

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

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U. S. DISTRICT COURT
EASTERN DISTRICT OF MO

STATE OF MISSOURI, *ex rel*,)
JEREMIAH W. (JAY) NIXON,)
Attorney General,)
)
Plaintiff,)
)
vs.)
)
AMERICAN BLAST FAX, INC., et al.,)
)
Defendants.)

No. 4:00CV933-SNL

WRIT OF MANDAMUS

On August 29, 2002 the Court ordered the parties to brief the issue as to whether this Court has jurisdiction to entertain the emergency motion of defendants for Writ of Mandamus pursuant to 28 U.S.C. § 1651 or for injunctive relief pursuant to the Federal Rules of Civil Procedure 62(c). All of the parties have responded and the Court is now prepared to rule.

This Court has jurisdiction to issue a Writ of Mandamus to the Federal Communications Commission (FCC) because it has federal subject matter jurisdiction over the central issue in this case; the constitutionality of 47 U.S.C. § 227. Once that statute was declared unconstitutional by this Court, the FCC was not free to continue enforcing it against Fax.com or its customers. This Court's power to utilize mandamus under the All Writs Act, 28 U.S.C. § 1651(a)(2002), "is firmly established." *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 541 (8th Cir. 1998), *vacated on other grounds* by 525 U.S. 1133, 119 S.Ct. 1022, 143 L.Ed.2d 34 (1999) (citations omitted). The FCC cannot, through bureaucratic means, do that which this Court found unconstitutional, and if it attempts to do so, this Court has both the power and the duty to protect its mandate. In re

MidAmerican Energy Co., 286 F.3d 483 (8th Cir. 2002) (citing Iowa Utils. Bd., 135 F.3d at 541).

Whether the FCC considers its actions proper under the Act

"can never justify the agency's disregard of the existing mandate of a federal court in a case in which the agency was a party litigant. 'It is emphatically the province and duty of the judicial department to say what the law is.' Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 2 L.Ed. 60 (1803). After a court has spoken, the FCC is bound to follow that court's mandate, because the FCC 'is not a court nor is it equal to [a] court in matters of statutory interpretation.' Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382 (D.C. Cir. 1983)."

Iowa Utils. Bd., 135 F.3d at 541.

The Court holds that it has continuing jurisdiction over the actions of the FCC aimed at enforcing a statute that this Court ruled unconstitutional in a case where the FCC was a party litigant. In so ruling, the Court finds on the basis of the facts now before it that the FCC will suffer no irreparable harm or injury.

IT IS THEREFORE ORDERED that having determined it has jurisdiction, this Court's preliminary order of August 29, 2002 restricting certain actions of the Federal Communications Commission, Nos. A-E, is made permanent.

IT IS FURTHER ORDERED that, pending the issuance of a mandate at the conclusion of the appeal of this Court's order of March 13, 2002 before the United States Court of Appeals for the Eighth Circuit,

- a. The Federal Communication Commission is hereby ordered to stay any and all proceedings under the Telephone Consumer Protection Act (TCPA) dealing with unsolicited advertisements transmitted by facsimile, 47 U.S.C. § 227, or related regulations against Fax.com and/or any customer, client or party in privity with Fax.com;

- b. to cease and desist from enforcing, or attempting to enforce, those provisions of the TCPA dealing with unsolicited advertisements transmitted by facsimile, 47 U.S.C. § 227, or related regulations against Fax.com and/or any customer, client or party in privity with Fax.com;
- c. to cease and desist from requiring any response and/or payment from Fax.com with regard to the Notice of Apparent Liability for Forfeiture that is the subject of Fax.com's Motion, File No. EB-02-TC-120, NAL/Acct. No. 200232170004, FRN 0007-2970-47, or in any way proceeding under said Notice;
- d. to identify by September 4, 2002 any and all parties and/or entities against whom it plans to proceed in connection with the Notice of Apparent Liability for Forfeiture against Fax.com and/or its announcement of August 7, 2002 of its intent to issue Citations and Letters of Inquiry;
- e. to provide notice by September 9, 2002 to any and all parties and/or entities identified in accordance with paragraph d of this Order, specifically advising them of this Order.

IT IS FINALLY ORDERED that this Court shall retain jurisdiction over this matter for purposes of enforcing this Order and its provisions.

Dated this 20th day of September, 2002.


SENIOR UNITED STATES DISTRICT JUDGE