

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

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In the Matter of) File No. EB-06-TC-336

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Progressive Business, Inc.) NAL/Acct. No. 200832170047

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Apparent Liability for Forfeiture) FRN: 0017770504

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ORDER

Adopted: February 1, 2011

Released: February 11, 2011

By the Commission:

I. INTRODUCTION

1. In this *Order*, we find that a proposed forfeiture, issued by the Commission to Progressive Business, Inc. (“Progressive Business”) for apparent willful and repeated violation of Section 227 of the Communications Act of 1934, as amended (“Act”), and the Commission’s related rules and orders, should not be imposed. The forfeiture was proposed in a *Notice of Apparent Liability for Forfeiture* (“NAL”) issued on June 3, 2008 in the amount of \$84,500 to Progressive Business for apparently delivering nine unsolicited advertisements to the telephone facsimile machines of two customers.¹ Progressive Business filed a response to the NAL on June 11, 2008 (“June 11 Response”)² and additional information in response to inquiries from Enforcement Bureau (“Bureau”) staff.³ Based on our review of the record, including this additional information, we find that Progressive Business did not willfully and repeatedly violate a Commission order or rule. Consequently, we conclude that no forfeiture should be imposed.

II. BACKGROUND

2. Section 227(b)(1)(C) of the Act makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an

¹ Progressive Business, *Notice of Apparent Liability for Forfeiture*, 23 FCC Rcd 9018 (2008).

² Letter from Thomas D. Schubert, Progressive Business Chief Financial Officer to Dan Grosh, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-366, dated June 11, 2008 (June 11 Response).

³ See Letter from Thomas D. Schubert, Progressive Business Chief Financial Officer to Dan Grosh, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-366, dated June 27, 2008 (June 27 Response); Email from Thomas D. Schubert, Progressive Business Chief Financial Officer to Dan Grosh, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-366, dated July 15, 2008 (July 15 Response); and Letter from Thomas D. Schubert, Progressive Business Chief Financial Officer to Dan Grosh, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-366, dated Sept. 11, 2008 (Sept. 11 Response).

unsolicited advertisement.⁴ The term “unsolicited advertisement” is defined in the Act and the Commission’s rules as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission in writing or otherwise.”⁵ Under the Commission’s rules, an “established business relationship”⁶ exception permits a party to deliver a message to a consumer if the sender has an established business relationship with the recipient *and* the sender obtained the number of the facsimile machine through the voluntary communication by the recipient, directly to the sender, within the context of the established business relationship, or through a directory, advertisement, or a site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution.⁷

3. On September 11, 2006, in response to one consumer complaint alleging that Progressive Business had faxed unsolicited advertisements, the Bureau issued a citation⁸ to Progressive Business, pursuant to section 503(b)(5) of the Act.⁹ The Bureau cited Progressive Business for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for business posters to a telephone facsimile machine, in violation of section 227 of the Act and the Commission’s related rules and orders. The citation warned Progressive Business that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation, and included a copy of the consumer complaint that formed the basis of the citation.¹⁰ The citation informed Progressive Business that within 30 days of the date of the citation, it could either request an interview with Commission staff, or could provide a written statement responding to the citation. By letter dated September 19, 2006, Progressive Business asserted in reply that it did not send unsolicited faxes and claimed an established business relationship with National By Products Co.¹¹ In fact, however, the complainant was an employee of the City of Wichita, Kansas, not National By Products Co. Bureau staff spoke with counsel for Progressive Business by phone in an effort to resolve this inconsistency. Progressive Business did not at that time submit a further response or provide any basis for concluding that the City of Wichita complaint was in fact associated with National By Products Co. or that an established business relationship between the City of Wichita and Progressive Business existed.

4. Subsequently, we received three additional complaints from two consumers indicating that Progressive Business sent them nine unsolicited facsimile transmissions after Progressive Business received the citation. Based on those complaints, the Commission issued a Notice of Apparent Liability for Forfeiture in the amount of \$84,500, concluding that Progressive Business apparently violated section 227 of the Act and the Commission’s related rules and orders by sending nine unsolicited advertisements to the two consumers’ facsimile machines after the date of the citation.

⁴ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

⁵ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13).

⁶ An “established business relationship” is defined as a prior or existing relationship formed by a voluntary two-way communication “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.” 47 C.F.R. § 64.1200(f)(5).

⁷ See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3)(i),(ii).

⁸ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-336, issued to Progressive Business on September 11, 2006.

⁹ See 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to non-common carriers for violations of the Act or of the Commission’s rules and orders).

¹⁰ Commission staff mailed the citation to Progressive Business, 370 Technology Drive, Malvern, PA 19355.

¹¹ Letter from Thomas D’Agostino, Esq., Progressive Business Publications to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, dated September 19, 2006.

5. In its June 11 Response to the NAL, Progressive Business claims established business relationships with each of the companies involved in both the citation and the NAL.¹² With respect to the citation, Progressive explains that it erred in its original response. Although the complaint in the citation was from an employee of the City of Wichita, and the complaint listed National By Products Co. as the apparent sender, Progressive interpreted the complaint as coming from National By Products Co. As a result, Progressive Business says, it provided information that was correct in demonstrating a prior business relationship with National By Product Co., but this information did not apply to the complaint. Progressive Business now claims established business relationships with both the City of Wichita and National By Products Co., and that these relationships are fully supported by detailed records.

6. Further, Progressive Business similarly claims established business relationships with the two companies involved in the three complaints cited in the NAL, Meadville Medical Center and Superior Systems. Progressive Business supports its claims with letters and billing information for the two companies, showing orders placed for Progressive Business publications.¹³ In addition, following conversations with Bureau staff, Progressive Business suppressed its faxing to the Meadville Medical Center and Superior Systems fax numbers that were the subject of the complaints and agreed to clarify the opt-out language in its faxes to comply more closely with Commission rules.¹⁴

7. Section 503(b) of the Act authorizes the Commission to assess a forfeiture for each violation of the Act, or of any rule, regulation, or order issued by the Commission under the Act, by a non-common carrier or other entity not specifically designated in section 503 of the Act. The maximum penalty for such a violation is \$11,000 for a violation occurring before September 2, 2008, and \$16,000 for a violation occurring on or after September 2, 2008.¹⁵ In exercising such authority, we are to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁶

¹² June 11 Response. Following receipt of this Response, Commission staff also forwarded copies of the three complaints cited in the NAL to Progressive Business, to allow it to examine and respond to those complaints. Fax from Dan Grosh, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-336, sent to Attn: Thomas Schubert, Progressive Business on June 19, 2008.

¹³ June 27 Response.

¹⁴ See Sept. 11 Response.

¹⁵ Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation in cases not covered by subparagraph (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. *See* 47 U.S.C. § 503(b). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(C) first to \$11,000 and more recently to \$16,000. *See* 47 C.F.R. § 1.80(b)(3); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000) (forfeiture maximum for this type of violator set at \$11,000); *Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004) (amendment of section 1.80(b) to reflect inflation left the forfeiture maximum for this type of violator at \$11,000); *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845 (2008) (amendment of section 1.80(b) to reflect inflation increased the forfeiture maximum for this type of violator to \$16,000).

¹⁶ 47 U.S.C. § 503(b)(2)(D); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087, 17100-01 para. 27 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999).

III. DISCUSSION

8. Upon review of the record, including Progressive Business's several Responses, we conclude that Progressive Business has presented a reasonable showing that it did have an established business relationship with the City of Wichita, the source of the complaint in the September 11, 2006 citation, as well as with the two businesses that were the source of the subsequent complaints in the NAL. We therefore conclude that the citation should be rescinded and that no forfeiture should be imposed on Progressive Business. We note that in its Sept. 11 Response, Progressive Business also expresses views concerning the fulfillment of opt-out requests from businesses where more than one person may use the same fax machine. That question is not at issue here and our decision here not to impose a forfeiture does not imply agreement with Progressive Business's views.¹⁷

II. ORDERING CLAUSES

9. **ACCORDINGLY, IT IS ORDERED** that, pursuant to section 503(b) of the Communications Act of 1934, as amended, and sections 0.111, 0.311, and 1.80(f)(4) of the Commission's rules, the proposed forfeitures in the *Notice of Apparent Liability for Forfeiture* against Progressive Business **WILL NOT BE IMPOSED**.

10. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), the citation issued to Progressive Business, Inc. by the Bureau on September 11, 2006, **IS RESCINDED**.

11. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent to Progressive Business, Inc., 370 Technology Drive, Malvern, PA 19355.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁷ See 47 C.F.R. § 64.1200(a)(3)(iv) and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3804 para. 31 (2006).