

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

May 1, 2014

IN RE:)	
)	
ALLEGED VIOLATIONS OF TENN. CODE)	DOCKET NO.
ANN. SECTIONS 65-4-501 - 506, KNOWN AS)	13-00095
THE "DO-NOT-FAX" LAW, BY OPEN)	
BUSINESS DIRECTORY, LTD.)	

ORDER

This matter came before Chairman James M. Allison, Director Robin Bennett and Director David F. Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA") at a regularly scheduled Authority Conference held on April 14, 2014, to reconsider its prior action of January 13, 2014, to consider evidence that Open Business Directory, Ltd. ("Open Business") violated Tenn. Code Ann. § 65-4-501 *et seq.*, known as the Tennessee "Do-Not-Fax" law, and to determine what, if any, penalty to impose.

BACKGROUND

On June 21, 2013, TRA Consumer Services Division ("CSD") investigative staff ("CSD Staff") filed a memorandum requesting that the Directors appoint a hearing officer to determine whether a show cause proceeding against Open Business for violations of Tenn. Code Ann. § 65-4-501 *et seq.* should be initiated. The Directors appointed a hearing officer in this matter on July 15, 2013.¹

¹ See *Order Appointing Hearing Officer* (August 28, 2013).

CSD Staff filed a *Petition* on November 4, 2013, setting forth its allegations against Open Business.² In the *Petition*, CSD Staff asserts that the TRA received twelve (12) complaints from at least five (5) Tennesseans or Tennessee entities during the period of February 7, 2011 through May 7, 2013 alleging that Open Business solicited them to purchase goods and/or services by an unsolicited facsimile.³ CSD Staff lists the five Tennesseans or Tennessee entities as: the Tennessee Regulatory Authority; Linda Wiggins; Vista Radiology, PC; Riverbend Maximum Security Institution; and Chalfant Travel Services.⁴ According to CSD Staff, Open Business responded to nine (9) of the notices of violation that were sent to them.⁵ Open Business variously denied violating state law, denied having a business relationship with the company listed in the complaint or denied that its order form met the definition of an advertisement for a good or service.⁶

On November 4, 2013, the Hearing Officer issued an *Order Requiring Open Business Directory, Ltd. to Appear and Show Cause Why the TRA Should Not Issue a Cease and Desist Order, Impose Civil Penalties and Seek Additional Relief Against It for Violations of Tenn. Code Ann. § 65-4-501 et seq.* (“*Show Cause Order*”). The *Show Cause Order* cited the alleged twelve (12) violations of Tenn. Code Ann. § 65-4-502(a) and required Open Business to appear at the January 13, 2014 Authority Conference and show cause why it should not be found in violation of state law and, upon such finding, the TRA should not immediately issue a cease and desist order, impose civil penalties and sanctions, and seek additional relief to the maximum extent allowed by law.⁷

² In support of its *Petition*, CSD Staff submitted the affidavit of Slayde Warren. See *Tennessee Code Annotated Section 4-5-313 Notice, Affidavit of Slayde Warren in Support of Allegations of Violations of Tenn. Code Ann. § 65-4-501 et seq. Pursuant to a Proceeding Requiring Open Business Directory to Show Cause Why a Cease and Desist Order and/or Fine Should Not Be Imposed* (November 6, 2013) (“*Warren Affidavit*”).

³ *Petition*, p. 1 (November 4, 2013).

⁴ *Warren Affidavit*, ¶ 7 (November 6, 2013).

⁵ *Id.* at ¶ 9.

⁶ *Id.* at ¶¶ 7-8.

⁷ *Show Cause Order*, p. 3 (November 4, 2013).

Tenn. Code Ann. § 65-4-502(a) states: “No person shall transmit or cause another person to transmit an unsolicited facsimile advertisement....” The TRA is authorized to issue a cease and desist order and impose a civil penalty up to the maximum of two thousand dollars (\$2,000) per violation of Tenn. Code Ann. § 65-4-502(a).⁸

At the regularly scheduled Authority Conference on January 13, 2014, CSD Staff presented evidence that Open Business had violated Tenn. Code Ann. § 65-4-502(a). No representative of Open Business was present in response to the *Show Cause Order*.⁹ CSD Staff described the efforts made to notify Open Business of the *Show Cause Order*.¹⁰ CSD Staff then requested that the panel impose the maximum civil penalty of twenty-four thousand dollars (\$24,000), based on twelve (12) violations of Tenn. Code Ann. § 65-4-502(a), and order that Open Business cease and desist transmitting, or causing another person to transmit, any unsolicited facsimile advertisement into Tennessee.

Based upon TRA Rule 1220-1-2-.17, the panel found that Open Business, after being given due notice, failed to participate in the proceeding and was in default. Further, based on the evidence presented in this docket, the panel found that Open Business had violated Tenn. Code Ann. § 65-4-502(a) on twelve (12) occasions by transmitting, or causing another person to transmit, an unsolicited facsimile advertisement to Tennesseans or Tennessee entities.

Therefore, pursuant to Tenn. Code Ann. § 65-4-504(a), the panel voted unanimously to require Open Business to pay twenty-four thousand dollars (\$24,000) immediately, representing a two thousand dollar (\$2,000) fine per violation of Tenn. Code Ann. § 65-4-502(a), and to cease and desist transmitting, or causing another person to transmit, unsolicited facsimile advertisements into the state of Tennessee.¹¹

⁸ Tenn. Code Ann. § 65-4-504(a) (Supp. 2013).

⁹ Transcript of Authority Conference, p. 14 (January 13, 2014).

¹⁰ *Id.* at 14-15.

¹¹ *Order*, p. 4 (January 23, 2104).

AGREEMENT FOR RECONSIDERATION

On February 5, 2014, Michael Barron, a representative of Open Business, wrote a letter to the Authority stating that the *Petition* and January 24, 2014 Order “does not appear to have been received by the Company at the above offices” and “[a]s such, the Company did not have the opportunity to respond to the petition.”¹² Open Business further stated that it was “in the process of relocating it’s [sic] offices but at the time of issue the Company received all post at the above office address.”¹³ Mr. Barron indicated that “the Company does wish to be heard on this matter.” He also stated that “[a]ll faxes are sent by a third party which has advised the Company that it complies with all regulations in this regard.”¹⁴ Mr. Barron further avers that the fax is an “Order form which is signed by the business...could not have been deemed to be an advertisement [sic].” Finally, Mr. Barron states that the “form has also been modified and improved upon as will be seen when the Company is given leave to respond.”¹⁵

CSD Staff responded to Mr. Barron’s letter, describing the efforts made to notify Open Business of the proceedings. Nevertheless, CSD Staff indicated it was “willing to agree to a reconsideration hearing if Open Business would like to avail itself of the opportunity to be heard by the Authority.”¹⁶

OPEN BUSINESS DIRECTORY REPLY

On April 14, 2014, Michael Barron filed a *Reply to the Petition Filed in Support of Allegations of Violations of Tenn. Code Ann. §65-4-501 et seq.* (“*Reply*”) in this docket on behalf of Open Business. In the *Reply*, Open Business reiterates that it was previously unaware of the

¹² Letter from Michael Barron to Tennessee Regulatory Authority (February 5, 2014).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Letter from Shiva Bozarth to Michael Barron, p. 1 (February 6, 2014).

Petition and that it has now had the opportunity to review the *Petition* and the *Warren Affidavit*.¹⁷

Open Business contends that the facsimiles were not advertisements as defined in the Tennessee statute. Rather, Open Business contends that each fax is a “Purchase Order Form by definition which does not advertise any service or availability or quality of any services and does not encourage the purchase of any services. A Purchase Order is **a request to purchase goods or services** [sic] The Order form does not advertise services.”¹⁸ According to Open Business, “[t]he Purchase Order Form sets out the terms should a business wish to order the service and the fee for such service.”¹⁹ Open Business sets forth a definition of an advertisement as “the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations” and a “notice or announcement in a public medium promoting a product, service or event or publicizing a job vacancy”.²⁰ According to Open Business, the “Purchase Order Form” does not make “such representations defined by the Code or generally.”²¹

In addition, Open Business attached to the *Reply* a copy of a “Purchase Order Form” signed by a representative of Chalfant Travel Services and dated January 18, 2012. Open Business asserts that, in this instance, a contract was entered into by the business. Open Business states that for the other complaints sent to them by the CSD Staff, no file could be found and therefore no contract existed.²²

In the letter from Michael Barron accompanying the *Reply* (“*Reply Letter*”), Open Business requests “that the hearing be conducted without the attendance of any Representative of

¹⁷ *Reply*, ¶¶ 2-3 (April 3, 2014).

¹⁸ *Id.* at ¶ 8 (emphasis in original).

¹⁹ *Id.* at ¶ 9.

²⁰ *Id.* at ¶ 10.

²¹ *Id.* at ¶ 11.

²² *Id.* at ¶ 6-7.

the Company and that this letter and the attached Reply be taken in evidence in support of the reconsideration request in respect of the above Order made pursuant to Tenn. Code Ann. § 65-4-501 et seq.”²³ Mr. Barron adds: “...we await hearing from you following the hearing.”²⁴

NOTICE OF SHOW CAUSE HEARING

On March 13, 2014, the Hearing Officer issued a Notice of Hearing for the hearing on April 14, 2014. The Certificate of Service indicates the Notice of Hearing was e-mailed to three separate addresses; mailed to locations in Boston, Massachusetts, Dubai, the Russian Federation and Switzerland, and faxed to three different numbers. On March 14, 2014, transmission verification reports for the faxes were filed in the docket file. Open Business’s *Reply* was filed on April 3, 2014 and, although it does not acknowledge that the Company received the Notice, it does state that Open Business requests the Hearing be conducted without the attendance of a Company representative, indicating it was aware of the Hearing.

APRIL 14, 2014 AUTHORITY CONFERENCE

At the regularly scheduled Authority Conference on April 14, 2014, CSD Staff again presented evidence that Open Business had violated Tenn. Code Ann. § 65-4-502(a). No representative of Open Business was present in response to the *Show Cause Order*.²⁵ CSD Staff described the efforts made to notify Open Business of the *Show Cause Order* and presented the evidence against Open Business.²⁶ CSD Staff requested that the panel impose the maximum civil penalty of twenty-four thousand dollars (\$24,000), based on twelve (12) violations of Tenn. Code Ann. § 65-4-502(a), and order that Open Business cease and desist transmitting, or causing another person to transmit, any unsolicited facsimile advertisement into Tennessee.

²³ *Reply Letter* (April 3, 2014).

²⁴ *Id.*

²⁵ Transcript of Authority Conference, p. 49 (April 14, 2014).

²⁶ *Id.* at 50-56.

TRA Rule 1220-1-2-.17 states:

- (1) Failure of a party to attend or participate in a pre-hearing conference, hearing or other stage of a contested case proceeding, after due notice thereof, shall be cause for finding such party in default, pursuant to T.C.A. § 4-5-309. Failure to comply with an order of the Authority or a Hearing Officer may be deemed a failure to participate in a contested case and, therefore, be cause for finding a party in default.
- (2)
 - (a) Upon entry into the record of the default of the petitioner at a contested case proceeding, the petition shall be dismissed.
 - (b) Upon entry into the record of the default of a respondent at a contested case proceeding, the matter shall be tried as unopposed relative to such respondent.
- (3) Where the case is unopposed, the petitioner has the burden of making out a prima facie case, which may be done on the basis of written filings. In order to carry out statutory policies, however, the Authority or Hearing Officer may require further proof.

Based upon TRA Rule 1220-1-2-.17, the panel found that Open Business, after being given due notice, failed to participate in the proceeding and was in default. Further, upon reconsideration of its prior actions, the panel found that, based on the evidence presented, Open Business had violated Tenn. Code Ann. § 65-4-502(a) on twelve (12) occasions by transmitting, or causing another person to transmit, an unsolicited facsimile advertisement to Tennesseans or Tennessee entities.

Therefore, pursuant to Tenn. Code Ann. § 65-4-504(a), the panel voted unanimously to require Open Business to pay twenty-four thousand dollars (\$24,000) immediately and to cease and desist transmitting, or causing another person to transmit, unsolicited facsimile advertisements into the state of Tennessee.

IT IS THEREFORE ORDERED THAT:

1. Open Business Directory, Ltd. shall immediately cease and desist sending, or causing to be sent, any unsolicited facsimile advertisements into the state of Tennessee; and

2. Open Business Directory, Ltd. shall immediately pay a fine of twenty-four thousand dollars (\$24,000), representing a two thousand dollar (\$2,000) fine per violation of Tenn. Code Ann. § 65-4-502(a).

Chairman James M. Allison, Director Robin Bennett and Director David F. Jones concur.

ATTEST:



Earl R. Taylor, Executive Director