entire communication into an advertisement.[187] Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. We emphasize that a newsletter format used to advertise products or

[183] *See* Financial Services Coalition Petition for Reconsideration at 13, filed August 25, 2003; Travel Industry Group Petition for Reconsideration at 14, filed August 25, 2003.

[184] *See* Wells Fargo Petition for Reconsideration at 3, filed August 25, 2003; Travel Industry Group Petition for Reconsideration at 14, filed August 25, 2003.

[185] *See* Proximity Marketing Request for Clarification at 7, 12, filed August 25, 2003.

[186] *See* 47 U.S.C. § 227(a)(4).

[187] *See* Air Conditioning Contractors Petition for Reconsideration at 2-3, filed August 12, 2003. In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is to a bona fide "informational communication." In determining whether the advertisement is to a *bona fide* "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership in the organization that sends the communication. We may also consider the amount of space devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender.

services will not protect a sender from liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules. We will review such newsletters on a case-by-case basis should they be brought to our attention.

54. Finally, we conclude that any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules.[188] The TCPA's definition of "unsolicited advertisement" applies to any communication that advertises the commercial availability or quality of property, goods or services, even if the message purports to be conducting a survey.[189]

### 5. Petitions for Reconsideration on EBR exemption

55. We also take this opportunity to dismiss as moot, any pending petitions, or parts thereof, that seek reconsideration of the Commission's determination that an established business relationship will no longer be sufficient to show that an individual or business has given prior express permission to receive unsolicited facsimile advertisements and those that seek reconsideration of the written permission requirement in section 64.1200(a)(3)(i) of the Commission's rules.[190] The Junk Fax Prevention Act codifies an established business relationship exception to the prohibition on sending unsolicited facsimile advertisements; therefore, such petitions are now moot.[191]

## G. Private Right of Action

56. The TCPA provides consumers with a private right of action in state court for any violation of the TCPA's prohibitions on the use of automatic dialing systems, artificial or prerecorded voice messages, and unsolicited facsimile advertisements.[192] Westfax raises concerns about class action lawsuits brought under the TCPA and asks the Commission to clarify the parameters of the private right of action.[193] As the Commission has stated in previous orders, Congress provided consumers with a private right of action, "if otherwise permitted by the laws or rules of court of a State." This language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those state courts' rules.[194] We continue to believe that it is for Congress, not the Commission, either to clarify or limit this right of action. Therefore, we decline to make any determinations about the specific contours of the private right of action.

## H. Effective Date of Rules

57. The record reveals that facsimile senders may need additional time beyond 30 days to

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[188] *See* 47 U.S.C. § 227(a)(4) and 47 C.F.R. § 64.1200(f)(10); *see also* Travel Industry Group Petition for Reconsideration at 14-15, filed August 25, 2003.

[189] *See* 47 U.S.C. § 227(a)(4).

[190] *See infra*, Appendix C, List of Petitions Filed.

[191] *See infra*, para. 66.

[192] 47 U.S.C. § 227(b)(3).

[193] Westfax Comments at 5-6.

[194] *See 2003 TCPA Order*, 18 FCC Rcd at 14136, para. 206.

comply with the rules adopted herein.[195] For example, senders will need to ensure that opt-out contact information is provided on all facsimile advertisements. They also will need to put in place mechanisms to allow recipients to opt-out of unwanted facsimile advertisements and establish procedures for removing facsimile numbers for individuals that have opted out of such advertisements. We believe it is important to provide adequate time for senders to come into compliance with the rules adopted in this order. Therefore, the amended facsimile advertising rules will become effective within 90 days of date of publication in the Federal Register.[196]

### I. Filings in Response to this Order

58. The Commission recently opened a new docket—CG Docket No. 05-338—and asked that all filings addressing the facsimile advertising rules be filed in the new docket.[197] Any filings in response to this Report and Order also should be filed in CG Docket No. 05-338.

## IV. PROCEDURAL ISSUES

### A. Paperwork Reduction Act

59. The *Report and Order* contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding.

60. In addition, pursuant to the Small Business Paperwork Review Act of 2002, Public Law No. 107-198, *see* 44 U.S.C. § 3506(c)(4), in this present document we have assessed the effect of rule changes and find that there likely will be an increased administrative burden on businesses with fewer than 25 employees. We have taken steps to minimize the information collection burden for small business concerns, including those with fewer than 25 employees. The rules adopted herein do not to require the maintenance of specific records for the sending of facsimile advertisements. We also decline to limit the duration of the EBR which might have resulted in an increase in recordkeeping burden for entities sending fax advertisements on the basis of an EBR. These measures should substantially alleviate any burdens on businesses with fewer than 25 employees.

### B. Congressional Review Act

61. The Commission will send a copy of this *Report and Order and Third Order on Reconsideration* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

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[195] Huntington Natl Bank at 8 (suggesting a one-year compliance period); SHRM Comments at 10 (supports a 90-day period for organizations to come into compliance); CBA Comments at 16 (suggesting a year)

[196] Those rules requiring OMB approval under the Paperwork Reduction Act are not effective until approved by OMB.

[197] *See JFPA NPRM* at para. 27.

### C. Accessible Formats

62. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This *Report and Order and Third Order on Reconsideration* can also be downloaded in Word and Portable Document Format (PDF) at http://www.fcc.gov/cgb/policy.

### D. Final Regulatory Flexibility Analysis

63. Pursuant to the Regulatory Flexibility Act of 1980, as amended,[198] the Commission's Final Regulatory Flexibility Analysis regarding the *Report and Order and Third Order on Reconsideration* is attached as Appendix B.

## V. ORDERING CLAUSES

64. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission's Rules, 47 C.F.R. §§ 64.1200 and 64.318, the *Report and Order and Third Order on Reconsideration* IS ADOPTED, and Part 64 of the Commission's rules, 47 C.F.R. § 64.1200, IS AMENDED as set forth in Appendix A.

65. IT IS FURTHER ORDERED that the rules and requirements contained in this *Report and Order and Third Order on Reconsideration* and in Appendix A SHALL BECOME EFFECTIVE within 90 days of publication in the Federal Register. Those rules and requirements which contain information collection requirements under PRA are not effective until approved by OMB.

66. IT IS FURTHER ORDERED, that certain petitions for reconsideration and/or clarification of the facsimile advertising rules in CG Docket No. 02-278 ARE DENIED in part, GRANTED in part, and DISMISSED in part, as set forth herein. Specifically, those petitions filed by Air Conditioning Contractors of America, American Association of Advertising Agencies, *et al.*, American Business Media, American Dietetic Association, American Society of Association Executives, American Tire Distributors, Inc., America's Community Bankers, Association of Small Business Development Centers, California Association of Realtors, Chamber of Commerce of the U.S., *et al.*, Coalition for Healthcare Communication, Consumer Bankers Association, Consumer Electronics Association, Copia International, LTC, Faxts, Inc., Federal Election Commission, Financial Services Coalition, Independent Insurance Agents and Brokers of America, Independent Sector, Jobson Publishing, LLC, Maryland Association of Nonprofit Organizations, John Mayhill, National Association of Chain Drugstores, National Association of Realtors, National Retail Federation, Newsletter & Electronic Publishers Association, Newspaper Association of America, Presidential Classroom for Young Americans, Inc., Produce Marketing Association, Proximity Marketing, Reed Elsevier, Inc., Scholastic, Inc., State and Regional Newspaper Associations, Travel Industry Group, Wells Fargo & Co., and Yellow Pages Integrated Media Association ARE DISMISSED to the extent they seek reinstatement of the established business relationship exemption.

[198] *See* 5 U.S.C. § 604.

67. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the *Report and Order and Third Order on Reconsideration* to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

## Appendix A

## Final Rules

Part 64 of the Code of Federal Regulations is amended as follows:

**PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (C), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254 (k) unless otherwise noted.

* * * * *

2. Subpart L is amended by revising the Subpart Heading L to read as follows:

**Subpart L – Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising**

* * * * *

3. Section 64.1200 is amended to remove paragraph (a)(3)(i).

* * * * *

4. Section 64.1200 is amended by removing the note for paragraph (f)(3) that reads as follows:

Paragraph 64.1200(f)(3) is stayed as of October 1, 2003, as it applies to the time limitations on facsimile advertisements. The Federal Communications Commission will publish a document in the Federal Register when the stay is lifted.

* * * * *

5. Section 64.1200 is revised to read as follows:

<u>§ 64.1200 Delivery restrictions</u>.

(a) * * *

(1) * * *

(2) * * *

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless –

(i) the unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(5) of this section, with the recipient; and

(ii) the sender obtained the number of the telephone facsimile machine through –

(A) the voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) the advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this subparagraph only if –

(A) the notice is clear and conspicuous and on the first page of the advertisement;

(B) the notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under subparagraph (v) is unlawful;

(C) the notice sets forth the requirements for an opt-out request under subparagraph (v);

(D) the notice includes—

(I) a domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) if neither the required telephone number or facsimile machine number is a toll-free number, a separate cost-free mechanism including a website address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) the telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(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 subparagraph (iii).

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if –

(A) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) the request is made to the telephone number, facsimile number, website address or email address identified in the sender's facsimile advertisement; and

(C) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with subparagraph (v) must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

* * * * *

6. Section 64.1200(f) is revised to read as follows:

(f) * * *

(1) * * *

(2) The term <u>clear and conspicuous</u> for purposes of subparagraph (a)(3)(iii)(A) means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures, and placed at either the top or bottom of the facsimile.

(3) The term <u>emergency purposes</u> means calls made necessary in any situation affecting the health and safety of consumers.

(4) The term <u>established business relationship</u> for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which

relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(5) The term established business relationship for purposes of paragraph (a)(3) on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(6) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(7) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(8) The term sender for purposes of paragraph (a)(3) means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(9) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(11) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(12) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(13) The term unsolicited advertisement 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.

(14) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

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## Appendix B

## Final Regulatory Flexibility Analysis

68. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[199] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking and Order (*JFPA NPRM*).[200] The Commission sought written public comment on the proposals in the *JFPA NPRM*, including comment on the IRFA. The only comment received on the IRFA was from the Office of Advocacy, U.S. Small Business Administration, and is discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[201]

### A. Need for, and Objectives of, the Report and Order and Third Order on Reconsideration

69. This Report and Order and Third Order on Reconsideration *(Order)* is necessary to comply with Congress' mandate for the Commission to issue regulations implementing the Junk Fax Prevention Act of 2005.[202] In this *Order*, and as set forth in the statute, we (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements; (2) provide a definition of an EBR to be used in the context of unsolicited facsimile advertisements that is not limited in duration; (3) require the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender; and (4) specify the circumstances under which a request to "opt-out" complies with the Act.

70. Specifically, in accordance with the Junk Fax Prevention Act, the *Order* permits the sending of facsimile advertisements to recipients with whom the sender has an EBR, provided certain conditions are met regarding how the facsimile number was obtained.[203] In addition, the definition of EBR for purposes of sending facsimile advertisements extends the EBR exemption to faxes sent to both businesses and residential subscribers and is not limited in duration.[204] Under the new rules, senders of facsimile advertisements must include a notice describing the procedures for opting out of future faxes that is clear and conspicuous and located on the first page of the advertisement.[205] The rules require that an opt-out notice include a cost-free mechanism for the recipient to request not to receive future faxes. The cost-free mechanism must include a toll-free telephone number, toll-free facsimile number, website address, or email address. If the recipient makes a request not to receive future fax advertisements, the

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[199] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[200] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278; 05-338, Notice of Proposed Rulemaking and Order, FCC 05-206, Appendix (rel. Dec. 9, 2005) (*JFPA NPRM*).

[201] *See* 5 U.S.C. § 604.

[202] *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act).

[203] *See Order, supra*, paras. 8-16.

[204] *See id., supra*, paras. 18-23.

[205] *See id., supra*, paras. 24-29.

sender must honor that request within the shortest reasonable time, not to exceed 30 days.[206]

71. In addition, the *Order* declines to exempt small businesses from the cost-free mechanism requirement, in part because the Commission is not requiring senders to provide toll-free telephone numbers for recipients to make opt-out requests.[207] Finally, the *Order* does not carve out an exemption for tax-exempt nonprofit professional or trade associations from the opt-out notice requirement, noting that the benefits to consumers of having opt-out information readily available outweigh the burden in including such notices.[208]

72. Finally, the *Order* addresses certain issues raised in petitions for reconsideration of the *2003 TCPA Order*[209] concerning the TCPA's facsimile advertising rules. Specifically, the *Order* provides guidance to fax senders on what messages do not constitute unsolicited advertisements for purposes of the fax rules and therefore could be sent without the prior permission of the recipient. The *Order* clarifies that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as a request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA.[210] The *Order* also concludes that messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements. These might include a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, an account statement, or communications sent to facilitate a loan transaction already entered into by the recipient.[211] In addition, the *Order* determines that facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules.[212] An incidental advertisement contained in such a facsimile does not convert the entire communication into an advertisement.

### B. Summary of Significant Issues Raised by Public Comments in Response to the Supplemental IRFA

73. The only comment filed directly in response to the IRFA was from the Office of Advocacy of the U.S. Small Business Administration (Advocacy).

74. In its comments, Advocacy identified five proposed rules that would impact small businesses. First, Advocacy noted the Commission's proposal to limit the duration of the EBR as it

[206] *See id., supra*, paras. 30-32.

[207] *See id., supra*, para. 28, n.103.

[208] *See id., supra*, para. 41-42.

[209] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*).

[210] *See Order, supra*, para. 43.

[211] *See id., supra*, para. 49.

[212] *See id., supra*, para. 53.

applies to unsolicited fax advertisements.[213] Advocacy contends that, as required by the Junk Fax Prevention Act, the proposed rule does not include an analysis or determination that the EBR has resulted in a significant number of complaints.[214] Advocacy does not believe that the FCC has gathered the necessary information about complaints to limit the EBR. In addition, Advocacy contends that for small businesses to keep track of inquiries by customers would require a considerable increase in the amount of record-keeping and would impede the ability of small businesses to respond to such inquiries.[215]

75. Second, the Commission asked whether it was necessary to set forth rules on what is to be considered "clear and conspicuous" for purposes of an opt-out notice on a fax advertisement.[216] Advocacy believes that the clear and conspicuous requirement should be held to a reasonable standard and that "any further attempts by the FCC to define the notice requirement would likely become mired in minutia and would likely cause more confusion than guidance."[217]

76. Third, Advocacy believes that 30 days to comply with a do-not-fax request is reasonable.[218] Fourth, Advocacy recommends that the Commission exempt small businesses from the cost-free mechanism requirement in the Junk Fax Prevention Act.[219] Advocacy contends that many small businesses (particularly very small businesses) do not have toll-free numbers. If the Commission determines not to exempt small businesses, Advocacy recommends that the FCC allow them to use alternatives to toll-free numbers because of the "great expense associated with maintaining toll-free numbers."[220] They state that small businesses recommend e-mail, web-based systems, or the designation of a third party as viable alternatives. Advocacy also says that small businesses believe that once a small business has chosen a means of receiving do-not-fax requests, then opt-out requests should only be enforceable if they are received in that manner.[221] Finally, Advocacy indicates that small businesses believe an exemption for tax-exempt nonprofit associations from the opt-out notice requirement would be appropriate.[222]

### C. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

77. The RFA directs agencies to provide a description of, and, where feasible, an estimate of,

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[213] SBA Advocacy Comments at 6.

[214] *Id.*

[215] *Id.*

[216] *JFPA NPRM*, para. 20.

[217] SBA Advocacy Comments at 7.

[218] *Id.* at 7-8.

[219] *Id.* at 8-9.

[220] *Id.*

[221] *Id.* at 9.

[222] *Id.*

the number of small entities that may be affected by the rules adopted herein.[223] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[224] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[225] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[226]

78. A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[227] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[228] The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[229] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[230] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[231]

79. A more precise estimate of small businesses affected might be made. The IFRA stated that the Commission's rules on the sending of unsolicited facsimile advertisements would apply to any entity, including any telecommunications carrier, that uses the telephone facsimile machine to advertise.[232] Advocacy agreed, stating that "since what can be considered a commercial fax is so broad, it is appropriate for the FCC to consider that its rule could potentially impact almost all small businesses."[233] Advocacy also noted that the U.S. Census Bureau updated its estimates based upon

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[223] 5 U.S.C. § 604(a)(3).

[224] 5 U.S.C. § 601(6).

[225] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[226] 15 U.S.C. § 632.

[227] 5 U.S.C. § 601(4).

[228] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[229] 5 U.S.C. § 601(5).

[230] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

[231] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[232] *JFPA NPRM*, para. 48. We also sought comment on the entities that must comply with the rules.

[233] SBA Advocacy Comments at 5.

census information from 2002, which places the total number of small businesses in the United States (which it defines as firms with fewer than 500 employees) at 5.68 million.[234] Advocacy explains that ordinarily the SBA defines small business on an industry-by-industry basis. However, Advocacy contends that this is not practicable for the proposed rules because of its "broad applicability across industry lines which would create confusion on the part of small businesses" as to whether or not they are covered by the rules. Accordingly, Advocacy recommends the Commission consider adopting a new small business size standard for this rule.[235] Drawing from the input from small business groups, Advocacy recommends that the FCC adopt a size standard of 100 employees for this rulemaking. Based on the U.S. Census 2002 numbers, Advocacy indicates that 5.6 million firms would then qualify as small businesses.[236] Given that we are not exempting small businesses from the requirement to identify a cost-free mechanism for fax recipients to opt-out of future unwanted faxes, we conclude it is not necessary at this time to adopt a new small business size standard for this rule. Therefore, we estimate that, consistent with Advocacy's comments, the rules apply to 5.68 million small entities across all industries in the United States.

### D. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements

80. The *Order* will likely result in increases in projected reporting, record keeping, and other compliance requirements for senders of facsimile advertisements. The statutory and rule changes affect both small and large companies. First, in accordance with the Junk Fax Prevention Act, the *Order* adopts an EBR exemption for sending fax advertisements. Should a question arise as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient. However, the Commission emphasized that there is no requirement that senders of fax advertisements maintain any specific records demonstrating that an EBR exists. We believe the EBR can be demonstrated with records kept in the usual course of business, such as purchase agreements, sales slips, applications and inquiry records.[237]

81. In accordance with the Junk Fax Prevention Act, the Commission concluded that an EBR alone does not entitle a sender to fax an advertisement to an individual consumer or business. The sender must also ensure that the telephone facsimile number was provided voluntarily by the recipient. We find that it would be permissible for the sender to fax an advertisement to a recipient that had provided a facsimile number directly to the sender, for example, on an application, information request, contact information form, or membership renewal form.[238] In the event a recipient complains that its facsimile number was not provided to the sender, the burden rests with the sender to demonstrate, with such business records, that the number was communicated in the context of the EBR. Similarly, if the facsimile number was obtained from the recipient's *own* directory, advertisement, or internet site, the Commission determined that it was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile

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[234] *Id.* at 4 (*citing* U.S. Census Bureau, *Statistics of U.S. Businesses, Tabulations by Enterprise Size 2002* <http://www.census.gov/csd/susb/usalli02.xls>).

[235] SBA Advocacy Comments at 4.

[236] *Id.* at 5.

[237] *See Order, supra*, para. 12.

[238] *See id., supra*, para. 14.

number in question. In such circumstances, the facsimile recipient's own advertisement would serve as evidence of the recipient's agreement to make the number available for public distribution.[239] If the sender obtains the number from sources of information compiled by third parties, the sender must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient. While the Commission is not requiring that any specific records be kept, should a question arise about how the facsimile number was obtained, the sender would need to demonstrate that it was voluntarily provided.[240] It is up to senders to determine the best way to do so if that becomes necessary.

82. The Junk Fax Prevention Act requires facsimile senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender. In the *Order*, we require that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements.[241] The notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax. The notice also must include a domestic contact telephone number and a facsimile machine number, and at least one cost-free mechanism for transmitting an opt-out request. In the *Order*, the Commission concluded that a website address, email address, toll-free telephone number, or toll-free facsimile machine number will constitute "cost-free mechanisms" for purposes of the rules. For those facsimile senders that do not already have one of these mechanisms in place, they will need to implement one in order to give recipients a cost-free way of opting-out of faxes. In accordance with the statute, the mechanism must accept opt-out requests 24 hours a day, 7 days a week at the mechanisms identified in the notice.[242] The rules also require that highly involved fax broadcasters must ensure that the faxes it transmits on behalf of each sender contain the necessary information to allow a consumer to opt-out of a particular sender's faxes in the future.[243]

83. The new rules require that a facsimile sender that receives a request not to send future unsolicited advertisements that complies with the rules must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days from the date of such request and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender.[244] Facsimile senders will need to take steps to remove such facsimile numbers from their faxing databases, or maintain do-not-fax lists to avoid sending advertisements to recipients that have opted out, within the shortest reasonable time, not to exceed 30 days. If a recipient subsequently provides the sender with his express permission to send advertisements, whether orally or in writing, the burden of proof rests with the sender to demonstrate that permission was given. Thus, we suggest that senders take steps to promptly document that they received such permission by, for instance, recording the oral authorization, or using established business practices

[239] *See id., supra*, para. 15.

[240] *See id.*

[241] *See id., supra*, para. 24.

[242] *See id., supra*, para. 29.

[243] *See Order, supra*, para. 38.

[244] *See Order, supra*, paras. 30-31.

or contact forms.[245]

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

84. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[246]

85. In this *Order*, we adopt rules in accordance with the provisions in the Junk Fax Prevention Act. In doing so, we consider a number of alternatives to minimize the economic impact on small entities that must comply with the rules. In this *Order*, the Commission adopts an EBR exemption to the prohibition on sending unsolicited facsimile advertisements. The exemption will permit all entities, including small businesses, to send fax advertisements to their EBR customers without having to secure written permission from them first. In addition, the Commission was authorized by Congress to consider limiting the duration of the EBR. In the *Order*, the Commission determined not to limit the EBR and alternatively indicated it would closely monitor implementation of the new EBR exemption and opt-out policies adopted in the *Order*.[247] As part of its review, the Commission will evaluate the Commission's complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements and whether such complaints involve fax advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.[248]

86. In addition, the Junk Fax Prevention Act requires facsimile senders to include a clear and conspicuous notice on the first page of the unsolicited advertisement that instructs the recipient how to opt-out of future unwanted faxes. As discussed in the *Order*, the Commission considered defining clear and conspicuous to mean a notice that is on the first page of the advertisement and apparent to a reasonable consumer.[249] Alternatively, we considered providing additional guidance to ensure that consumers are aware of their opt-out rights and sending parties have standards by which they can comply with the law.[250] In the *Order*, the Commission determined that "clear and conspicuous" for purposes of the opt-out notice means a notice that would be apparent to a reasonable consumer and located on the first page of the fax advertisement. We further clarified that the notice must be separate from the

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[245] *See Order, supra*, para. 46.

[246] 5 U.S.C. § 603(c).

[247] *See Order, supra*, paras. 21-23.

[248] *See id., supra*, para. 23.

[249] *See id.*, para. 25.

[250] *Id.*

advertising copy or other disclosures and placed at either the top or bottom of the fax.[251] However, we declined to adopt rules specifying the font type, size and wording of the notice.

87. The statute also requires that senders identify in their notices a cost-free mechanism for recipients to transmit opt-out requests to the senders. Rather than require senders to provide a toll-free telephone number for consumers to request that no future faxes be sent, the Commission chose an alternative approach that permits senders to use a website address, email address, toll-free telephone number, or toll-free facsimile number.[252] Allowing senders to use websites and email addresses should minimize any burdens on them, particularly small businesses for whom setting up a toll-free number might be costly. The Commission also determined that recipients must use the opt-out mechanisms identified by the senders in their notices so that such businesses, including small businesses, can more easily account for all opt-out requests and process them in a timely manner.[253]

88. In the *JFPA NPRM*, the Commission sought comment on whether to exempt small businesses from the requirement to provide a cost-free mechanism for a recipient to transmit an opt-out request.[254] As noted above, the Commission declined to require fax senders to offer a toll-free number for recipients to request that no future faxes be sent. Given that we are not mandating the use of toll-free numbers, as well as the support in the record for using websites and email addresses by small businesses, the Commission determined not to exempt small businesses from the cost-free mechanism requirement.[255] The Commission found that the record contained little empirical evidence that the costs associated with setting up a website or email address would be unduly burdensome to a small business given its revenues.[256]

89. The Commission also considered the burdens to businesses of having to comply with opt-out requests in the "shortest reasonable time." The record revealed that some commenters support a period of 30 days within which senders must comply with opt-out requests. Other commenters support a shorter period of time for honoring do-not-fax requests, such as 10 or 15 days.[257] In the *Order*, the Commission determined to require senders to honor requests within the shortest reasonable time from the date of such request, not to exceed 30 days.[258] We believe this will permit both senders with large databases of facsimile numbers, as well as small businesses with limited resources, to remove numbers for individuals that opt-out of faxes.

90. Finally, the *Order* removes the Commission's rule at section 64.1200(a)(3)(i) which requires the sender to obtain a signed, written statement indicating the recipient's consent to receive

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[251] *See id.*, para. 26.

[252] *See id.*, paras. 27-28.

[253] *See id.*, para. 34.

[254] *JFPA*, para. 22.

[255] *See Order, supra*, para. 27-28.

[256] *Id.*

[257] *See id.*, para. 30.

[258] *See id.*, para. 31.

facsimile advertisements.[259] The Commission determined instead that prior express invitation or permission to send an advertisement may be given by oral or written means, including electronic methods. We noted that written permission could take many forms, including email, facsimile, and internet form. We believe this determination will permit small entities to obtain permission more easily from consumers who make inquiries, file applications, or request information.

### F. Report to Congress

91. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the SBREFA.[260] In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order* and the FRFA (or summaries thereof) will also be published in the Federal Register.[261]

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[259] *See id.*, para. 11, n.38.

[260] *See* 5 U.S.C. § 801(a)(1)(A).

[261] *See* 5 U.S.C. § 604(b).

## Appendix C

**Comments Filed**

| | |
|---|---|
| American Society of Travel Agents, Inc. | ASTA |
| American Society of Association Executives | ASAE |
| American Bar Association | ABA |
| American Financial Services Association | AFSA |
| America's Community Bankers | ACB |
| American Road & Transportation Builders | ARTBA |
| American Teleservices Association | ATA |
| ACA International | ACA |
| American Business Media | ABM |
| Attorneys General of Arkansas, Connecticut, Kentucky, and New Mexico | AGs |
| American Bankers Association | American Bankers Assoc |
| American Health Care Association | Am Health |
| American Hotel and Lodging Association | AHLA |
| Bank of America | Bank of America |
| B. Sachau | Sachau |
| Credit Union National Association | CUNA |
| Comerica Incorporated | Comerica |
| Coastal Training Technologies Corporation | CTTC |
| Consumer Bankers Association | CBA |
| Countrywide Home Loans | Countrywide |
| Direct Marketing Association | DMA |
| Electronic Privacy Information Center | EPIC |
| Douglas M. McKenna | McKenna |
| Everett Laboratories, Inc. | Everett Labs |
| Empire Corporate Federal Credit Union | Empire |
| Harold Hallikainen | Hallikainen |
| Huntington National Bank | Huntington Natl Bank |
| Housing Policy Council | HPC |
| International Foodservice Distributors Associations | IFDA |
| Independent Sector | IS |
| Jimmy Sutton | Sutton |
| Joint Comments of Direct Marketing Association, American Association of Advertising Agencies, Association of National Advertisers, Inc. and Magazine Publishers | Joint Associations |
| Joint Comments of Named State Broadcasters Association | State Broadcasters |
| Lorman Education Services | Lorman Ed Services |
| Michael Worsham | Worsham |
| Mortgage Finance Coalition | MFC |
| National Multi Housing Council | NMHC |
| National Association of Realtors | NAR |
| National Federation of Independent Businesses | NFIB |
| National Newspaper Association and Newspaper Association of America | NAA |
| National Association of Wholesaler-Distributors | NAWD |

| | |
|---|---|
| Newsletter & Electronic Publishers Association | NEPA |
| North American Equipment Dealers Association | NAEDA |
| National Independent Automobile Dealers Association | NIADA |
| Office of Advocacy, US Small Business Administration | SBA Advocacy |
| Privacy Rights Clearinghouse | PRC |
| Reed Elsevier, Inc. | Reed Elsevier |
| Robert Biggerstaff | Biggerstaff |
| Securities Industry Association | SIA |
| Society for Human Resource Management | SHRM |
| Sprint/Nextel | Sprint |
| Staples, Inc. | Staples |
| Texas Office of Public Utility Counsel | Texas OPC |
| Verizon | Verizon |
| Wayne G. Strang | Strang |
| Westfax, Inc. | Westfax |
| Yellow Pages Association | YPA |

**Reply Comments Filed**

| | |
|---|---|
| Robert Biggerstaff | Biggerstaff |
| CBS Corporation | CBS |
| Direct Marketing Association | DMA |
| Fax Ban Coalition | Fax Ban Coalition |
| Lorman Education Services | Lorman Ed Services |
| Douglas M. McKenna | McKenna |
| National Association of Realtors | NAR |
| National Association of Broadcasters | NAB |
| Wayne G. Strang | Strang |
| Texas Office of Public Utility Counsel | Texas OPC |

**Petitions For Reconsideration of 2003 Report and Order Filed**

| | |
|---|---|
| Air Conditioning Contractors of America (8/12/03) | Air Conditioning Contractors |
| American Association of Advertising Agencies, Association of National Advertisers, and National Association of Broadcasters (filed as AAAA/ANA/NAB) (8/25/03) | Advertising Agencies |
| American Business Media (8/25/03) | American Business Media |
| American Dietetic Association (8/6/03) (8/25/03) | Dietetic Association |
| American Society of Association Executives (7/25/03) (8/20/03) | ASAE |
| American Tire Distributors, Inc. (8/25/03) | American Tire |
| Association of Small Business Development Centers (filed as Donald Wilson) (8/11/03) | ASBDC |
| Biggerstaff, Robert (8/22/03) | Biggerstaff |
| Brautigam, Jr., Lawrence C. (8/25/03) | Brautigam |
| Brown, Dennis C. (8/18/03) | Brown |
| California Association of Realtors (8/25/03) | California Realtors |

| | |
|---|---|
| Chamber of Commerce of the United States, Associated General Contractors of America, Community Associations Institute, Credit Union National Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Grocers Association, National Restaurant Association, and National Federation of Independent Business (filed as The Chamber of Commerce of the United States, et al.) (8/25/03) | Chamber of Commerce |
| Coalition for Healthcare Communication (8/25/03) | Coalition for Healthcare |
| Consumer Bankers Association (8/26/03 – LATE FILED) | Consumer Bankers |
| Consumer Electronics Association (8/21/03) | Consumer Electronics |
| Copia International, Ltd. (filed as Steve Hersee) (8/25/03) | Copia |
| Direct Marketing Association (8/25/03) | DMA |
| FaxDaily (filed as John Mayhill) (8/12/03) | FaxDaily |
| Faxts, Inc. (filed as Edwin Solot) (8/22/03) | Faxts |
| Financial Services Coalition (8/25/03) | Financial Services Coalition |
| Independent Insurance Agents and Brokers of America (8/25/03) | Independent Insurance Agents |
| Independent Sector (filed as Patricia Read) (8/25/03) | Independent Sector |
| Jobson Publishing LLC (8/25/03) | Jobson |
| Maryland Association of Nonprofit Organizations (filed as Henry W. Bogdan) (8/25/03) | Maryland Nonprofit |
| National Association of Business Political Action Committees (8/25/03) | Business PACs |
| National Association of Chain Drug Stores (8/25/03) | Chain Drug Stores |
| National Association of Realtors (8/25/03) | NAR |
| National Retail Federation (8/4/03) (refiled 9/17/03) | National Retail |
| Newsletter & Electronic Publishers Association (8/15/03) | Newsletter & Electronic Publishers |
| Newspaper Association of America and the National Newspaper Association (filed as Newspaper Association of America) (8/22/03) | Newspaper Association |
| Nextel Communications, Inc. (filed as Nextel Communicaitons, Inc.) (8/25/03) | Nextel |
| Office of Advocacy, U.S. Small Business Administration (8/25/03) | Office of Advocacy |
| Presidential Classroom for Young Americans Inc. (8/20/03) | Presidential Classroom |
| Produce Marketing Association (8/18/03) | Produce Marketing |
| Proximity Marketing (8/6/03) (8/25/03) | Proximity Marketing |
| Reed Elsevier Inc. (8/25/03) | Reed Elsevier |
| Scholastic Inc. (8/21/03) | Scholastic |
| Travel Industry Group (8/25/03) | Travel Industry Group |
| Wells Fargo & Company (8/25/03) | Wells Fargo |
| Yellow Pages Integrated Media Association (8/25/03) | Yellow Pages |

**Oppositions to Petitions for Reconsideration Filed**

| | |
|---|---|
| National Association of State Utility Consumer Advocates (10/14/03) (filed as NASUCA) | NASUCA |
| Oney, Walter (9/23/03) | Oney |
| Strang, Wayne G. (10/20/03) | Strang |
| Yellow Pages Integrated Media Association (10/14/03) | Yellow Pages |
| YP.Net (10/14/03) | YP.Net |

**Replies to Oppositions Filed**

| | |
|---|---|
| America's Community Bankers (11/3/03) (filed as America Community Bankers) | Community Bankers |
| Biggerstaff, Robert (10/31/03) | Biggerstaff |
| National Association of Wholesaler-Distributors (11/5/03) | Wholesaler-Distributors |
| National Federation of Independent Business (11/3/03) | NFIB |
| Office of Advocacy, U.S. Small Business Administration (10/30/03) | Office of Advocacy |

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

| | | |
|---|---|---|
| In The Matter of | ) | MB Docket No. 04-191 |
| | ) | |
| **San Francisco Unified School District** | ) | |
| | ) | |
| For Renewal of License for Station | ) | Facility ID No. 58830 |
| KALW(FM), San Francisco, California | ) | File No. BRED-19970801YA |
| | ) | |

**Appearances**

*Marissa G. Repp, Esquire* and *Martin A. Price, Esquire*, on behalf of San Francisco Unified School District; *James W. Shook, Esquire* and *Dana E. Leavitt, Esquire,* on behalf of the Enforcement Bureau

# INITIAL DECISION
# OF
# CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

**Issued:** April 6, 2006 **Released:** April 7, 2006

## PRELIMINARY STATEMENT

1. This proceeding was set to determine whether the application of San Francisco Unified School District ("SFUSD") for renewal of license for noncommercial educational Station KALW(FM) should be granted. *San Francisco Unified School District, Hearing Designation Order and Notice of Apparent Liability for Forfeiture,* 19 FCC Rcd 13326 (2004) ("*HDO*").[1]

### Issues

2. The Commission specified issues:

(1) To determine whether San Francisco Unified School District falsely certified its application with respect to the completeness of the KALW(FM) public inspection file and the effect thereof on its qualifications to be a Commission licensee.

[1] The *HDO* was issued incident to allegations of a petition to deny renewal filed on November 3, 1997. *HDO* at Paras. 1-5.

(2) To determine whether San Francisco Unified School District made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its certification in the subject license renewal application that it had placed in the KALW(FM) public inspection file at the appropriate times the documentation required by Section 73.3527, and the effect thereof on its qualifications to be a Commission licensee.

(3) To determine, in light of the evidence adduced pursuant to the specified issues, if the captioned application for renewal of license for station KALW(FM) should be granted.

*HDO* at Para. 24.

3. Whether or not the hearing record warrants denial of SFUSD's renewal, the Presiding Judge shall determine whether an Order of Forfeiture in an amount not to exceed $300,000 should be issued against SFUSD for willful and/or repeated violations of the Communications Act and the Commission's rules. *HDO* at Para. 25. *See* § 503(b) (1) of the *Communications Act of 1934*, as amended [47 U.S.C § 503(b) (1)]; 47 C.F.R. §§ 73.3527 and 73.3613.

4. SFUSD was permitted to introduce evidence on meritorious service, limited to one year of programming that aired prior to the filing of a Petition to Deny – November 3, 1996 to November 3, 1997 – and to the one year of programming that aired prior to release of the *HDO* – July 16, 2003 to July 16, 2004. Meritorious programming is considered "only to argue ascertainment of community interests, and/or for considering reduction of forfeiture amounts." *See Memorandum Opinion and Order*, FCC 04M-31, released October 8, 2004, and *Memorandum Opinion and Order*, FCC 04M-37, released November 12, 2004.

5. The Presiding Judge added an issue:

> To determine whether station KALW(FM) has provided meritorious service relevant to a renewal of SFUSD's license, and/or relevant to mitigating the amount of any forfeiture.

*Order*, FCC 05M-42, released September 16, 2005.

6. The Presiding Judge also added an issue:

> To determine whether San Francisco Unified School District through its agents made misrepresentations of fact and/or lacked candor before the Commission during, or in connection with, discovery testimony taken by the Enforcement Bureau on September 28, 2004.

*Memorandum Opinion and Order*, FCC 05M-17, released April 1, 2005, *modified by Addendum*, FCC 05M-20, released April 5, 2005.

### Burdens of Proof

7. SFUSD must establish by a preponderance of the evidence that its renewal application certification was not intentionally false in representing that the public inspection file ("PIF") for Station KALW(FM) contained all documentation required by the Commission's rules, and that such documentation was placed in the file at the times specified by the rules. SFUSD also must prove by a preponderance of evidence that its subsequent representations about the completeness of its PIF made in responses to a petition to deny and to a letter of inquiry, were not intentionally false.

8. On the added issue about the truthfulness of SFUSD deposition testimony, the Enforcement Bureau has the burdens of proceeding and proof.

9. An evidentiary hearing on the issues was conducted from June 6 to June 10, 2005. The parties proffered witness testimony, conducted cross-examination, and introduced documentary exhibits.[2] Following the hearing, there were received into evidence additional exhibits sponsored by SFUSD. *Order* FCC 05M-31, released June 23, 2005. On October 7, 2005, the parties filed Proposed Findings of Fact and Conclusions of Law. On November 15, 2005, Reply Proposed Findings of Fact and Conclusions of Law were filed.

## FINDINGS OF FACT

### Background

10. SFUSD has held the license for station KALW(FM) ("Station") since its inception in 1941. (Official Notice; SFUSD Exh. 22, p. 19.) Its most recent license renewal was on December 31, 1990. (Official Notice.) KALW(FM) provides non-commercial educational service to the residents of San Francisco and nearby communities. This service includes locally-produced programs and programming obtained from National Public Radio and Public Radio International.[3] SFUSD and the Bureau stipulate that the Station provided meritorious service during the relevant time periods and furnished broadcast programming to San Francisco responsive to community needs, interests and concerns. (SFUSD Exh. T-6 at 2; Stipulation filed August 31, 2005.)

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[2] Hereafter, each of SFUSD's exhibits will be referred to as (SFUSD Exh. __) and each of the Bureau's exhibits will be referred to as (EB Exh. __). Hearing transcript pages will be referred to as (Tr. __).

[3] SFUSD Exh. T-6 at 2.

### Governance

11. SFUSD is governed and controlled by an elected Board of Education ("BOE"), comprised of seven members serving four-year terms. A Superintendent of Schools ("Superintendent") hired by the BOE has overall responsibility for SFUSD's operations, including the operation of the Station. The Superintendent has delegated administrative authority to oversee Station operations to one or more special assistants or consultants. (SFUSD Exh. T-4 at 2.) By letter dated February 17, 2006, counsel for SFUSD reported that Superintendent Arlene Ackerman is retiring and she is being replaced by new Superintendent Gwen Chan.

12. SFUSD and the Superintendent do not participate in the Station's day-to-day management. The Station's General Manager handles the day-to-day responsibilities, including the preparation of an annual report. There are assistants to the Superintendent designated to keep her informed of issues affecting the Station. In September 2004, in response to the matters addressed in this proceeding, the superintendent issued a directive that all applications and filings with the Commission must be cleared by communications counsel, and Station management must report in writing to the Superintendent annually on regulatory compliance. (SFUSD Exh. T-4 at 2-3.)

13. SFUSD's support of the Station is limited to in-kind services such as the sites of the station's offices and studios, and administrative assistance. (SFUSD Exh. 22 at 19.) The Station does not receive direct financial support from SFUSD. All operating funds come from donations of listeners, grants from the Corporation for Public Broadcasting, and grants from underwriters. (SFUSD Exh. 15 (dep. at 205-13); SFUSD Exh. 18 (dep. at 403-07)). During fiscal year ending June 30, 2004, KALW(FM) received $1.3 million for its operations, more than $1 million of which came from listener donations. (SFUSD Exh. 78-C at 6.)

14. On July 30, 1997, Mr. Ramirez forwarded a completed renewal application to SFUSD for review and signature. Under the Superintendent's name, SFUSD certified to the Commission that "the statements in this Report [renewal application] are true, complete and correct to the best of my knowledge and belief, and are made in good faith." On July 30, 1997, counsel for SFUSD reviewed the final renewal application to be certified. (EB Exh. 7 at 2.) On July 30, 1997, former SFUSD Superintendent Waldemar Rojas signed the renewal application, thereby certifying that all representations were accurate. Mr. Ramirez mailed the renewal application to the Commission on July 30, 1977, and it was stamped as filed at the Commission on August 1, 1997. (SFUSD Exh. 5 at 1-5.) It appears from this record that the affixing of a signature at the Superintendent's level was an act taken in the course of SFUSD's business. The Superintendent's signature was the act of certification for SFUSD.

15. There is no evidence that indicates that supervisors at SFUSD had sufficient information on July 30, 1997, to believe that the renewal application and a related PIF were deficient. However, SFUSD's management must have known that a petition to deny renewal had been filed on November 3, 1997, and was aware of the Bureau's letter of inquiry of February 5, 2001 ("LOI"). On May 24, 2001, shortly after counsel responded to the LOI on behalf of SFUSD, they submitted to Superintendent Ackerman a "Report on License Renewal". (SFUSD

Exh. 22.) SFUSD was reminded by counsel that on November 3, 1997, a petition to deny renewal had been filed that was based on an alleged "failure to maintain the station's public file in accordance with FCC rules." (*Id.* at 3.) Counsel expressed their opinion that the charges lacked any merit. (*Id.*)

### General Managers

16. The Station is a non-profit, non-commercial enterprise. Station Managers are salaried employees having no monetary stake, and there is no profit motive at any level of management, including General Manager. SFUSD employs a General Manager who is responsible for the Station's day-to-day management. Recent General Managers include: Margaret Ann (Nicole) Sawaya (March 1, 2001 – March 24, 2006),[4] William Helgeson (acting October 2000 – February 28, 2001 and January 1998 – mid-1998),[5] Michael Johnson (mid-1998 – September 2000), and Jeffrey Ramirez (August 5, 1996 – January 31, 1998).

17. The General Manager has responsibility for updating and maintaining the Station's PIF. (EB Exh. 5 at 117.) One requisite is maintaining updated and current ownership information in the PIF. 47 C.F.R. §§ 73.3527(c), 73.3615(e), (f), (g) (1996) (EB Exh. 59). In 1997, supplemental ownership reports were to be placed in the PIF after election changes of BOE membership.[6] Issues/programs lists were to be placed in the PIF on a quarterly basis, ten days following the end of each calendar quarter. 47 C.F.R. § 73.3527(a) (7)(1996) (EB Exh. 59 at 2-3). When a renewal application was filed on August 1, 1997, the Station's PIF was deficient in its ownership reports, and in its issues/programs lists.

18. Jeffrey Ramirez became General Manager on August 5, 1996, and left the Station on January 31, 1998. (SFUSD Exh. T-1 at 1.) His initial concerns were logistics for a Station move that was completed in December 1996. (Tr. 669.) At the same time, he was responsible for programming, funding, program changes, weather and traffic reports, and a new underwriting program. (SFUSD Exh. T-1 at 4-7.) The Station had been required to operate from a series of temporary locations following a 1989 earthquake that had destroyed the high school housing the Station's studios and offices. (SFUSD Exh. T-2 at 5.) PIF deficiencies existed and occurred during his tenure. He resigned in early 1998. He was temporarily replaced in July 1999, by Mr. Michael Johnson. Mr. Helgeson served as interim manager in between Ramirez – Johnson – Sawaya appointments. Ms. Sawaya arrived at the Station on March 1, 2001. (SFUSD Exh. T-3 at 1.)

---

[4] SFUSD has advised that Ms. Sawaya was resigning effective March 24, 2006.

[5] Since 1992, Mr. Helgeson has at various times served in the dual capacity of Operations Manager and acting General Manager.

[6] Current responsibilities differ. *See* 47 C.F.R. §§ 73.3527(e) (4), 73.3615(d), (f), (g) (2004). There are no longer requirements for supplemental ownership reports.

19. In August 1996, Mr. Ramirez was hired as General Manager of the Station. (SFUSD Exh. T-1 at 1, 2.) Mr. Ramirez believes that he successfully sold himself at SFUSD interviews with his "programming experience, creativity and positive energy." (*Id.* at 3.) He had no prior general manager experience, his exposure to regulatory aspects of station management was "very limited," and he had never before been involved with a license renewal application or the maintenance of a public information file. (*Id.* at 3-4.)

### New Oversight Policy

20. In September 2004, Superintendent Ackerman issued a directive to the Station and to her immediate staff that "all applications, reports and filings made by [SFUSD] must be cleared in advance with outside communications counsel." (SFUSD Exh. 48.) There was no similar "directive" in effect in 1997, and Mr. Ramirez, a regulatory novice, was virtually left to his own devices. However, he did have access to and did utilize services of communications counsel provided by SFUSD to the Station and its General Manager.

### Public Inspection File

21. Proper maintenance of a PIF is important. *See N. Benfield, et al,* 13 FCC Rcd 4102, 4105 (Mass Media Bur. 1997). Contents of a PIF are not optional, and a PIF must contain copies of every ownership report filed, and issues/programs lists for each quarter describing the treatment of significant community issues. 47 C.F.R. § 73.3527. The Station's PIF was contained in one file cabinet drawer. It was located in an open space that was readily available to staff, volunteers, and the public. (SFUSD Exh. 22 at 4.) Shortly after becoming General Manager, Mr. Ramirez was counseled by a staff member to inspect the PIF. (SFUSD Exh. T-1 at 11; Tr. 283.) He was cautioned by the Station's Chief Engineer:

> [I]n August 1996, - - - I told Mr. Ramirez that Ownership Reports and quarterly issues reports hadn't been filed, - - -.

(EB Exh. 5 at 42-43.) That exchange occurred "at some time in August 1996 with respect to the public inspection file," but Mr. Ramirez took no action. (SFUSD Exh. 4 at 49; Tr. 352; SFUSD Exh. 1 at 64-5.) He did not begin to focus on the PIF until after receiving a renewal application form and instructions in May 1997, nearly nine months after his conversation with Mr. Evans. (SFUSD Exh. T-1 at 12; Tr. 280-83, 354, 357, 368.)

22. In June 1997, Mr. Ramirez perused the PIF and he found it to be disorganized. (SFUSD Exh. T-1 at 12.) He asked Ms. Susen Hecht, a Station volunteer, to put the file in order, without giving her specific instructions. (Tr. 372-73.) She did not put the file in any particular order. But without being asked, she provided Mr. Ramirez with a written inventory of what she had found in the PIF. She entitled her report "License Renewals Materials – In Files At Present" (referred to as "Hecht report"). (SFUSD Exh. T-1 at 12-13; Tr. 376-77.)

23. Ms. Hecht volunteered at the Station for four years. (EB Exh. 5 at 44) She performed part-time general office work. (EB Exh. 44 at 195.) She averred in an affidavit:

> In June 1997, Station Manager Jeff Ramirez asked me to review the public inspection files for license renewal purposes, which I did. I found the files disorganized and incomplete. I itemized the contents of the files and gave Mr. Ramirez written confirmation titled *License Renewal Materials – In Files at Present* in June 1997. (Italics in original.)

(EB Exh. 5 at 44-49.) Her affidavit "testimony" confirms the position she held as Station volunteer, and establishes the genuineness of her written report in the form of an inventory that she provided to Mr. Ramirez. (EB Exh. 5.) The reliability of her report was attested to by the testimony of a knowledgeable witness, Mr. Jason Lopez. (EB Exh. 4 at 5-6.) Ms. Hecht was unavailable for deposition or cross-examination as her whereabouts are unknown. (Tr. 722; EB Exh. 4 at 5.)

**Hecht Report**

24. The Hecht report was an exhibit to a petition to deny SFUSD's renewal that was filed in November, 1997. (EB Exh. 5 at 44-49.) Ms. Hecht itemized in writing what she found and what she did not find in the PIF. Mr. Ramirez elected to ignore Ms. Hecht's report, and there was no evidence of Mr. Ramirez questioning her on the contents of her report. He testified:

> .... I never read Susen Hecht's document closely, nor gave it much consideration at all.... Instead, I conducted and relied upon my own review of the PIF.

(SFUSD Exh. T-1 at 12-13.) SFUSD has acknowledged that Mr. Ramirez did read the Hecht report. (EB Exh. 38 at 5.)

25. The Hecht report reflected the following:

> Ownership reports --- for the following dates:
>
> 1/13/91; 11/90; 3/3/89; 9/16/88; 7/28/88; 7/5/83
>
> Minority ownership – 2/28/88 and 2/20/89
>
> Employee Reports –All years included EXCEPT 1994, 1990, 1989
>
> Reports Missing: 1992, 1990, 1989, 1988 and 1983

\- - -

CONTENTS - - -
Programs – Incomplete 1992 (Winter and Spring ONLY)
Complete 1991; partials for 97-98.
[PRO]Gram List – Empty

(EB Exh. 5 at 46 – 49.) Ms. Hecht needed no expertise merely to observe the contents of a file, write down what she found, and note what she did not find. SFUSD offered no evidence to rebut the contents of her report. Therefore, the Hecht report can be considered as reliable evidence of deficiencies existing in the Station's PIF in 1997, containing ownership reports and issues/programs lists.

26. Mr. Ramirez may have reviewed the PIF in May or June of 1997, but without benefit of deficiencies noted in the Hecht report. She notes in her affidavit that she "found the files disorganized and incomplete." (EB Exh. 5 at 44.) There were enough "red flags" in the Hecht report which, in conjunction with Mr. Evan's earlier warning, put Mr. Ramirez on notice that the PIF was deficient. He should have given the Hecht report a "hard look," and he should have debriefed Ms. Hecht in order to learn the true state of the PIF. He did neither. Mr. Ramirez was grossly negligent and irresponsible in failing to follow up or otherwise utilize the informative Hecht report.

## Renewal Application

27. Renewal of SFUSD's license is in abeyance pending a final decision in this proceeding. The renewal term ran from January 1, 1991, to December 1, 1997. On May 15, 1997, the Commission sent SFUSD a renewal application packet. The documents consisted of a renewal application and related instructions, an ownership report form (FCC Form 323-E for noncommercial educational stations), and a broadcast EEO program report (FCC Form 396), and related instructions. (EB Exh. 1.) Mr. Ramirez read the renewal application question and instruction relating to the PIF (SFUSD Exh. 1 at 32-33; SFUSD Exh. T-1 at 12; Tr. 385). Yet he denied familiarity with renewal instructions shown to him at hearing, and he could not recall whether he had reviewed the instructions when he filled out the renewal application. (Tr. 350-51.)

## Renewal Form 303-S

28. Question 1(b), asks:

Have the following reports been filed with the Commission:

(b) The applicant's Ownership Report (FCC Form 323 or 323-E), as required by 47 C.F.R. Section 73.3615?

> (c) If No, give the following information:
>
> Date last ownership report was filed:
>
> Call letters of station for which it was filed:

(SFUSD Exh. 5 at 4.) Mr. Ramirez checked "**Yes.**"

SFUSD's erroneous certification as to its ownership reports filed with the Commission is generally relevant to candor and will receive attention in this decision.[7] But the gravamen of ownership reporting alleged in the *HDO* is in relation to copies being timely deposited in the PIF, Question 2 below.

29. Question 2 asks:

> Has the applicant placed in its public inspection file at the appropriate times the documentation required by 47 C.F.R. Section 73.3226[8] and 73.3527 (local inspection file of noncommercial educational stations)?
>
> If No, attach as an Exhibit a complete statement of explanation.

(SFUSD Exh. 5 at 5.) Mr. Ramirez checked "**Yes.**"

**Public Inspection File**

30. The *HDO* cites the relevant regulation:

> *Public File.* Section 73.3527 of the Commission's rules require all licensees of noncommercial educational broadcast stations to maintain a public inspection file containing designated information. Among the materials required to be in the public inspection file are copies of every ownership report and related materials filed by the station, and issues/programs lists for each

[7] Official notice is taken of the fact that the Station's licensing file maintained in the Commission public reference room contains no "filed" ownership reports subsequent to January 31, 1991. 47 C.F.R. § 1.361 (other proof of official record). The rule requiring educational stations to keep ownership reports was formerly at Section 73.3615(g), and is not at Section 73.3527(e)(8). *See Review of Public Inspection Files*, 13 FCC Rcd 15691 (1998), *recon granted*, 14 FCC Rcd 10922 (1999).

[8] Section 73.3526 pertains to public inspection files of commercial stations and has no application to KALW(FM), an educational station.

> quarter describing the programs that represent "the station's most significant treatment of community issues during the preceding three month period." Both the ownership reports and the issues/programs lists are required to be placed in the public inspection file in a timely manner and retained until the Commission acts on the station's renewal application [footnotes omitted].

*HDO* at 4.

31. The *HDO* alleges, SFUSD admits, and substantial evidence proves:

> (1) The KALW(FM) public inspection file did not contain all of the supplemental ownership reports required - - - on August 1, 1997, when the subject license renewal application was filed.[9] Missing items include the 1995 ownership supplement, which was not signed and dated until December of 1997. Additionally, it appears that the 1993 ownership supplement was not executed and submitted until July 30, 1997, four years after it should have been placed in the public file.
>
> (2) The KALW(FM) public inspection file did not contain the quarterly issues/programs list required by then Section 73.3527(a)(7). That rule requires: (1) a brief narrative describing what community issues were given the station's most significant treatment; (2) the programming that provided this treatment; (3) the time, date, duration, and title of each program in which the issue was treated.

*HDO* at 5.

32. Mr. Ramirez received the form and instructions for completing the renewal application which he read. (SFUSD Exh. T-1 at 13.) Mr. Ramirez became aware of the applicable regulation (47 C.F.R. § 73.3527(e)) which prescribes that a public information file will contain "ownership reports" and "issues programs lists." (*Id.*) He also consulted a National Association of Broadcasters ("NAB") memorandum and a National Public Radio ("NPR") Station Manager's Handbook. (EB Exh. 11-A; SFUSD Exh. 6 at 7-8.) These sources instruct licensees to exercise care in maintaining a complete, current PIF that includes supplemental ownership reports for seven years, and lists of programs providing significant treatment of local

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[9] It is officially noted that the Commission has abolished the supplemental ownership report requirement. *See Biennial Regulatory Review et seq.*, 13 FCC Rcd 11349, 11380 (1998).

issues. After consulting these sources, it was inexcusable and irresponsible for Mr. Ramirez to certify "Yes" to ownership and issues/answers, particularly in view of the "red flag" Hecht report that he rejected.

33. *Question 2* asks the applicant to certify to the completeness of the Station's PIF. Mr. Ramirez understood, or could readily understand, the plain language of the question and instructions, and he had access to communications counsel for advice on how to answer questions. By the time he received Ms. Hecht's inventory report, he had, in some manner, seen the contents of the PIF. (Tr. 376-77.) The Hecht report, if read with a modicum of care, should have sent a responsible General Manager back for a second look at the PIF, particularly in view of Mr. Evans' earlier "heads-up" warning. Resources readily available were wholly sufficient to enable him to follow the Commission's application reporting rules, but he failed.

## Ownership Reports

34. Question 1(b) of the renewal application asks whether the applicant's complete Ownership Reports required by Section 73.3615 have been filed with the Commission. Mr. Ramirez answered "Yes," based on his misunderstanding that Question 1(b) referred only to the current ownership report accompanying the renewal application. (SFUSD Exh. T-1 at 15.) Mr. Ramirez rationalized his erroneous "Yes" answer by assuming that the purpose of the Ownership Reports was to identify the current composition of the BOE where staggered elections are held every two years for four-year terms. (SFUSD Exh T-1 at 15; Tr. 442-44.)

35. Former Section 73.3615 also required licensees to retain in their PIF "[a] copy of all ownership and supplemental ownership reports ...." 47 C.F.R. § 73.3615(g) (1996); (EB Exh. 59 at 6.) Supplemental ownership reports were required within 30 days of changes to the BOE. 47 C.F.R. § 73.3527(f). Newly elected BOE members took office in January 1993, 1995 and 1997. (EB Exh. 40 at 6, 10; EB Exh. 38 at 22-24, 29-31.) SFUSD's renewal application filed with the Commission provided no supplemental reports for 1993 and 1995 to reflect the newly elected BOE members. *Cf. HDO* at 5.

36. Mr. Ramirez claimed ignorance of requirements for supplemental ownership reports for years 1993 and 1995. (Tr. 442-43.) These reports would have disclosed newly elected BOE members in those years. (EB Exh. 34 at 3; EB Exh. 37 at 22-24, 29-31.) He believed that the rules only required placement in the PIF of the 1997 full ownership report (more complete than a supplemental report) which would be the literal "current" report. Mr. Ramirez admitted this misunderstanding in a January 1998 declaration in responding to a petition to deny renewal. (EB Exh. 6 at 17.)

**Issues/Programs Lists**

37. Section 73.3527(a)(7) provides that a non-commercial licensee must retain in a PIF:

> every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three-month period. The list for each calendar quarter is to be filed by the tenth day of the succeeding calendar quarter....

47 C.F.R. § 73.3527(a)(7) (1996); (EB Exh. 59 at 2.) Mr. Ramirez did recognize that programming responsive to issues "important to the community" was to be identified on a list that is placed in the PIF, and he sought such a list when he first reviewed the PIF. (Tr. 387-88.) Mr. Ramirez was searching for a "piece of paper" that reflected programming that addressed community concerns. (Tr. 387.) He could not find such a "piece of paper" and so he asked station program producers to prepare program lists. (Tr. 388, 393.) Mr. Ramirez's "paper chase" is consistent with Mr. Evans' observation that the PIF was a "mess" (EB Exh. 5 at 42), and also with the findings of Ms. Hecht (EB Exh. 5 at 46-49) which were corroborated by Mr. Lopez (EB Exh. 4 at 5-6).

38. A Stipulation shows that a large number of programs were aired during Mr. Ramirez's tenure at KALW that were responsive to needs, interests and concerns of the local community. (SFUSD Exh. 79.) However, the Bureau argues, and it appears from the record, that from 1992 to July 1997, SFUSD was seriously remiss in preparing quarterly lists of programming for inclusion in the Station's PIF. (EB Exh. 5 at 46 [Hecht]; EB Exh. 4 at 13 [Lopez].) Station programming was made available to the public through quarterly program guides distributed at local schools, public buildings, and other locations. (SFUSD Exh. T-6 at 1; SFUSD Exh. T-2 at 13; Tr. 681.) Quarterly program guides are published quarterly and describe weekly programming and special features to be broadcast during specified three month periods. *HDO* at 5 n. 26. SFUSD suggests that its program guides, which were readily available to the listening public, serve as a legitimate proxy for program issues lists. There is no provision in the rules for proxy compliance.

39. Mr. Ramirez consulted NAB guidelines. (EB Exh. 11-A at 1-6 "Your Public File," copyright 1997, NAB, Washington, D.C.) (SFUSD Exh. T-1 at 13.) The NAB guidelines warn that maintaining the PIF is "an important task," that FCC enforcement is "alive and well," and that there is a forfeiture policy for a $10,000 fine on violations. The NAB's guidelines instruct that issues/ programs lists should be retained for eight years, that they should be placed in the PIF file by January 10, April 10, July 10 and October 10 of each year, and that each list should include the issues examined, the time, date and length of the program, the program title, the type of program, and the guests appearing on the program. (EB Exh. 11A at 2, 4.) Mr. Ramirez should have realized before filing the renewal application that SFUSD had not followed NAB guidelines relating to issues/programs lists to be maintained in its PIF at the time SFUSD filed its renewal application in August 1997.

40. Mr. John Covell was producer of a popular program entitled "City Visions" covering local news, elections, and the city's economy. (Tr. 302-03.) Mr. Ramirez asked Mr. Covell to prepare written materials for inclusion in the PIF prior to the submission of the renewal application. (Tr. 305.) Mr. Covell prepared a document providing a list of "City Visions" programs for the period 1992-1997. This "issues/ programs" list was placed in the PIF. (SFUSD Exh. T-1 at 14.) At the time the Station's renewal application was filed, Mr. Ramirez believed that Mr. Covell's list alone was sufficient to satisfy the PIF requirement. (SFUSD Exh. T-1 at 14.)

41. Mr. Ramirez learned after August 1, 1997, that the "City Visions" list was defective in that it did not specify the community issues addressed by each program, that it did not date back to the start of the license term in 1991, and that it was prepared just prior to the completion and filing of the renewal application and did not meet the quarterly filing requirement. (SFUSD Exh. T-1 at 14.) But there is no evidence linking Mr. Ramirez's certification on renewal with other program guides. The "City Visions" list is the sole program documentation that Mr. Ramirez relied upon for certification, and was his only basis for answering "Yes" to Question 2. (EB Exh. 6 at 17-18; SFUSD Exh. T-1 at 14.) Reliance on the "City Visions" list as the basis for PIF certification is unacceptable, and Mr. Ramirez had no basis to rely on the incomplete "City Vision's" list. (EB Exh. 5 at 70-72; Exh. "O" to petition to deny at 1-3.)

**Legal Advice on Renewal**

42. Mr. Ramirez had no experience in preparing a renewal application. (SFUSD Exh. T-1 at 9; Tr. 586.) In exercising good judgment, on May 8, 1997, he contacted the Sanchez Law Firm which had served as communications counsel for SFUSD for 15 years. The firm consisted of Ernest T. Sanchez, Esquire and Susan M. Jenkins, Esquire, both experienced communications counsel ("Sanchez counsel or attorneys"). The firm served as counsel for SFUSD from the 1980s continuing until withdrawal as counsel in September 2004. (SFUSD Exh. 22 at 2, 43.)

43. Mr. Ramirez claims to have relied on counsel for advice in completing the renewal application. (SFUSD Exh. T-1 at 13; EB Exh. 7 at 12.) Mr. Sanchez had conversations with Mr. Ramirez at times between receipt of the renewal application materials on May 15, 1997, and his filing of the renewal application on August 1, 1997. Mr. Ramirez spoke to Mr. Sanchez regarding renewal on at least four separate occasions prior to the submission of the application to SFUSD headquarters for the Superintendent's signature. (EB Exh. 7 at 1-2, billing entries 2309, 1943, 2310 & 1956; Tr. 533-37.) Billing records introduced by the Bureau reflect four separate occasions before filing the renewal application that Mr. Ramirez spoke with Mr. Sanchez. (EB Exh. 7 entries 1943, 1956, 2309-10; Tr. 533.) When Mr. Ramirez completed the application, including his erroneous "Yes" certifications, he forwarded his draft to Mr. Sanchez for review one day before filing. (EB Exh. 7 at 2.)

44. But Mr. Ramirez cannot recall what he asked Mr. Sanchez. (SFUSD Exh.T-1 at 13; Tr. 362-64.) Mr. Ramirez also did not recall whether he told Mr. Sanchez what was in the station's PIF, what he planned to put in the PIF, or whether issues/programs lists had or had not previously been placed in the PIF. (Tr. 403-04.) Notwithstanding this inability to recall, billing records reflect that Mr. Sanchez had conversations with Mr. Ramirez between receipt of the renewal application and the filing of the renewal application. (EB Exh. 7.)[10] But the legal advice given is subject to privilege, and SFUSD has not offered to waive its privilege. In the final analysis, his inability to recall specific advice sought, requires rejecting Mr. Ramirez's claim that he relied on advice of counsel in answering "Yes" to Questions 1 and 2.

**Petition to Deny**

45. Golden Gate Public Radio ("GGPR") is a non-profit corporation. (SFUSD Exh. 22 at 35; EB Exh. 4 at 2.) GGPR's members were employees of Station KALW(FM), either full-time, or part-time, or volunteers. (SFUSD Exh. 4 at 48; SFUSD Exh. 22.) Mr. Dave Evans was Chief Engineer, Mr. Jason Lopez and Ms. Deirdre Kennedy were part-time announcers, and Mr. Mel Baker began working at the Station in early 1996. (EB Exh. 4 at 1; EB Exh. 44 at 123, 139.) Other announcers included Ms. Joann Mar, Mr. Joseph Hughes and Ms. Hedy Jacobitz. All these individuals are described by Mr. Ramirez as "disgruntled." (EB Exh. 6 at 14.)

46. Mr. Ramirez made unpopular programming changes and cut programs that had been popular with the Station's staff. (SFUSD Exh. T1 at 6-7.) He also implemented a new underwriting program for the Station to raise more grant money. (SFUSD Exh. T1 at 7.) Those changes were not favored by certain long-serving staff, and some became upset. (SFUSD Exh. T-1 at 8.) The goal of GGPR was to take over governance and management of the Station. Essentially, GGPR demanded that the School Board turn over operation of the Station. (SFUSD Exh. T1 at 8; SFUSD Exh. 22 at 6; SFUSD Exh. 4 at 79-80.)

47. On October 1, 1977, counsel for GGPR sent to Mr. Sanchez a threatening list of justifications for a petition to deny, making clear that the petition could be avoided by agreeing to allow GGPR to operate the Station. (SFUSD Exh. 4 at 79-80.) There was much at stake for SFUSD, and so Mr. Ramirez relied heavily on experienced counsel to make appropriate corrections and to provide acceptable explanations to the Commission. (SFUSD Exh. T-1 at 18.)

[10] Mr. Sanchez's billing records reflect time spent during this period selecting documents for Mr. Ramirez. (EB Exh. 7 at 1, entry 1819.) Billing records reflect a 45 minute conference call on the renewal application occurring on June 30, 1997. (EB Exh. 7 at 1.) SFUSD was billed for conferences with Mr. Ramirez on May 8, June 30, July 7 and July 10, 1997. (EB Exh. 7 at 1-2.) Telephone calls on July 7 and 10, 1997 exceeded 75 minutes. (EB Exh. 7 at 2.) Mr. Sanchez submitted bills for services rendered on May 7, May 14, May 31, July 2 and July 30, 1997. (EB Exh. 7 at 1-2.) Mr. Ramirez's preparation of the renewal application and the answers certified therein were related to billed legal advice. (Tr. 533)

Billing records reflect that in October 1997, Mr. Ramirez prepared and sent an "inventory of public file" to Mr. Sanchez, (EB Exh. 7 at 3; EB Exh. 3 at 3), and also reflect contemporaneous discussions between Mr. Ramirez and Sanchez attorneys. (EB Exh. 7 at 3.) On advice of counsel, supplemental ownership reports were to be prepared that had been due to be filed in 1993 and 1995, and as of December 1997, Mr. Ramirez "made sure" that supplemental ownership reports were added to the PIF. (SFUSD Exh. T-1 at 18.) But SFUSD failed to file corresponding supplemental reports with the Commission (SFUSD Exh. 7), and the compliance quality of the PIF remained in question.

48. On November 3, 1997, GGPR made good on its threat and filed its petition to deny renewal, alleging that supplemental ownership reports had not been timely prepared, filed, or included in the PIF, and that issues/programs lists had not been timely prepared since 1992. (EB Exh. 5.)[11] GGPR further alleged that the Station's management knew that such documentation had not been timely prepared, filed, or placed in the PIF, and that the licensee had falsely certified in its renewal application that all ownership reports and issues/ programs lists had been placed in the PIF in a timely manner. (EB Exh. 5 at 1-5.) These allegations were supported by affidavits from Dave Evans, Susen Hecht and Jason Lopez. (EB Exh. 5 at 42-43.)

**Opposition to Petition to Deny**

49. SFUSD filed its opposition to GGPR's petition on January 20, 1998. (EB Exh. 6.) The truth and correctness of factual allegations in the opposition were certified to by Mr. Ramirez as General Manager, and by Mr. Enrique Palacios, Special Assistant to the Superintendent who was an off-premises supervisor of Mr. Ramirez. (SFUSD Exh. 4 at 31, 45-46, 49-51.) (EB Exh. 6 at 13-14 *et seq.*) The petition also contained allegations of violations of EEO rules that were not included in the *HDO.* Mr. Palacios was the primary source for rebutting those EEO allegations. Mr. Ramirez was primarily responsible for erroneous certifications concerning supplemental ownership reports and programming lists and the PIF.

50. SFUSD's opposition was a pleading prepared by counsel. The pleading argues that affidavits of Mr. Evans and Ms. Hecht are insufficient because they did not allege specific fact that "told" Mr. Ramirez "about what was in the files at the time he prepared the renewal application." (SFUSD Exh. 4 at 37.) That argument lacks conviction because it fails to mention the reasonable conclusion that Ms. Hecht's report showed that there were specific omissions of ownership reports and programming lists that should have been in the PIF. If Ms. Hecht had been wrong, the opposition would have alleged that Mr. Ramirez had searched the PIF and had found all or some of those missing items which would reduce or destroy Ms. Hecht's credibility. But counsel could not so allege because, as Ms. Hecht had reported and as corroborated by Mr. Lopez, missing documents which she inventoried as missing actually were missing.

[11] GGPR's petition to deny was treated as an "informal objection" under Section 73.2587. *See HDO* at 3. Since GGPR does not have party status, there was no appearance of GGPR in this proceeding, and GGPR did not participate in the hearing.

51. Mr. Ramirez rejected Ms. Hecht's work product and relied on his own judgment. (SFUSD Exh. T-1 at 12-13.) But he never pointed out any factual errors. Mr. Ramirez declared that when he certified to ownership and programming, he found the Hecht report to be "inaccurate and confused" without specifying any example, and that he did not "recall any prior conversation" with Mr. Evans. (EB Exh. 6 at 17.) *Compare* the following evidence: The Hecht report was a spontaneous delineation of what was found in and missing from the PIF (EB Exh. 5 at 46-49). It was corroborated by Mr. Lopez's personal review of the PIF. (EB Exh. 4.) Both Ms. Hecht and Mr. Lopez specified documents found and the years of reports that were missing, thereby making their evidence reliable and credible.

52. On January 17, 1998, Mr. Ramirez signed a declaration in support of SFUSD's opposition, representing that he "believed" that he had "fully accounted for all public issues/programs during [his] tenure as "General Manager," and that he was mistaken but his was a "good faith" belief. (SFUSD Exh. 4 at 38, 50; Tr. 447.) He testified that he had meant to admit that he had certified "incorrectly," but that he was relying on legal advice. (Tr. 447, 450-51.) The declaration also represented that after talking with Mr. Evans in 1996, Mr. Ramirez sought "to determine what was in the files" and "what was needed to make them complete," and that "review and update of the file has been and is an ongoing process." (SFUSD Exh. 4 at 49-50.) On cross-examination, Mr. Ramirez at first hesitated but then answered:

> I did look at the file and I did pretty much see the same thing that I think Dave was trying to call to my attention and followed up on it in the way that I did.

(Tr. 452-53.) He admitted that he "might have wrote this differently." But he testified that the declaration was a "good faith effort" to show that "ultimately – I looked at the file." (Tr. 454.) Mr. Ramirez avoided answering whether there was an "ongoing process" for reviewing the PIF, and he testified that he meant to say that he started reviewing the PIF to bring it into compliance by the time the renewal application was filed. (Tr. 455.) That testimony provides no additional explanation and it does not alter his untrue declaration that there was an "ongoing process" of file review and update.

53. On January 16, 1998, Mr. Sanchez filed a declaration which he prepared for Mr. Helgeson in support of the opposition. (SFUSD Exh. 4 at 74-75.) Mr. Helgeson represented in paragraph 4 of his declaration:

> I am aware of and have assisted with, an ongoing affirmative effort since the arrival of Jeffrey Ramirez --- to update and maintain the station's public information file ---.

Mr. Ramirez did not know whether that statement was accurate." (Tr. 476-77.) When asked about any assistance Mr. Helgeson provided, Mr. Ramirez testified: "I'm not aware of any assistance that Bill [Helgeson] provided me ---." (Tr. 476-77.) Mr. Ramirez was not aware of Mr. Helgeson ever working independently on the PIF. (Tr. 483.)

54. On January 30, 1998, Mr. Helgeson sent a fax transmittal to Mr. Sanchez:

> Attached is list that Jeff, Ana and I used yesterday to "clean up" KALW's Public File. ---.

(EB Exh. 10.) Mr. Ramirez was asked whether he understood the reference to "clean up" the PIF, and he testified: "No, I don't." (Tr. 484.) He was asked whether new documents were being added to the PIF in January 1998, and he answered, "I don't remember." (Tr. 484.) This one page document was fact-specific about a "cleanup-list" that if it existed would have significance in corroborating Mr. Ramirez's account that he had reviewed the PIF in connection with his completion of the renewal application. His inability to recall a "list" that was sent to Mr. Sanchez leads to the conclusion that there never was such a "list."

55. Mr. Lopez rebutted both declarations, including with respect to the 1993 and 1995 ownership reports that Mr. Sanchez had attached to the opposition. According to Mr. Lopez, the 1993 report "was inaccurate" in representing that three of those listed were BOE members in 1993. The 1995 report bore a date of December 10, 1997, and it was not in the PFI when Mr. Lopez had inspected it in July 1997. (EB Exh. 4 at 3, 7.) Earlier Mr. Lopez affirmed that when he reviewed the PIF in July 1997, he did not find any "Program Guides" or any "NPR programming." He did find a list consisting of pages 5, 6 and 7 for a program believed to be "City Visions," which he photocopied and returned to the PIF. (EB Exh. 4 at 3.) Mr. Lopez was never contradicted by a subsequent declaration or on his cross-examination. (Tr. 1199-1235.) In July 1997, he found that there were incomplete lists of issues/programming, and that there were no supplemental ownership reports showing changes in the BOE's membership following 1992 and 1994 elections. Mr. Lopez also found that the PIF did not contain program guides or lists that were based on NPR programming. (EB Exh. 4 at 3.)

**New General Manager**

56. In January 1998, Mr. Ramirez resigned and left the Station "to find alternative employment in a more positive environment." (SFUSD Exh. T-1 at 19; EB Exh. 40 at 4.) He regretted his "mistake" but he believes that he did his best to understand the PIF obligations, to answer renewal questions in "good faith," and to provide counsel with information needed to respond to GGPR's complaints. (SFUSD Exh. T-1 at 19.) Mr. Helgeson immediately became interim General Manager. (SFUSD Exh. T-2 at 10.)

57. In February 2001, SFUSD offered the position to Ms. Margaret Ann (Nicole) Sawaya. (Tr. 869-72.) She was hired and started as General Manager on March 1, 2001. On March 6, 2001, Mr. Sanchez obtained an extension to respond to the LOI to enable Ms. Sawaya to become involved in responding. (SFUSD Exh. T-3; EB Exh. 16.) Ms. Sawaya had held a former position as a general manager. (SFUSD Exh. T-3 at 2-4.) She was an intern at KQED(FM), a public radio station in San Francisco where she worked for "several years" as producer and journalist. She was a "public affairs host" at KQED-TV, San Francisco. She was hired as Program Director at KZYX(FM) in Phito, CA and there she was promoted to Station

Manager for her last six months. She became employed by NPR in Washington, D.C. where she worked for two years. She was hired by Pacifica Foundation Station KPFA(FM), Berkeley, CA, where she became General Manager. She supervised 28 employees and 25 volunteers. But all regulatory work was done at Pacifica headquarters. She worked at KPFA(FM) for eighteen months, and lost her position in a labor dispute. She was working as a media consultant for Pacifica News Service when she was contacted by Mr. Helgeson who knew her through NPR. Mr. Ramirez recommended her as a replacement General Manager at Station KALW(FM). She was hired without being told of the pending petition to deny renewal. (SFUSD Exh. T-3 at 2-4.)[12]

**Letter of Inquiry**

58. On February 5, 2001, the Bureau issued a Letter of Inquiry ("LOI") requiring SFUSD to provide information concerning allegations of GGPR's petition to deny (EB Exh. 13). The Bureau also delayed action on the renewal application to allow time for SFUSD to reply. (*Id.*) The LOI posed questions on whether at the time the renewal application was filed, the PIF contained supplemental ownership reports and quarterly issues/programs lists. (EB Exh. 13 at 1-3.)

59. On March 8, 2001, Ms. Sawaya sent her first memo to Mr. Sanchez: "I really hope we can put this license challenge to bed very soon...." (EB Exh. 20.) In a second memo on March 8, 2001, Ms. Sawaya recommended "No's" in responding to the LOI questions. (Tr. 1338; SFUSD Exh. 21.)

> **LOI question 1 asked:**
>
> On August 1, 1997, when the subject license renewal application was filed, did the KALW(FM) public inspection file contain all of the ownership and supplemental ownership reports required to be kept in the file by Section 73.3527?
>
> a) If the answer is "no," detail any omission or deficiency. If the answer is "yes," please include a copy of each such report with the response to this inquiry letter.
>
> (EB Exh. 13 at 2.)

[12] SFUSD reported to the Commission Secretary and the Presiding Judge by letter dated February 17, 2006, that Ms. Sawaya has resigned her position as General Manager, and SFUSD began soliciting applicants for a qualified replacement.

**Sawaya response:**

1) **No.** Missing was: ownership report January 31, 1993 – was put in file December 10, 1997. Missing was ownership report January 31, 1995 – was put in file December 10, 1997. (see enclosed copies) ....

(EB Exh. 21; Tr. 1339-41.)

**LOI question 2 asked:**

On August 1, 1997, did the KALW(FM) public inspection file contain all of the issues/programs lists required by Section 73.3527? Did any lists that were in the file contain the information required by Section 73.3527?

a) If the answer is "no" to either inquiry, detail any omission or deficiency. If the answer is "yes," include a copy of each issues/programs list with the response to this letter.

(EB Exh. 13, p. 2.)

**Sawaya response:**

1) **No.** The premises of KALW, [FM] were almost entirely destroyed during the Loma Prieta earthquake in the Fall of 1989 in San Francisco. Until the beginning of 1997, when KALW moved to its current location (Philip & Sala Burton High School), the station was moved several times to temporary facilities. During this period, KALW was operating out of a variety of abandoned school gyms. Many day-to-day operations did not happen during this period, and the record-keeping ability of the station was severely hampered by the constant changing of locations. Most files and paperwork were kept in boxes, some of which were lost as moves kept occurring. Unfortunately, the public file of issues/programs was susceptible to the physical chaos at the station.

(EB Exh. 21.)

**LOI question 4 asked:**

If the answer to any of the above questions is "no," detail when and precisely what steps were instituted to correct any problems and ensure that the public inspection file contained all requisite materials?

(EB Exh. 13 at 2.)

**Sawaya response:**

KALW did ownership reports for 1993 & 1995, and we have brought all ownership reports up to date, with the most recent being January 31, 2001. KALW's reports were spottily corrected during the late 1990's. However, all reports were corrected in the Fall of 1997 when matters came to the attention of then general manager, Jeff Ramirez.[13]

(EB Exh. 21.)

**LOI question 5 asked:**

As of the date of this letter [February 5, 2001], is the KALW(FM) public inspection file now complete?

> a) If the answer to any of the questions 1-3 above is "no" and presuming that the public inspection file is now complete and current, give the date on which the KALW(FM) public inspection file contained all required materials.
>
> (EB Exh. 21.)

[13] Ms. Sawaya could not remember how she knew what Mr. Ramirez had done with respect to ownership reports, but she presumes that she was told by Mr. Helgeson. (SFUSD Exh. T-3 at 11.) In view of the short time that she was at the Station before sending her March 8 memos, Mr. Helgeson probably was a source of information.

**Sawaya response:**

Ownership reports are now completed and current. Donor support for specific programs is non-applicable. Issues and program listings are current, and back listings are in the process of being completed to the best of our ability.

(EB Exh. 21.) (SFUSD Exh. T-3 at 8.) This is an admission that there still were incomplete issues/programs lists, and that the lists were being updated.

60. Ms. Sawaya transmitted her March 8 memos to Mr. Sanchez. (EB Exhs. 13, 21; Tr. 1367.) On April 5, 2001, counsel represented to the Commission that "present General Manager and Operations Manager of KALW(FM) [Ms. Sawaya and Mr. Helgeson] have completely reviewed KALW's public inspection file and made sure that it contains all required documents, reports and information through to the present." (EB Exh. 34 at 8.) There is not sufficient evidence in the record proving that there was such a complete review of the PIF, or that on April 5, 2001, it contained "all required documents." SFUSD's response to the LOI is inconclusive in these respects.

61. Ms. Sawaya "determined rather quickly" that the PIF was not properly maintained, "a fact that she reported to the Sanchez Law Firm." The Bureau concludes that she "accurately reported" to Mr. Sanchez that Mr. Ramirez prepared supplemental ownership reports after the August 1997 filing and that he placed reports in the PIF in December 1997. She also "accurately reported" to Mr. Sanchez that issues/ programs lists were in the process of being completed. By March 26, Ms. Sawaya believed the "public file is now in excellent order including past years in question" and communicated that to Mr. Sanchez. (SFUSD Exh. 19.) By April 3, Ms. Sawaya sent Mr. Sanchez documents related to the license challenge. (SFUSD Exh. 20.) On April 3, Mr. Helgeson sent an e-mail to Ms. Sawaya, Mr. Campos, and Ms. Wright, advising them that he had had a one-hour conversation with Mr. Sanchez and Ms. Jenkins specifying "what documents were (or should be) in KALW's public file ... ownership reports, quarterly issue reports and donor lists." (EB Exh. 27.) These events show that Ms. Sawaya acted reasonably and responsibly in attempting to provide Mr. Sanchez with the current status of the PIF.

62. Mr. Helgeson declared that Mr. Sanchez had provided him with a copy of the final response, that he had reviewed it, and that he had personal knowledge of the facts therein. (EB Exh. 34.) Mr. Helgeson was relying on counsel who prepared the response and drafted his declaration. Both the letter and the declaration bore a date of April 5, 2001. Mr. Helgeson could not have meaningfully reviewed the final LOI response that was still being edited on April 5. Mr. Helgeson could not have personal knowledge of all facts asserted in the response, and he did not have personal knowledge of the PIF's contents as of August 1, 1997. Therefore, he did not have a factual basis for affirming or ratifying Mr. Ramirez's input on SFUSD's erroneous certification. He merely assumed that Mr. Ramirez was accurate and truthful. And he was not in control of counsel's strategy in replying to the LOI.

**SFUSD's Financial Condition**

63. The Station receives no direct financial support from the District. The District provides in-kind contributions of office, production and broadcasting space, and administrative support. (SFUSD Exh. 78-C at 11.) The Bureau concedes that the District would be the "source for paying forfeitures." (Tr. 644.)

64. The operating budget of the Station is funded almost entirely by contributions from more than 13,000 members along with grants received from groups such as the Corporation for Public Broadcasting. Mr. Helgeson indicated in testimony that the Station had a "pretty good year" with its contributions. (Tr. 645.) The Station's budget for fiscal year 2003-2004 was approximately $1.5 million dollars, slightly more than in fiscal year 1996-1997. (SFUSD Exh. 78-C at 6; SFUSD Exh. 2 at 14.) It is concluded that SFUSD, as licensee, would be responsible for paying any forfeiture. (Tr. 644.)

65. The District's Annual Financial Report dated June 30, 2004 ("Financial Report") noted patterns of deficit spending during the 2003-04 fiscal year that resulted in a deficit in available reserves in an amount of $6.9 million. (SFUSD Exh. 78-A at 64.) The Financial Report identifies causes of the deficit as reduced State revenues, costs of fringe benefits, declining school enrollment which caused a reduction in funding, and an increase in the number of charter schools which cost more to run than the school revenues that the District receives. (*Id.* at 64-65.) The Financial Report urges the District to reverse its deficit spending, and warns that without new sources of revenue, significant spending cuts will be necessary. (*Id.*) The Report concludes that District management concurs with the recommendation to achieve expenditure reductions, and that the District is investigating and/or implementing hiring freezes, reductions in central office staff, furloughs, reductions in all discretionary budgets, and decreases in special education and child development programs.[14]

66. SFUSD's "Budget Outlook" reports that the District's deficit for Fiscal Year 2004-2005 is expected to be $4.9 million and that the District's deficit for Fiscal Year 2005-2006 is expected to be $22.3 million, unless cost saving measures are implemented. (SFUSD Exh. 78-B.) Mr. Lopez observed in his testimony that the District had closed several schools in the city in an effort to narrow the budget shortfall. (Tr.1232.) Mr. Ramirez testified that the Station was never "living from paycheck to paycheck," and "there was never a budget crisis that I can remember ever having." (Tr. 317.) The evidence on financial condition that was provided by SFUSD, does not establish that SFUSD cannot pay a forfeiture of a reasonable amount.

[14] The Annual Financial Report for the Fiscal Year July 1, 2004 to June 30, 2005 had not yet been completed when SFUSD submitted its Proposed Findings.

## CREDIBILITY ANALYSIS

67. The controlling issue of intent to deceive, or gross indifference for the truth that is tantamount to intent, is grounded in an admittedly erroneous "Yes" certification to completeness of the Station's PIF. That admittedly untruthful certification, recklessly solicited of SFUSD's top manager by Mr. Ramirez, will be considered in the context of declarations in support of SFUSD's opposition to a petition to deny, declarations in support of its counsel's response to the LOI, and related depositions, hearing testimony, and cross-examination.

### Ownership

68. Question 1(b) asked if the applicant's ownership report was filed with the Commission. The word "Ownership Report" is in the singular. The regulation then in affect required noncommercial stations to file an "Ownership Report" at the time the application for renewal is filed. A literal reading of the question could have caused Mr. Ramirez to believe there was good faith compliance by filing a current ownership report. The question and answer are of lesser significance because the same question of ownership is also addressed in the question on completeness of the PIF. Finally, the policy requiring supplemental ownership reports became moot, which renders the lack of supplemental ownership reporting a *de minimis* shortfall. SFUSD has met its burden of proof with respect to mistakenly answering "Yes" as to ownership reporting, and there are no adverse credibility findings to be made with respect to Question 1.

### Public Information File

69. SFUSD relies on advise of counsel in defense of its certification that the licensee had the required documentation in the PIF at appropriate times. But there is no evidence as to what advice, if any, counsel provided to Mr. Ramirez, and SFUSD never proffered any evidence that shows when or whether Mr. Sanchez had actual knowledge of the contents of the PIF. It was when counsel relied on Mr. Ramirez to answer the petition to deny through his 1998 declaration that Mr. Ramirez reportedly sent counsel an inventory of the PIF, as shown by billing records. (EB Exh. 7 at 3.) Yet there was no written "inventory" offered in evidence, and the only "inventory" was the Hecht report.

70. Mr. Ramirez answered Question 2 about the Station's PIF with an erroneous "Yes." Before answering he asked Ms. Hecht for help in reviewing the PIF, but he has no recollection of instructions. (SFUSD Exh. T-1 at 12.) What follows is baffling. Mr. Helgeson recalls that "she [Ms. Hecht] was assisting Jeff [Ramirez] in regards to the renewal documentation that needed to be done and the forms that needed to be filled." (Tr. 675.) Mr. Ramirez testified that Ms. Hecht reviewed the PIF and then prepared what would be useful for certification in the form of an inventory of the file's deficiencies. Mr. Ramirez looked at the information with editorial criticism, testifying that he had found Ms. Hecht's document to not "look like professional, reliable work," but failing to point out any factual inaccuracy. (SFUSD

Exh. T-1 at 12.)[15] Ms. Hecht provided a current inventory or accounting of the PIF that revealed the most recent supplemental ownership report to be dated 1991, and the last complete issues/ programs lists to have been prepared in 1992. Ms. Hecht's report clearly had flagged the problem. (EB Exh. 44 at 79-80; 87-89.)

**Ignoring Information**

71. When he first arrived at the Station, Mr. Ramirez was told by Mr. Evans about deficiencies. He was again warned by the Hecht report about deficiencies. Ms. Hecht did what she was asked to do albeit in a more complete format than requested. Mr. Ramirez had given her a task without instruction, and then forthwith rejected her efforts. Instead, he conducted and relied upon his own review of the PIF. Yet he could not testify to specifics about the PIF he claims to have examined. It cannot be concluded on this record that Mr. Ramirez learned more on his own about the PIF's deficiencies than did Ms. Hecht, a disinterested volunteer who he told to look into the condition of the PIF, who did so, and who had the good sense to write down a list of observed deficiencies. His own review was comparatively less adequate, and he admittedly erred in causing SFUSD to certify to a complete PIF.

72. In one instance of poor recollection, Mr. Ramirez was asked who had told him that reports were needed for BOE election results in '92 and '94 elections. He answered: "I don't remember --- [but] I can think through how I think I came to that decision." (Tr. 442.) A list of delicts regarding renewal prepared by GGPR's attorney was given to Mr. Ramirez, and as he testified:

> --- the list would have drawn my attention to the fact that the certification I made with respect to the ownership report was not accurate. So I think that would have then caused me to undertake --- to create the ownership reports for 1993 and 1995.

(Tr. 443.) Soon after October 4, he drafted '93 and '95 reports and sent them to the Superintendent's office for signature where they apparently languished for two months. (Tr. 444; SFUSD Exh. T-1 at 18.) While he does admit in testimony to preparing these missing reports, his memory of the operative facts was "a very vague memory." (Tr. 445.) As was frequently the case, when shown a billing reference to refresh recollection of a conference with Mr. Sanchez, Mr. Ramirez reminded Bureau counsel: "There's a lot that I don't remember. I don't know why." (Tr. 446.)

[15] Much of Mr. Ramirez's direct testimony was presented in negative terms in criticizing and blaming others rather than presenting positive, affirmative statements of what he was thinking and doing, and who and when he was talking to in reaching critical decisions on completing the renewal application. (SFUSD Exh. T-1, *passim.*)

### Issues/Programs Lists

73. Mr. Ramirez was unclear and unconvincing in his contention that he relied in good faith on only an incomplete "City Visions" list.[16] There was additional important programming. "AIDS Update" was a weekly show involving a significant local public health issue. (Tr. 293.) Arts and culture are an important part of the San Francisco community, and "Open Air" features fine arts interviews with local authors and artists. (Tr. 296.) Mr. Ramirez recalls generally asking producers, which would include producers of "AIDS Update" and "Open Air," to provide similar lists of issues and programming for the renewal application. (Tr. 393.) However, his recollection was faulty (Tr. 297), and there is no credible evidence of "AIDS Update" or "Open Air" programming being referenced in the PFI in 1997. (SFUSD Exh. T-1 at 14.)

74. Mr. Ramirez failed to testify to particulars about what he had found present or missing from the PIF, repeatedly claiming that he could not remember specifics. By contrast, credible evidence of Ms. Hecht and credible testimony of Mr. Lopez identified specific reports which were missing and specifically noted the incomplete "Exhibit O." There were no allegations and no proof was offered that Ms. Hecht or Mr. Lopez had fabricated testimony, or that their conclusions were factually wrong. But Mr. Ramirez was grossly and recklessly negligent in misrepresenting to the Superintendent that the PIF was in compliance with Commission regulations, which caused SFUSD to erroneously certify by Superintendent's signature on the renewal application. (EB Exh. 5 at 25-28.)

### Repeated Inabilities to Remember

75. Mr. Ramirez repeatedly forgot what he would be expected to remember. He represented in written testimony attested to on May 2, 2005:

> I do generally recall asking various producers to put together lists of programs that demonstrated the Station's treatment of community issues prior to submitting the Renewal Application.

(SFUSD T-1 at 14.) In cross-examination, Mr. Ramirez was asked if he had looked in the PIF to determine "whether or not any such material made it into the file," to which he answered, "I don't remember if I did that." (Tr. 393.) Mr. Ramirez then was asked about specific producers who were responsible for important programming. Mr. Alan Farley produced "Open Air"

[16] The petition to deny included an "Exhibit O" which is an untitled three page excerpted document containing pages numbered 5, 6, 7. The document listed programming that had been broadcast as "City Visions" programming during the period June 5, 1995 to July 7, 1997. There were 95 programs identified by "producer" and by "topic." When Mr. Sanchez responded to the LOI in April 2001, he attached a continuation sheet which showed "City Visions" programming from July 7, 1997 to October 6, 1997. (EB Exh. 34.)

dealing with local fine arts and culture, yet Mr. Ramirez could not recall asking him to prepare material for the PIF. (Tr. 291-93, 297.) Mr. Ramirez recalled a program called "Commonwealth Club of California" but he did not remember the producer's name, Mr. Ricardo Esway. (Tr. 305.) He recalled Mr. Martin Nemko, producer of "Work With Marty Nemko" which dealt with careers and related training. When asked if he recalled asking Mr. Nemko to prepare material for inclusion in the PIF, Mr. Ramirez answered "I don't remember." (Tr. 306-309.) He then was asked about Mr. Chuck Finney, producer of a program called "Your Legal Rights." He was asked whether he recalled asking Mr. Finney to create a document for inclusion in the PIF. He answered, "No, I don't remember that." (Tr. 309-312.)

76. Overall testimony shows – and perhaps dictates – that when it came to certification of PIF completeness in 1997, Mr. Ramirez was prepared to rely on the incomplete list of "City Vision" programming while knowing full well that there were no other lists of issues/programs in the PIF when he certified an unconditional "Yes." When pressed on individual producers' names, he fell back on repetitive responses of "I don't remember." His representation in testimony that "I believed that the "City Visions" list alone was sufficient to satisfy the issues/ programs list requirements for my tenure at the Station" was at best an irresponsible rationalization with no foundation in fact, and Mr. Ramirez knew that to be the case. (SFUSD T-1 at 14.) Here, despite repeated denials of memory, Mr. Ramirez was lacking in candor in his testimony presented in 2005 when he was on notice of relevant facts. In considering the totality of his testimony, it is impossible to credit Mr. Ramirez with credibility as a witness.

**1998 Opposition to Petition to Deny**

77. SFUSD's attorneys relied on Mr. Ramirez's declaration of January 1998, and on Mr. Helgeson's companion declaration, both of which the attorneys prepared, and both of which claimed that they undertook efforts to maintain the PIF, but both failing to state specifics. Rationalizations as to good faith innocence that are insufficiently tied to facts are speculative, and therefore are not to be believed. But SFUSD's opposition papers, including the Ramirez and Helgeson declarations, were prepared and advocated by counsel, and SFUSD followed its counsel's legal advice. It would be unreasonable for Mr. Ramirez and Mr. Helgeson to reject counsel's advice when that could have delayed the filing of an opposition, or otherwise might have prejudiced SFUSD's pleading cycle.

78. On January 30, 1998, Mr. Helgeson reported to Mr. Sanchez about a "clean up" of the PIF. (Tr. 831-859.) Until then, he had only assisted Mr. Ramirez in "cleaning up" the PIF, having little knowledge of the PIF. Mr. Ramirez testified at hearing that he knew nothing about Mr. Helgeson working on the PIF. Mr. Helgeson's declaration of January 16, 1998, lacks specificity and does not support a conclusion that he had sought to determine "what was in the files," or that there was an "ongoing process" of review and update of the PIF. To the contrary, he never meant to represent in his declaration that he was "responsible for maintaining" the PIF, and he had never been responsible "for keeping the PIF up-to-date." (SFUSD Exh. T-2 at 9.) Because of counsel's involvement in preparing the declaration, Mr. Helgeson's questionable and

misleading declaration does not establish that Mr. Helgeson had intentionally misrepresented to the Commission. Mr. Helgeson's credibility is assessed further below in connection with responding to the LOI.

## 2001 Reply to Letter of Inquiry

79. Ms. Sawaya became concerned with a timely response to the LOI while maintaining a detachment from substance. (EB Exh. 23.) She never submitted a supporting declaration. On March 26, 2001, she inquired of Mr. Sanchez whether the "reply to the FCC ha[d] been written." (SFUSD Exh. 19.) Her prompting e-mails were copied to Ms. Jackie Wright, Executive Director, Office of Public Engagement, her "immediate boss" at SFUSD, and to Mr. David Campos, a Deputy City Attorney embedded at SFUSD. (EB Exhs. 22, 23, 49.) Most of the work of the Sanchez attorneys on the letter's preparation occurred just before submitting the response when on April 2 and 3, Ms. Jenkins billed 17 hours. (EB Exh. 35.)

80. There was one significant exception to Ms. Sawaya distancing herself from the LOI response. In a candid March 8 memo to counsel, she wrote "No" to the LOI's question about whether the PIF contained all required supplemental ownership reports and issues/programs lists on August 1, 1997. In the same memo, Ms. Sawaya advised Mr. Sanchez that Mr. Ramirez prepared supplemental ownership reports for 1993 and 1995, after the renewal application had been filed, but that these reports had not been placed in the PIF until December 1997. (EB Exh. 21.) Ms. Sawaya concluded that the PIF had not been maintained as required, and reported that to counsel. Then Ms. Sawaya sent Mr. Sanchez copies of these two ownership reports, plus three others that were overdue. Ms. Sawaya was the first manager at SFUSD to try to come to grips with specific facts as they existed in July-August 1997, and to report them to counsel.

81. Counsel's final letter of April 5, 2001, stated that Station management had a "belief" that its PIF as of August 1, 1997, "contained all of the issues/program lists for the entire period in question." (EB Exh. 34 at 3.) After attorney-client dialogue between Mr. Sanchez and Ms. Sawaya and others, the LOI was answered as Sanchez counsel had drafted it. Inexplicably, Mr. Sanchez rejected Ms. Sawaya's candid "No" answer. There is no evidence to show that Ms. Sawaya was factually in error in recommending "No" responses. Mr. Sanchez shifted the response to mitigation, emphasizing sequential location changes of Station premises causing disruption of PIF maintenance. Counsel also tied the reply letter to a good faith "belief" that on August 1, 1997, all required supplemental ownership reports were in the PIF.

82. Mr. Helgeson was asked whether he had seen counsel's letter before it was sent on April 5, and he testified that "I do not have any recollection of having seen this letter before it was sent in, given the date of April 5th." (Tr. 1072.) Counsel had taken control of the LOI response, and it would not be expected that there would be any objection from Ms. Sawaya, or from any other Station employee. The contents of counsel's letter cannot be accepted as a reliable reconstruction of decisional facts, and the "Yes" answers were misleading. But no intention to deceive is apparent in counsel's letter.

### Depositions and Testimony

### William Helgeson

83. Mr. Helgeson was asked on cross-examination about his intent in his 1998 declaration. (Tr. 804-14.) When the Presiding Judge intervened, Mr. Helgeson conceded that, contrary to the assertion in his declaration, he (Mr. Helgeson) did not have knowledge of what the rules required. (Tr. 824-25; 831-42 [discussing EB Ex. 10].) And even though contemporaneous e-mails reflected that Mr. Helgeson was supposed to have helped answer the LOI's questions, he repeatedly insisted that his role was only to bring the PIF up-to-date, notwithstanding that he was the only SFUSD employee to verify SFUSD's assertions in the final LOI response. (Tr. 921-22, 942, 1096-97.)

84. Bureau Exhibit 10 (EB Exh. 10) is a one sheet hand-written message to Mr. Sanchez which Mr. Helgeson identified as his handwriting. (Tr. 831.) It shows a date of January 30, 1998, and states:

> Attached is list that Jeff, Ana & I used yesterday to "clean up" KALW's Public File.

Mr. Helgeson testified that now he is "not sure what list it refers to particularly." He went on to testify "I'm not sure what I meant at this time [and] I can't remember what or why I put the words 'clean up' in quotes, either." (Tr. 832.) He testified further: [W]e felt that we needed some list because I certainly didn't know what should and shouldn't be in a public file --- I just assumed there was some printed list." (Tr. 833.) He continues: "I'm not sure --- like I say I don't know what clean up was then." (Tr. 834.) When asked if the public file had been reorganized, he answered "I don't know if we reorganized" and did not "recall us taking an inventory." (Tr. 835-36.) Mr. Helgeson showed an inability to recall what he should have known concerning the state of the Station's PIF in January 1998. Disarray in testimony with regard to his declaration and the PIF when he assumed the General Manager's position in 1998, seems mainly attributable to his ignorance of regulations, his loyalty to Mr. Ramirez, and recently to his disability.[17] It could not be determined from his misdemeanor whether he was being untruthful, and he receives the benefit of the doubt.

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[17] Mr. Helgeson testified in writing:

> [As of] early 2004, --- I am now legally blind. --- When I look directly at a piece of paper with writing on it, I cannot read the words printed. --- Moreover, I cannot see the entire document when I look at the enlarged image. --- I generally do not receive the mental impressions of documents that sometimes help people refresh their memories.

(SFUSD Exh. T-2 at 17.)

85. Mr. Helgeson testified at hearing that he had no intent of attesting to the PIF's contents in August 1997, but only intended to state what was in the PIF in April 2001. His declaration of 2001 was to support the LOI response, and he candidly testified that his certification as to the truth of the entire contents of the reply was not "accurate." (Tr. 1112.) He had misguided faith in Mr. Ramirez knowing Commission rules, and in believing that Mr. Ramirez would have acted in accord with the rules. (Tr. 824-825.) None of what Mr. Helgeson believed was based on fact, and none of it proved to be true. However, Mr. Helgeson's reliance on counsel, his naiveté regarding Mr. Ramirez's ability and trustworthiness, and his candid admission, negate any focused intent to deceive the Commission.

**Nicole Sawaya**

86. On September 28, 2004, the Bureau deposed Ms. Sawaya. Her deposition testimony was convoluted with inabilities to remember and re-directing of questions. (SFUSD Exh. 18 at 371, 391.) To illustrate, when asked whether she had seen the LOI, she responded:

> My guess is, and this is only a guess, that I have not or that I did not, but quite frankly, sir, I really don't remember.

(SFUSD Exh. 18 at 368.) Such testimony of unfamiliarity with the LOI is facially inconsistent with her hearing testimony. She acknowledged drafting memos on March 8, 2001, and testified at the hearing that she had used the LOI as a guide in formulating the substantive responses in her memos. (Tr. 1365.) Ms. Sawaya and Mr. Helgeson collaborated in making the 1999, 2000, and 2001 ownership reports current, and these she mailed to Mr. Sanchez. (Tr. 1346.) She was involved in a meaningful way in completing incomplete files of the Station. (Tr. 1361.) (SFUSD Exh. 18, *passim.*) When asked whether she had been asked to respond to the LOI's first question, she answered "No." (*Id.* at 368-69.) She was asked whether she knew if anyone was asked to respond to that question, and she answered "I don't know." (*Id.*) Identical responses were given for remaining questions in the LOI. (*Id.* at 369-70.) She had seen a final reply in draft form, but could not remember providing any information or comments. (*Id.* at 370-71.) Ms. Sawaya "didn't want to come to any quick judgments, especially given the fact that some people were still at the station that was involved in this." She had not even looked at the PIF until "my second week there [at the station], --- . (SFUSD Exh. 18 at 367-76.) She concluded that by mid-March the PIF appeared to her to be in good order. (SFUSD Exh. 18 at 375-76.) Ms. Sawaya lacked candor in denying having any recollection about the LOI. But her denial is not found to be disqualifying for SFUSD because it is obviously not true so that no one would be misled, and she had no discernable motive to lie on the merits.

87. Ms. Sawaya prepared for her deposition by reading GGPR's petition to deny and the *HDO*. (SFUSD Exh. T-3 at 9.) Both documents discuss in detail what was, or what was not, in the PIF at various times. For context *see HDO* Paras. 9-11. But she testified that she only expected to be "asked to discuss what the Station was doing on the programming front and its fiscal situation and [her] role in bringing it to its current status." (SFUSD Exh. T-3 at 9.) Yet in an e-mail sent two months earlier, Ms. Sawaya stated that she understood the *HDO* and that "the

issue at hand is FCC regulations around what must be in a station's public file, not whether we 'think' our programming is public service or not." (EB Exh. 57.) This e-mail shows that Ms. Sawaya understood the focus of her deposition would be issues of the *HDO*. Certainly, in advance of her deposition with qualified counsel at her side, she must have known that she would be asked serious and penetrating questions about *HDO* allegations. Her testimony that she expected to testify only about programming was misleading. But it should not be attributable to SFUSD for disqualification because it is *de minimis*, and there is no clear motive to deceive.

88. Ms. Sawaya asserted that she had memory loss because she "had not seen [her] March 8 memo in over three and a half years," that she "wasn't asked about the memo at the deposition," and that she "was not told of the document until some time afterwards." (SFUSD Exh. T-3 at 9.) Ms. Sawaya asserted that she did not retain a hard copy of her March 8 memo because "it is not my practice to print paper copies of electronic documents and place them in a file." (SFUSD Exh. T-3 at 10.) Ms. Sawaya then admitted that her March 8 memo was stored in her computer in a directory styled "MyDocs," which she claims she did not access due to a technician's glitch (SFUSD Exh. T-3 at 10.) It is difficult to accept her explanation about forgotten March 8 memos which were important evidence. It also is difficult to accept that she would keep an "Ernie file" that omitted to include her March 8 memos. But as unreliable as is this testimony, it does not prove an intentional lack of candor with respect to her testimony on substantive issues.[18]

89. There is a lack of proof of any intentional and knowing concealment on Ms. Sawaya's part of prior misrepresentations in connection with certification of the PIF. There is insufficient evidence to conclude that Ms. Sawaya attempted through a knowing deception to convince the Commission that in August 1997, the station had maintained its PIF in accordance with Commission rules. Ms. Sawaya was concerned about showing superiors at SFUSD that she was pressing counsel on whether a "reply to the FCC ha[d] been written." (SFUSD Exh. 19.) Her deposition testimony does not support a conclusion that she intended to mislead. She had no motive to deceive the Commission, she never executed a declaration, and her candor in March 2001 offsets failures at deposition to recall details, and any misstatements in deposition are not decisionally significant.

[18] It is important that on September 28, 2004, when the Bureau deposed Ms. Sawaya, SFUSD had not yet authorized the Sanchez attorneys to turn over its files to new counsel. *See* Declaration of Nicole Sawaya, executed March 2, 2005, included in support of Opposition to Enforcement Bureau's Motion to Enlarge Issues, filed March 2, 2005. SFUSD's in-house counsel did not send a written request authorizing the Sanchez law firm to transfer files to Hogan & Hartson until January 2005, in connection with the Bureau's Second and Third Requests for Documents. Once again, SFUSD was "a day late and a dollar short" in giving Station management assistance at a critical time of need.

## CONCLUSIONS OF LAW

### General Considerations

90. The Commission's policy on ownership responsibility is applicable in assessing responsibility of SFUSD for the actions of the Station's management. The Commission has a policy that "[a] corporation must be responsible for the FCC – related misconduct --- of its employees in the course of their broadcast employment." *Character Policy Statement*, 102 FCC 2d 11179, 1218 (1986). SFUSD has vicarious responsibility for Mr. Ramirez's conduct under this policy. The policy also provides that "mitigating factors must be considered." *Id.*

91. The Commission's policy on renewal where there has been wrongdoing concludes that "a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission." (*Id.*) It is concluded that gross negligence, vicariously attributable to SFUSD under principles of *respondent superior*, does not automatically result in denial of license renewal. The evidence and applicable case law establish that Mr. Ramirez causing "Yes" certification by SFUSD as to condition of the PIF and his lack of candor in testimony, are serious. But it is concluded that these are isolated violations and are not likely to reoccur. Furthermore, the fact that Mr. Ramirez has left the Station, coupled with the adoption of a compliance policy and retention of new counsel, constitutes reliable evidence that the Station may continue to be operated by SFUSD in the public interest.

### Legal Considerations

92. Section 309(k) of the Communications Act provides that if upon consideration of a renewal application and related record, the Commission finds that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or the Commission's Rules; and (3) there have been no violations that, taken together, show a pattern of abuse, the Commission will grant the renewal application. But if after hearing the licensee fails to meet the standard, the Commission still may grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted." 47 U.S.C. §§ 309(k)(2), 209(k)(3). The questions for remedial decision are whether the evidence proves "serious violations" and if so, whether the renewal application should be denied, or granted for a term shorter than eight years. 47 C.F.R. § 73.1020.

93. SFUSD had to truthfully and accurately check off "No" to Questions 1 and 2. 47 USC § 312(a). Instead, SFUSD unwittingly boxed itself into a very close call for license renewal, a box built by Mr. Ramirez's unwitting choice to rationalize wrong answers to simple questions that could have been rectified, but were not rectified until issuance of the *HDO*.[19] To

[19] Upon issuance of the *HDO*, SFUSD retained new counsel, and filed an amended renewal application with "No" certifications to Questions 1 and 2. (SFUSD Exhs. 48, 76.)

make matters worse, it was after the erroneous "Yes" certifications were announced by GGPR that Mr. Ramirez dissembled. Thus, there were three scenarios involving disqualifying misrepresentations or lack of candor: first, the "Yes" certifications on August 1, 1997; second, the opposition to the petition to deny on January 20, 1998; and third the response to LOI filed on April 5, 2001. In each scenario, SFUSD represented that the Ramirez certifications of August 1, 1997, were correct. In any one of these three scenarios – or all – SFUSD had the opportunity to reflect, research, answer correctly, and perhaps avoid this hearing. SFUSD and its Station management failed all three times to get it right.

**Misrepresentation and Candor**

94. In order for there to be a disqualifying certification, it must be shown that there is a misrepresentation or lack of candor in connection with an application. *In re Application LUJ, Inc.*, 17 FCC Rcd 16980, 16982 (2002); *In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits,* 2 FCC Rcd. 2122 (1987). Misrepresentation and lack of candor differ as legal concepts only in that misrepresentation involves false statements of fact, while an absence of candor involves concealment, evasion, and failures to be fully informative. *Fox River Broadcasting, Inc.,* Order, 93 FCC 2d 127, 129 (1983). Both misrepresentation and lack of candor can be disqualifying.

95. Substantial evidence of an intent to deceive is required to support a finding of misrepresentation. *See LUJ, Inc.*, 17 FCC Rcd 16980, 17982 (2002) (certifications in assignment application were not false where Commission was not deprived of dispositive information, there was no motive that inferred an intent to deceive, and there was no direct evidence of such an intent). *See Liberty Productions Ltd. P'ship*, 16 FCC Rcd 12061, 12083-93 (2001). In *Liberty Productions,* there was an issue of misrepresentation/lack of candor based on a site availability certification, a more narrowly focused inquiry than here, and the Commission did not find substantial evidence of an intent to deceive. The Commission would not rely on conflicting deposition testimony showing that a witness had "no clear memory" of conversations occurring years before hearing testimony. *Id.* at 12092-93. Commission decisions require a showing of substantial evidence of intent to deceive in order to sustain a finding of misrepresentation. *Id.* at 12085. *Compare Ronald Brasher*, 19 FCC Rcd 18462, 18491-92 (2004) (license revocation for undisclosed parties-in-interest, control of licenses without authorization, concealment of scheme to apply for excessive licenses, numerous misrepresentations and lack of candor, false signatures, false testimony). By contrast, Mr. Ramirez, an inexperienced General Manager who was not a member of any control group, was merely a salaried employee without motive to deceive the Commission.

96. False or misleading representations of Mr. Ramirez that were consequences of his inexperience and absence of oversight do not rise to the level of disqualifying misconduct. *In re Application of Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992). Mr. Ramirez's "Yes" determination of a complete PIF is found to be "wanton, gross and callous, and in total disregard of obligations to the Commission to certify honestly in renewal applications as to be equivalent to an affirmative and deliberate intent." *Golden Broadcasting Systems, Inc.,* 68 FCC 2d 1099, 1106 (1978), quoting *Tipton County Broadcasters*, 37 F.C.C. 191 (1964). *See also Liberty Cable*

*Co. Inc.*, 15 FCC Rcd 25050 (2000), *reh. den.*, 16 FCC Rcd 16105 (2001) (unlicensed operations were legion and in disregard of obligation to activate only authorized paths held to be "tantamount to intentional misconduct.") But in that case, management knew of continuing premature activations and encouraged an employer to continue to activate without concern to non-licensure. *Id.* There is no such active complicity of SFUSD in Mr. Ramirez's misleading acts of misjudgment, and SFUSD should not be denied renewal based on Mr. Ramirez's one-time instance of ineptness and gross negligence.

97. Also, the Commission will not impute a disqualifying lack of candor to an applicant where the record shows a good faith reliance on counsel. *WEBR, Inc. v. FCC*, 420 F.2d 158, 167-168 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining candor); *Professional Radio, Inc.*, 2 FCC Rcd 6666 (1987) (applicant not penalized for erroneous site designation made on advice of counsel); *Broadcast Association of Colorado*, 104 FCC 2d 16 (1986) (applicant improperly certifying on advice of counsel not disqualified). In the case of *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110 (Rev. Bd. 1993), the Review Board affirmed an *Initial Decision* finding of justified reliance on counsel for applicant's erroneous site certification, noting particularly that the certification was prepared hastily by counsel and neither the applicant nor counsel were focused on "significance of details." 8 FCC Rcd at 5113. This case is similar to *Abacus Broadcasting* in the haste that was required in signing declarations, and in the reliance on counsel to draft appropriate documents, pleadings and correspondence to be submitted to the Commission without meaningful review by Station management.

## Discussion

98. Due to inexperience with renewal applications and inattention to details, Mr. Ramirez negligently failed to maintain the PIF. He was grossly negligent in soliciting SFUSD management to certify wrongfully to the PIF's compliance in the face of his inattention, negligence, inexperience, or even disinterest. But the fault was not solely his. He arrived at a Station which had been disrupted by an earthquake and a series of moves. There is no evidence of supervision by the Superintendent's office that would have provided effective managerial direction to Mr. Ramirez. Equally important, there is no evidence that communications counsel on retainer to SFUSD had advised Mr. Ramirez to repair, or how to repair, a deficient PIF, and there was no legal auditing procedure. Supervisory deficiencies coupled with failures on the part of Mr. Ramirez to receive or follow legal advice that could have rectified the PIF's contents, constitute circumstances that in their totality raise serious doubts that there was ever any intent by the licensee to mislead or deceive the Commission. The weight of the evidence establishes that the Station's violations were mainly caused by Mr. Ramirez's gross negligence which was unknown to SFUSD until after the fact.

99. If he had taken seriously the NAB memo, the FCC instructions, and the information in the Hecht report, Mr. Ramirez, who had been sensitized by Mr. Evans when he first came aboard, would have known that the PIF was not current and would be in violation. Mr. Ramirez at least suspected by June 1997, more than a month before filing the renewal application, that the Station's PIF was deficient. Had Mr. Ramirez acted with reasonable diligence, it could have been corrected by the time the renewal application was filed. Making

matters worse, Mr. Ramirez signed a misleading declaration to oppose a petition to deny wherein he represented that the Station had an "ongoing process" of updating the PIF. He later testified falsely at hearing to the truth of that assertion, thereby putting license renewal further at risk. Mr. Ramirez cannot rely on advice of counsel as a defense for his misconduct because he could not recall whether he told Mr. Sanchez anything about the state of the PIF. (Tr. 403-04.) And when he testified to "working too fast," "not paying attention," while there was an "ongoing process" to update the PIF, Mr. Ramirez cannot rely on advice of counsel for his lack of candor. (Tr. 452, 455.)

100. But Mr. Helgeson and Ms. Sawaya justifiably relied on counsel. Mr. Helgeson reasonably relied on Mr. Sanchez in connection with his declaration of January 1998 and April 2001, because Mr. Helgeson was not familiar with the events of the 1997 renewal application and he had to rely on counsel who were advising Mr. Ramirez. Ms. Sawaya had recommended to counsel correct and candid answers to the LOI shortly after she was hired. She only changed her position in order to accommodate counsel who had been advising SFUSD on legal matters for many years. She did not wish to jeopardize SFUSD's legal defense, and there were deadlines that had to be met. The erroneous response to the LOI was prepared and sent by counsel and there was little time for any Helgeson/Sawaya review. The testimony of Mr. Helgeson and Ms. Sawaya at deposition and hearing was persuasive as to their reasonable reliance on counsel.

101. The 1998 Helgeson declaration was misleading in representing "an ongoing effective effort --- to update and maintain the Station's public inspection file." But there are mitigating circumstances. When Mr. Helgeson realized that SFUSD's certification was under serious attack by GGPR, he assumed that Mr. Ramirez had reviewed the PIF and had knowledge of its contents before certifying "Yes." Mr. Helgeson played no part in certification of the PIF. As a latecomer, he had to rely on the only (and best) resources who had been involved in advising Mr. Ramirez, *i.e.* the Sanchez attorneys. With the license under challenge by GGPR, Mr. Helgeson was compelled to rely on informed and experienced counsel to draft the declaration. In addition, the signing and filing of the declaration was rushed, and Mr. Helgeson had great difficulty in reading documents. His testimony at hearing did not demonstrate an abundance of candor, but his near blindness precludes any negative assessment of his demeanor and related candor.[20] The Bureau does not challenge his deposition. In assessing his declarations and his testimony, Mr. Helgeson receives the benefit of the doubt.

102. The Bureau is correct that the evidence establishes that Ms. Sawaya understood the issues in this proceeding prior to her deposition. Ms. Sawaya knew that "the issue at hand is FCC regulations concerning a station's public file, not whether we 'think' our programming is public service or not." (EB Exh. 57 [e-mail from Ms. Sawaya to Mr. Sanchez showing an understanding of *HDO* issues].) Her ability to assess which issues would likely be explored at deposition, is a reliable indicator of her awareness and caution in giving deposition testimony.

[20] The Presiding Judge had opportunity to observe Mr. Helgeson whose testimony was given over three days. (Tr. 593-1198.) Mr. Helgeson had to use a special magnifying instrument to identify and focus on the many documents presented by examining counsel. He gave the appearance of trying to cooperate with cross-examination, and there was nothing untoward in his demeanor appearance on the stand.

Short of speculation, there is no inference to draw that Ms. Sawaya consciously avoided questions at her deposition about her involvement in responding to the LOI by "shading" her testimony in order to distance herself, or by having strategic amnesia. As new General Manager, she presented truthful answers which counsel rejected. She then deferred to counsel, and as would be expected by her SFUSD superiors, she cooperated with counsel in facilitating a timely response to the LOI.

103. Ms. Sawaya attempted at deposition to excuse her failure to recall her March 8 memo, a copy of which was located on her computer. A lack of memory as to such an important document that the witness prepared and sent to counsel is difficult to understand, but a loss of memory as explanation cannot be summarily rejected. *See Liberty Productions Ltd. P'ship, supra* at 12092-93. Her e-mail communications with counsel show that the "license challenge" was a matter of grave concern to her as it had a potentially negative impact on her future employment. That realization motivated her to cooperate with SFUSD's long-time counsel who she trusted. It seems highly unlikely that she could "forget" a memo that she had prepared that raised questions with counsel about the veracity of answers in filings made with the Commission. Her not remembering the memo and that she "doesn't typically print out documents," is hard to accept in view of her ability to print two March 8 memos, one of which served as a cover memo for the original signed supplemental ownership reports that she sent to Mr. Sanchez. (SFUSD Exh. T-3 at 9.) It is also difficult to accept that Ms. Sawaya could have set up and maintained her own "Ernie file," and not place these March 8 memos therein. However, this circumstantial proof does not establish that she intended to mislead the Commission, and it is plausible to conclude on this record that she did temporarily forget in 2004 her March 8 memos of 2001. Here, Ms. Sawaya is entitled to receive the benefit of the doubt.

104. At hearing, Ms. Sawaya insisted that her role in drafting and completing an LOI response was merely that of facilitator. (Tr. 1328-29, 1332, 1437-38.) Such testimony is transparently inconsistent with the detail of her March 8, 2001 memos to Mr. Sanchez, and her correspondence regarding the LOI in March and April 2001. (SFUSD Exh. T-3 at 9.) There is over-statement in her oft-repeated claim that the issues raised by the LOI were complex and beyond her ken. (Tr. 1332, 1364, 1436.) To the contrary, after only one week on the job, Ms. Sawaya had ascertained that SFUSD's renewal application certification about the PIF was wrong and drafted a focused memo recommending correction and explaining the deficiencies in the PIF which she sent to counsel. Ms. Sawaya also directed her staff to achieve compliance, which involved researching the PIF and responding to the LOI in a timely and truthful manner. When questioned at her deposition about her role in responding to the LOI, Ms. Sawaya attempted to create an appearance that she was only a facilitator and had no substantive involvement in responding. But there was no discernable deceit or intent to deceive on her part, best illustrated by how quickly, candidly and thoroughly she responded in early March. From observing her testifying, there was nothing in her demeanor to suggest that she was intentionally lying about not recalling. However, there also is little weight to be accorded her testimony which is based on recollection, since there is very little of substantive value that she could remember.

105. Counsel had crafted a reply to the LOI and erroneously reported that on August 1, 1997, the PIF "contained all of the ownership reports." There was no basis in fact for making such a claim, since the Hecht report showed that ownership reports and program/issues lists were

missing. It also was factually wrong to assert that program guides and NPR issues lists were in the PIF as of August 1, 1997. (EB Exh. 5 at 44-49; EB Exh. 4 at 3.) Mr. Helgeson had placed both sets of documents in the PIF in March 2001, only after he had confirmed that the PIF was a "disorganized mess" and lacked documents. NPR materials were added as attachments to the LOI response, but those documents were not in the PIF. By the time the letter was sent on April 5, neither Mr. Helgeson (Tr. 1012) nor Ms. Sawaya (Tr. 1424) had control over what the letter contained. Preparation and issuance of counsel's letter response to the LOI do not support any conclusion that Mr. Helgeson, Ms. Sawaya, or SFUSD intended to mislead, or were motivated to mislead, in responding to the LOI.

**Mitigation**

106. What was missing from the PIF in 1997, were supplementary ownership reports for earlier periods. Such reports were discontinued by the Commission. Station program guides were regularly made available in the community which gave information on programming. Thus, SFUSD was making efforts to inform the community about its programming, and there is no question about the responsiveness of its programming to the community's issues. And despite deficiencies in quarterly issues/programming lists, the Station consistently produced programming that was responsive to San Francisco.

107. Mr. Sanchez's preparation of an opposition to GGPR's petition to deny and response to the Bureau's LOI was the primary responsibility of SFUSD's retained counsel. It also was the responsibility of Mr. Ramirez and Mr. Helgeson to cooperate with counsel. Counsel took control over the process of preparing and finalizing supporting declarations of Mr. Ramirez and Mr. Helgeson, and therefore counsel was also responsible for the accuracy of the declarations. SFUSD's response to the LOI also became the responsibility of counsel. The questioned testimony of Mr. Ramirez, Mr. Helgeson and Ms. Sawaya was given with the assistance of counsel, and as sequestered witnesses, their testimony was beyond the supervision of SFUSD. It is concluded that advice of counsel played a substantial role in the preparation of SFUSD's opposition to petition to deny in its response to the LOI, and in preparing the testimony of Messrs. Ramirez and Helgeson and Ms. Sawaya. *See Abacus Broadcasting Corp., supra* at 5112. *See also WADECO, Inc. v. FCC*, 628 F. 2d 122, 127 (D.C. Cir. 1980).

108. There is no evidence of a repetition of compliance violations. Except for isolated violations attributed to former General Manager Ramirez, SFUSD has a record of compliance with the Commission's rules throughout the renewal period. In reacting to this case, SFUSD adopted a responsible policy that requires counsel to monitor compliance with Commission rules. (SFUSD Exh. T-4 at 3.) SFUSD has retained new communications counsel to diligently oversee compliance, and in that way SFUSD will increase its oversight of Station management. The General Manager who prepared the renewal application is no longer employed by the licensee. His successor had prior experience as a General Manager and showed greater concern for compliance. SFUSD is now in the process of selecting another new General Manager, and hopefully will select one who has solid compliance experience. There is good reason to conclude that there should be no reoccurrence of failures to maintain the Station's PIF, and that there will be no misleading application or report filed with the Commission in the future. These

circumstances show that SFUSD should be fully rehabilitated with respect to PIF maintenance and reporting within two years of this ruling. "*Compare Abacus Broadcasting Corp., supra* at 5113 (question of intent to deceive is a "close one" but "on balance" the record as a whole does not support a disqualifying intent to deceive).

109. While considerations of negligence in failing to hire and supervise apply in this case, a licensee's negligence is not disqualifying misconduct that precludes renewal. *In re Application of Pinelands, supra* at 6065. SFUSD acted reasonably by relying on its counsel. There is ample authority for holding that when there is good faith reliance on qualified communications counsel who is retained to prepare pleadings, declarations, and responses to Commission require (LOI), the misconduct of employees, even if potentially disqualifying, should be substantially mitigated. *See WEBR, Inc. v. FCC,* 420 F2d 158, 167-68 (good faith reliance on counsel is relevant to determining who is acting with candor); *WADECO, Inc. v. FCC,* 628 F.2d at 127 (good faith reliance on counsel protects applicant from disqualification).

**Forfeiture**

110. Section 73.3527 of the Commission's Rules (Rules) requires non-commercial broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. Section 73.3527(e)(8)(i) provides that an issues/programs list is to be placed in a station's public inspection file each calendar quarter. Where lapses occur in maintaining the public file, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation. *See Padre Serra Communications, Inc.*, 14 FCC Rcd 9709 (1999). There is no dispute that serious willful lapses of PIF maintenance occurred at the Station for which SFUSD is responsible.

111. The *HDO*, Para. 25 provides that:

> IT IS FURTHER ORDERED, that, irrespective of whether the hearing record warrants an Order denying the renewal application for KALW(FM), it shall be determined, pursuant to Section 503(b)(1) of the Communications Act of 1934, whether an ORDER OF FORFEITURE in an amount not to exceed $300,000 shall be issued against SFUSD for willful and/or repeated violations of Sections 73.1015, 73.3527, and/or 73.3613 of the Commission's Rules, which occurred or continued within the applicable statute of limitations. [Footnotes omitted.]

The "Yes" certification on August 1, 1997, concerning the PIF was grossly negligent and so wanton as to equate with an act of willful misrepresentation of compliance with Section 73.3527(a)(2)(e)(4)(8) of the Commission's rules [47 C.F.R. § 73.3527]. As a separate and distinct violation, the licensee failed to maintain ownership reports and issues/programs lists in its PIF from 1991 to 2001.

112. The Bureau asks for denial of renewal for alleged violations, but does not ask that any forfeiture be applied in this case. SFUSD admits that under usual circumstances a $10,000 base forfeiture would be imposed for violation of the PIF rule. But SFUSD asserts that its current deficit condition demonstrates an inability to pay even the base amount. SFUSD has not persuaded of its inability to pay a reasonable forfeiture.[21] Section 1.80 of the Commission's rules establishes a base forfeiture amount of $10,000 for public file violations.[22] The evidence presented by SFUSD on its financial condition does not prove an absolute inability to pay any forfeiture.[23] Considering the record as a whole, a $10,000 forfeiture is appropriate for SFUSD's erroneous "Yes" certification in connection with maintaining a deficient PIF.

## CONCLUSION

113. The Enforcement Bureau has presented its case in support of license denial. But it is "only in the most egregious case" that "termination of all rights [must] be considered, and this case does not fall among the "most egregious." *Character Policy Statement*, *supra* at 1228. *Compare Contemporary Media, Inc.*, 13 FCC Rcd 14437 (1998), *reh. den.* 14 FCC Rcd 8790 (1999) (disqualification for criminal acts and repeated misrepresentations which were unaccompanied by adequate remedial measures.) Rehabilitation is significant, and SFUSD's changes in Station personnel and its adopted compliance program show a tendency toward rehabilitation. *Id.* Another positive factor is the "ability to operate in the public interest with no likelihood of future misconduct." (*Id.* at 1229.) *Policy Regarding Character Qualifications*, 5 FCC Rcd 3252 (1990) (mitigating factors include frequency, willfulness, currentness and seriousness of misconduct, the nature of participation by managers, efforts to remedy, record of compliance, rehabilitation.) All of these factors considered in their totality, and particularly the probability of full rehabilitation, rule out denial of SFUSD's license renewal. Full rehabilitation usually can best be assured by ordering a short-term renewal and forfeiture. *See Abacus Broadcasting Corp.*, 8FCC Rcd 5110, 5117 (1993) (short-term renewal appropriate to test future compliance; forfeiture also assessed).

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[21] The authorized forfeiture amount is $300,000. *HDO* at Para. 25. The Presiding Judge has favorably considered meritorious programming identified by SFUSD. (SFUSD Exh. 79.) Consideration also has been given to SFUSD's presentation on forfeiture. *See* Paras. 70-72, *supra*. Under all circumstances, the forfeiture ordered in the amount of $10,000.00 seems reasonable and appropriate.

[22] 47 C.F.R. § 1.80(b) (4), Note to paragraph (b) (4): Section I. Base Amounts for Section 503 Forfeitures; *Forfeiture Policy Statement*, 12 FCC Rcd at 17113, Appendix A, Section I.

[23] The rules provide for requests for installment payments. *See* 47 C.F.R. § 1.1914.

114. The Superintendent's recognition of need for effective future compliance with Commission rules shows persuasive remediation. The fact that Mr. Ramirez was a salaried, at-will employee who left the Station in 1998, makes it unlikely that there would be a reoccurrence of non-compliance in the future. Nor should SFUSD's long-held license be jeopardized by poor judgments of an uninformed General Manager. Ultimately, the misconduct proved by the Bureau pales in comparison to misconduct found to justify the harshest penalty, revocation or denial. *Compare Contemporary Media, supra* (criminal conduct), *Ronald Brasher, supra* (fictitious names in scheme to transfer licenses), *Liberty Cable Co., supra* (management sanctioned unauthorized activations by employee).

115. Under established Commission policies favoring renewal and allowing for mitigation of violations which could be a basis for renewal denial, it is concluded that SFUSD qualifies for a short-term renewal.

## ORDER

Based on the record in this proceeding, IT IS ORDERED that pending renewal application (File No. BRED-19970801YA) of San Francisco Unified School District for License for Station KALW(FM), San Francisco, California, IS GRANTED for a period of two years from the release date of this *Initial Decision.*

IT IS FURTHER ORDERED that San Francisco Unified School District IS ASSESSED a forfeiture penalty in an amount of Ten Thousand Dollars ($10,000), to be paid within two years from the release date of this *Initial Decision.*

FEDERAL COMMUNICATIONS COMMISSION[24]

Richard L. Sippel
Chief Administrative Law Judge

[24] This *Initial Decision* shall become effective and this proceeding *shall be terminated* 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. § 1.276(b).



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