Federal Communications Commission
Washington, D.C. 20554

November 9, 2007

Honorable Mario E. Ramirez, Jr.
Judge, 332nd Judicial District
The State of Texas
Hidalgo County Courthouse
100 North Closner Blvd.
Edinburg, TX 78541

Re: Dr. Francisco Peña, Individually and on Behalf of All Those Similarly Situated v. Pfizer, Inc., et al., Cause No. C-006-03-F, 332nd Judicial District, Hidalgo County, Texas

Dear Judge Ramirez:

The Federal Communications Commission (Commission) respectfully submits this response to the Court's letter of September 7, 2007, asking for the agency's views on several questions that have arisen in the above-captioned case under the Telephone Consumer Protection Act (TCPA).

BACKGROUND

A. The Telephone Consumer Protection Act

1. On December 20, 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA") to address the growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy.[1] The TCPA, in addition to other things, prohibits the use of any telephone facsimile machine, computer, or other device to send an "unsolicited advertisement" to a telephone facsimile machine. 47 U.S.C. § 227(b)(1)(C). An unsolicited advertisement is defined 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." 47 U.S.C. § 227(a)(4). The TCPA also requires those sending any messages via telephone facsimile machines to identify themselves to message recipients. 47 U.S.C. § 227(d)(1)(B). The TCPA provides for a private right of action in state courts allowing for recovery for actual monetary losses or statutory damages of up to $500, whichever is greater and each subject to trebling for a willful or knowing offense, for each violation of the statute.

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

47 U.S.C. § 227(b)(3). The statute also authorized the Commission to "prescribe regulations to implement [its] requirements." *Id.* § 227(b)(2).

2. In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited advertisements to facsimile machines. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992) ("*1992 TCPA Order*"). The Commission's rules on unsolicited facsimile advertisements incorporated the language of the statute virtually verbatim. *See* 47 C.F.R. § 64.1200 (1993).

3. The TCPA exempted from the term "unsolicited advertisement" material transmitted with the recipient's "prior express invitation or permission." 47 U.S.C. § 227(a)(5) (1992), but did not expressly except persons with whom the sender has an established business relationship ("EBR") from the prohibition on sending unsolicited facsimile advertisements. *Cf.* 47 U.S.C. § 227(a)(3) (creating such an express exception from the definition of "telephone solicitation").

4. The Commission concluded, however, that facsimile transmissions from persons or entities that have an EBR with the recipient "can be deemed to be invited or permitted by the recipient," and thus the existence of an EBR indicated that a fax advertisement fell outside the TCPA's definition of unsolicited fax advertisements. *1992 TCPA Order*, 7 FCC Rcd at 8756 n.87. 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.

1992 TCPA Order, 7 FCC Rcd at 8771 ¶35.

5. The Commission reiterated on reconsideration that the *1992 TCPA Order* had made "clear that the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions," *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12408 (1995). No party sought judicial review of the *1992 TCPA Order* or the subsequent reconsideration order.

6. In July 2003, the Commission revised many of its telemarketing and facsimile advertising rules under the TCPA. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003)("*2003 TCPA*

Order"). The Commission reversed its prior conclusion that an EBR provides companies with the necessary express permission to send facsimile advertisements to their customers. *Id.* at 14126 ¶189. Based on its experience of over a decade with the TCPA and the comments in the proceeding, the Commission concluded that "the interest in protecting those who would otherwise be forced to bear the burdens of unwanted faxes outweighs the interests of companies that wish to advertise via fax." *Id.* at 14127 ¶191. As a result, the Commission revised its rules to provide that a fax recipient's express permission must be in writing and include the recipient's signature. *Id.* at 14128-29 ¶191. In modifying the rule, the Commission "emphasize[d] that, prior to the effectuation of rules contained herein, companies that transmitted facsimile advertisements to customers with whom they had an established business relationship were in compliance with the Commission's existing rules." 18 FCC Rcd at 14126 n. 699.

7. In response to comments filed after the release of the *2003 TCPA Order* indicating that many organizations needed additional time to secure this prior written permission, the Commission on its own motion 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. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 16972, 16974-75 ¶¶ 5-6 (2003). The Commission emphasized that, until its modified rules became effective, "an established business relationship will continue to be sufficient to show that an individual or business has given express permission to receive facsimile advertisements." 18 FCC Rcd 16975 ¶ 6. On October 1, 2004 and June 27, 2005, the Commission further delayed the effective date of these requirements.[2]

B. Junk Fax Prevention Act of 2005 and FCC Implementation

8. On July 9, 2005, Congress amended the facsimile advertising provisions of the TCPA by enacting the Junk Fax Prevention Act of 2005 ("JFPA").[3] In general, the JFPA: (1) codifies an EBR exception to the prohibition on sending unsolicited facsimile advertisements; (2) provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements; (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; and (4) specifies the circumstances under which a request to "opt-out" complies with the Act. *See* Junk Fax Prevention Act, §§ 2(a) – 2(d). The Act required the FCC to issue regulations to implement these provisions no later than April 5, 2006. JFPA, § 2(h).

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[2] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 20125 (2004) and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd 11424 (2005).

[3] Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 199 Stat. 359 (2005).

9. In an April 2006 Report and Order, the Commission adopted rules necessary to implement Congress' mandate in the Junk Fax Prevention Act of 2005. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd 3787 (2006) ("*Report & Order*"). In that action the Commission: (1) codified in its rules an EBR exception to the prohibition on sending unsolicited facsimile advertisements; (2) provided a definition of an EBR to be used in the context of unsolicited facsimile advertisements that is not limited in duration; (3) required 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) specified the circumstances under which a request to "opt-out" complies with the Act.

10. Specifically, in accordance with the Junk Fax Prevention Act, the *Report & Order* establishes that the sending of facsimile advertisements to recipients with whom the sender has an EBR is permissible under the TCPA, as amended, provided certain conditions are met regarding how the facsimile number was obtained. 21 FCC Rcd at 3791-96 ¶¶8-16. 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. *Id.* at 3800-03 ¶¶24-29. The rules also 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 sender must honor that request within the shortest reasonable time, not to exceed 30 days. *Id.* at 3803-05 ¶¶30-32.

11. Several parties have sought judicial review of the FCC's 2006 *Report & Order* implementing the JFPA. Those consolidated cases are currently pending in the U.S. Court of Appeals for the District of Columbia Circuit. *See Biggerstaff, et al. v. FCC*, D.C.Cir. Nos. 06-1191, *et al.*

DISCUSSION

A. The Commission's Prior EBR Exception Is Not Subject To Collateral Attack In This Proceeding.

12. The law is clear that the Commission's TCPA Orders are not subject to collateral attack in this lawsuit. As we explain below, federal district courts or state courts may not review FCC orders. Rather, Congress has set forth an exclusive mechanism for judicial review of FCC orders of the type at issue in this case that requires a petition for review to be filed directly in a federal circuit court of appeals within 60 days of publication of the agency order. That mechanism precludes review here, and the FCC's interpretation of the TCPA thus must be regarded as binding law for purposes of this litigation.

13. Challenges to orders of the FCC are governed by section 402 of the Communications Act of 1934, which states that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter ... shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code." 47 U.S.C. § 402(a) (emphasis added).[4] Chapter 158, which is known as the Hobbs Act and is codified at 28 U.S.C. §§ 2341 *et seq.*, provides in relevant part that "[t]he court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C. § 2342(1). The statute specifies that "[a]ny party aggrieved by the [FCC's] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

14. The Communications Act and the Hobbs Act thus specify the precise procedure for obtaining judicial review of FCC orders and vest exclusive jurisdiction in the courts of appeals. "[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). The "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] appeal to the Court of Appeals as provided by statute." *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (emphasis added).

15. Courts have recognized and applied that principle repeatedly, both with respect to the FCC and in similar contexts involving orders of other federal agencies. For example, the Second Circuit held that a bankruptcy court could not enjoin the effects of an FCC order or declare that order to be void. Not only did the court recognize that "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals," but it held that a litigant may not challenge the validity of an FCC order as a defense to an action against it. Rather, the court of appeals' exclusive jurisdiction over FCC action "extends as well to collateral attacks: A defensive attack on [an FCC decision] is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." Thus, "[t]he jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise." *In re FCC*, 217 F.3d 125, 139-140 (2d Cir.) (quotation marks and citations omitted), *cert. denied*, 531 U.S. 1029 (2000); *accord In re: NextWave Personal Communications*, 200 F.3d 43, 54 (2d Cir. 1999) (because "jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals," a district court "lack[s] jurisdiction to decide" cases involving FCC regulatory matters); *see also Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d. 130, 142-49 (D.C. Cir. 2001), *affirmed on other grounds*, 537 U.S. 293 (2003).

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[4] Judicial review of FCC licensing decisions, of which this case is not one, is governed by 47 U.S.C. § 402(b), which vests exclusive jurisdiction in the D.C. Circuit.

16. In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), which construed a statute similar to the Hobbs Act, the Court held that "[i]t can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. ... So acting, Congress ... prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." 357 U.S. at 336 (citations omitted). "Hence, upon judicial review of the Commission's order, all objections to the order ... must be made in the Court of Appeals or not at all." *Ibid.*; *see also Merritt v. Shuttle, Inc.*, 245 F.3d 182, 188 (2d Cir. 2001) ("read[ing] *City of Tacoma* as holding that [an exclusive review provision] precludes (i) de novo litigation of issues inhering in a controversy over an administrative order, where one party alleges that it was aggrieved by the order, and (ii) all other modes of judicial review of the order").

17. All federal courts of appeals to have addressed the issue have likewise ruled that the Hobbs Act divests trial courts of jurisdiction over FCC orders. *Qwest Corp. v. Public Utils. Comm'n of Colorado*, 479 F.3d 1184, 1192 n.6 (10th Cir. 2007); *Vonage Holdings Corp. v. Minnesota* PUC, 394 F.3d 568, 569 (8th Cir. 2004) ("[n]o collateral attacks on the FCC order are permitted" in private party litigation); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-397 (9th Cir. 1996); *Telecommunications Research & Action Center,* 750 F.2d at 75; *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1412-1422 (11th Cir. 1993); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (describing challenge to FCC rule in private party district court litigation as having been "brought in the wrong court at the wrong time against the wrong party").

18. State courts have recognized that the same limitation applies there. *See, e.g., Consolidated Tel. Coop. v. Western Wireless Corp.*, 637 N.W.2d 699, 707 (N.D. 2001) ("Unless the FCC's rulings and regulations have been appropriately challenged in the proper federal forum, we are not at liberty to review the FCC's statutory interpretation even if we doubted its soundness, and we must apply the rulings and regulations as written."); *Carnett's, Inc. v. Hammond*, 610 S.E.2d 529, 531 (Ga. 2005)(same); *Blitz v. Express Image, Inc.*, 2006 WL 2425573 (N.C. Superior 2006).

B. The Court's Specific Questions

1. Whether the FCC recognized an EBR defense to unsolicited fax advertisements under the TCPA.

Yes – *see* paras. 4-5 above.

2. If so, please explain the source of the FCC's authority to recognize this defense as applied to unsolicited fax advertisements under the TCPA.

47 U.S.C. 227(b)(2) – "The Commission shall prescribe regulations to implement the requirement of this subsection." *See* paras. 1-2 above.

3. Whether the EBR defense applies to a private right of action under the TCPA.

Yes. A private right of action under 47 U.S.C. 227(b)(3) is to enforce provisions of the statute as implemented by the FCC. *See, e.g., Carnetts, Inc. v. Hammond*, 610 S.E.2d at 531. *See* paras. 1-5 above.

4. What is the meaning and purpose of the EBR defense as applied to unsolicited fax advertisements?

The Commission explained in 1992 that facsimile transmissions from persons or entities that have an EBR with the recipient "can be deemed to be invited or permitted by the recipient," and thus the existence of an EBR indicated that a fax advertisement fell outside the TCPA's definition of unsolicited fax advertisements. *1992 TCPA Order*, 7 FCC Rcd at 8756 n.87. The Commission reiterated on reconsideration that "the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions," *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd at 12408. *See* paras. 4-5 above.

5. Whether the EBR defense was in effect on December 8, 2002, when the subject fax was sent?

Yes – *see* paras. 4-7 above.

6. Whether the FCC's actions regarding the EBR defense are now final.

Yes. The EBR exception to the TCPA's general prohibition on the transmission of unsolicited fax advertisements remained in effect from 1992 until it was replaced in 2006 with rules implementing the 2005 Junk Fax Protection Act. *See* para. 6 above.

Any challenge to the original EBR exception would now be untimely. 28 U.S.C. § 2344 (orders must be challenged within 60 days of entry).

As noted, there is currently pending in the United States Court of Appeals for the District of Columbia Circuit a case in which the petitioner has argued that the FCC acted unlawfully by failing to repeal retroactively to 1992 the EBR exception to the TCPA. That case has been briefed. Oral argument in that case is scheduled for November 20, 2007. *See Biggerstaff, et al. v. FCC*, D.C.Cir. Nos. 06-1191, *et al.* In addition, there is currently pending before the FCC, a petition for rulemaking seeking the same retroactive repeal relief. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 22 FCC Rcd 5050 (CGB March 15, 2007).

Respectfully submitted,

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