

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Scott Malcolm)	File No.: EB-TCD-12-00001013
DSM Supply, LLC)	NAL/Acct. No.: 201432170003
Somaticare, LLC)	FRN: 0023383201

ORDER ON RECONSIDERATION

Adopted: February 15, 2018

Released: February 15, 2018

By the Commission: Commissioner O’Rielly approving in part and dissenting in part.

I. INTRODUCTION

1. In February 2016, the Federal Communications Commission (Commission) issued a forfeiture order (*Forfeiture Order*) holding Scott Malcolm liable, jointly and severally, with DSM Supply, LLC, and Somaticare, LLC (collectively, Malcolm), for the illegal transmission of unsolicited facsimile advertisements.¹ The Commission found that Malcolm violated the Telephone Consumer Protection Act (TCPA) and its implementing regulations, and imposed a forfeiture of \$1,840,000.² Malcolm filed a “Request for Reconsideration” (Petition) asking the Commission to reconsider the amount of the forfeiture.³

2. Malcolm’s Petition makes one new argument—that the proposed forfeiture constitutes an excessive fine prohibited by the Eighth Amendment to the U.S. Constitution. This argument is based on three claims: (1) that Malcolm had “some basis” to believe that these faxes did not violate the law and Commission regulations, (2) that unsolicited faxes are “annoying” but involve no “economic injury to the recipients or to the government,” and (3) the forfeiture amount “will permanently destroy Malcolm’s livelihood.”⁴ As discussed more fully below, we dismiss the Petition for failure to comply with the Commission’s rules, which required Malcolm to raise such arguments in the response to the Notice of Apparent Liability. As a separate and independent ground for rejecting the Petition, and for the reasons stated below, we conclude that it fails to demonstrate that the forfeiture amount violates the Excessive Fines Clause of the Eighth Amendment.

¹ *Scott Malcolm, DSM Supply, LLC, Somaticare, LLC, Forfeiture Order*, 31 FCC Rcd 1652 (2016) (*Forfeiture Order*).

² *Forfeiture Order*, 31 FCC Rcd at 1654, para. 9; Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (TCPA).

³ See Scott Malcolm, DSM Supply, LLC, Somaticare, LLC, Request for Reconsideration, 2-3 (received Mar. 18, 2016) (on file in EB-TCD-12-00001013) (Petition). The Commission treats this “Request for Reconsideration” as a petition for reconsideration.

⁴ *Id.* at 2.

II. DISCUSSION

A. Malcolm's Petition Relies on Facts and Arguments that He Could Have Presented Previously and is Thus Procedurally Deficient

3. Pursuant to the Commission's rules (Rules), a petition for reconsideration that relies on facts or arguments not previously presented to the Commission may be granted only if it relies on facts or arguments that (i) relate to events that have occurred or circumstances that have changed since the petitioner's last opportunity to present such matters to the Commission, (ii) were unknown to the petitioner until after the last opportunity to present them to the Commission, or (iii) the Commission or its designee determines that reconsideration of the facts or arguments relied on is required in the public interest.⁵

4. Malcolm "does not contest the imposition of liability on him personally."⁶ The sole argument in the Petition is that the forfeiture is "excessive" in violation of the Eighth Amendment.⁷ Malcolm raises this Eighth Amendment argument for the first time in his Petition. However, that claim does not rely on events that have occurred or circumstances that have changed since his prior filings.

5. The Commission has already provided Malcolm with the opportunity to raise this argument, and he did not do so. The Communications Act of 1934, as amended (Act), requires the Commission to advise those subject to forfeiture of the amount of the Commission's proposed penalty, and to provide an opportunity to challenge the proposed amount, including asserting an inability to pay.⁸ The Commission issued a Notice of Apparent Liability (*NAL*) in which Malcolm was notified of the proposed forfeiture amount and informed that he could "file a written statement seeking reduction or cancellation of the proposed forfeiture," should he decide not to pay the forfeiture outright.⁹ He did not respond in a timely manner. The *NAL* also contained specific requirements for putting forth an "inability to pay" argument.¹⁰ He did not follow those requirements. Instead, Malcolm filed an untimely response to the *NAL* (*NAL* Response) nearly seven months after the filing deadline and did not dispute his ability to pay in that pleading.¹¹

⁵ 47 CFR § 1.106(c).

⁶ See Petition at 2; see also *Scott Malcolm, DSM Supply, LLC, Somaticare, LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 2476, 2483-84, paras. 16-19 & n.53 (2014) (*NAL*) (finding personal liability); *Forfeiture Order*, 31 FCC Rcd at 1653, para. 5. Malcolm also does not challenge the liability of DSM Supply, LLC, or Somaticare, LLC. With respect to violations of the TCPA, Malcolm notes that he "does not assert that the requirements of [various statutory exceptions] were in fact met; he asserts only that there is some basis for his thinking that they were." *Id.* at 3.

⁷ Petition at 2.

⁸ 47 U.S.C. §§ 503(b)(4)(A), (C).

⁹ *NAL*, 29 FCC Rcd at 2485, para. 23.

¹⁰ *Id.* at 2486, para. 27 ("The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.")

¹¹ See *Scott Malcolm, DSM Supply, LLC, Somaticare, LLC*, Response of Malcolm *et al* to Notice of Apparent Liability for Forfeiture (received Oct. 16, 2014) (on file in EB-TCD-12-00001013) (*NAL* Response). Although the Commission rejected the *NAL* Response as untimely, it considered and rejected the arguments put forth therein. *Forfeiture Order*, 31 FCC Rcd at 1652-54, paras. 3-8.

6. Malcolm's newly raised Eighth Amendment argument relies in part on a "deprivation of livelihood" claim.¹² The argument is premised on tax returns from 2012 to 2014, which either predate his NAL Response,¹³ as is the case for 2012 and 2013 tax returns, or are based on economic factors that Malcolm was aware of at the time of his NAL Response.¹⁴ None of the factual claims that Malcolm makes to support the new Eighth Amendment argument has come to light since his last opportunity to present them to the Commission, nor were any of the cited facts then unknown to him.¹⁵ There is no information in the tax returns that Malcolm could not have presented earlier to the Commission; therefore they do not provide a basis for reconsideration.

7. Moreover, we find the public interest does not require the Commission to reopen the forfeiture decision to consider information or arguments that Malcolm could have, but did not, present earlier. The Act contains numerous safeguards for persons such as Malcolm who do not hold a Commission license or authorization.¹⁶ Malcolm was provided notice—in the form of a citation (*Citation*)—that he was in violation of the TCPA and our rules; he was given an opportunity to discuss the notice.¹⁷ The Commission only took further action against Malcolm when he continued to violate the law following his receipt of the *Citation*.¹⁸ Subsequently, Malcolm had an opportunity to raise his Eighth Amendment arguments in his NAL Response and declined to do so. Malcolm's TCPA violations were numerous, egregious, and occurred after being issued a citation advising him that he was violating the law.

8. Further, enforcement of our procedural rules promotes orderliness and finality in the administrative process and thereby serves the public interest, convenience, and necessity.¹⁹ It also promotes the efficient use of Commission resources. Neither the Act nor Rules require the Commission to be administratively burdened by petitions for reconsideration that reargue issues that were already addressed, or that rely on facts or arguments that the petitioner could have—but did not—present to the Commission at an earlier stage.²⁰ Indeed, as the Commission has long recognized, "[n]o judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed."²¹ For all these reasons, we conclude that the public interest would not be served by consideration of Malcolm's new argument. Accordingly, we dismiss the Petition on procedural grounds.

¹² In addition to Malcolm's "deprivation of livelihood" argument, the Petition relies on some of the facts and arguments Malcolm previously raised and the Commission rejected. For example, Malcolm reiterates a claim from his NAL Response that the facsimile advertisements in question were solicited or otherwise fell under the established business relationship exception. *Compare id.* at 5, with Petition at 2-3. We have previously considered and rejected these arguments and need not revisit them here.

¹³ See NAL Response.

¹⁴ See Petition at 5; see also Scott Malcolm, DSM Supply, LLC, Somaticare, LLC, Declaration of Scott Malcolm, part 3, exhs. B, C, and D (received Mar. 18, 2016) (on file with EB-TCD-00001013) (Malcolm Declaration).

¹⁵ 47 CFR § 1.106(c).

¹⁶ See 47 U.S.C. § 503(b)(5).

¹⁷ *Somaticare, Inc. aka DSM Supply, LLC and DSM Supply, LLC aka Somaticare, Inc.*, Citation (EB Dec. 20, 2011) (on file in EB-TCD-12-00001013) (*Citation*). The citation was addressed to both DSM and Somaticare, and directed to the attention of Mr. Malcolm.

¹⁸ *Id.*

¹⁹ *Think 12 Corporation d/b/a Hello Depot*, Order on Review, 27 FCC Rcd 16618, 16620, para. 10 (2012).

²⁰ Indeed, the lack of new facts or information suggest that the Petition could be dismissed or denied by the Enforcement Bureau. See 47 CFR § 1.106(p).

²¹ *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941), cited, e.g., in *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Order on Reconsideration, 31 FCC Rcd 1367, 1372 para. 10 & n.40 (2016).

B. The Commission’s Reasonably Imposed Forfeiture is Constitutional

9. Although we dismiss the Petition on procedural grounds, we also reject Malcolm’s Eighth Amendment argument on the merits, as a separate and independent ground for our decision.

10. Whether a fine subject to scrutiny under the Eighth Amendment is unconstitutionally “excessive” depends on whether the amount of the fine is “grossly disproportional” to the gravity of the underlying offense.²² One factor that is often highly probative, if not dispositive, is whether the fine in question is within the prescribed statutory maximum for the underlying offense.²³ Additional factors that routinely bear on whether a fine is grossly disproportional to the gravity of the underlying offense include: (1) the nature and extent of the underlying offense, including whether it was in furtherance of other illegal conduct; (2) whether the person fined is within the class of persons for whom the authorizing statute was principally designed;²⁴ and (3) the nature of the harm caused by the sanctioned person’s conduct.²⁵ Finally, the burden to establish that a fine is grossly disproportional lies with the party challenging the fine.²⁶

11. Malcolm does not meet his burden to show that the forfeiture imposed is unconstitutionally excessive. First, the Commission’s forfeiture did not exceed the statutory maximum of \$16,000 per violation for the offense in effect at the time of the violation.²⁷ The Commission explained in the *NAL* why assessing the maximum forfeiture per violation was consistent with Commission precedent and was necessary to deter future violations by Malcolm and his companies.²⁸ In particular, the Commission explained that it had generally considered \$4,500 per unsolicited fax advertisement as a base forfeiture for violating the prohibition against sending junk faxes.²⁹ The Commission also explained that it applies an upward adjustment to \$10,000 per unsolicited fax advertisement where consumers request that facsimile messages stop, but the sender continues, and imposes more substantial forfeitures (as in this case) to persistent violators and violators whose practices are egregious.³⁰ In this case, the Commission applied the statutory maximum of \$16,000 per violation because Malcolm’s “advertisements prompted over 350 complaints to the Commission *after* the Bureau first warned these parties that their conduct

²² *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

²³ Courts have said, for example, that “[n]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment.” *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) (internal quotation marks omitted). Similarly, the D.C. Circuit readily upheld the Commission’s imposition of the maximum statutory penalty (adjusted for inflation) against an unlicensed radio operator who challenged that penalty as excessive. *See Grid Radio v. FCC*, 278 F.3d 1314, 1322 (D.C. Cir. 2002) (noting that the statutory amount was “neither indefinite nor unlimited,” and that it did not “seem excessive in view of the [petitioner’s] continued and willful violation of the licensing requirement”).

²⁴ Malcolm is a “person” for purposes of the TCPA—he either personally sent the faxes or was responsible for their transmission. *Forfeiture Order*, 31 FCC Rcd at 1653, para. 5; *NAL*, 29 FCC Rcd at 2484, para. 19.

²⁵ *See, e.g., United States v. Viloski*, 814 F.3d 104, 109 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1223 (2017); *Collins v. SEC*, 736 F.3d 521, 526-27 (D.C. Cir. 2013).

²⁶ *See, e.g., Viloski*, 814 F.3d at 109.

²⁷ 47 U.S.C. § 503(b)(2)(D); 47 CFR § 1.80(b)(5) (2012); *id.* § 1.80(b)(7) (amended and renumbered pursuant to *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 28 FCC Rcd 10785 (EB 2013)).

²⁸ *NAL*, 29 FCC Rcd at 2481-82, paras. 11-12.

²⁹ *See id.* at 2481, para. 11.

³⁰ *Id.* at 2481-82, paras. 11-12.

violated the law.”³¹ Malcolm and his companies were found to be “knowing, flagrant, and persistent violators of the junk fax rules” that were “not likely to be deterred from continuing to send unsolicited faxes, and violating other junk fax rules, unless a substantial penalty is assessed.”³² Thus, the Commission assessed a forfeiture of \$16,000 per violation for the 115 violations that occurred within the applicable statute of limitations based on its finding that the volume and egregious nature of the violations justified the maximum penalty possible.³³ Because the forfeiture was within the statutory limits, there is a strong indication that it was not excessive.

12. Malcolm contrasts this case with *Texas v. American Blastfax, Inc. (Blastfax)*, a case brought by the State of Texas under the TCPA and the Texas Deceptive Trade Practices Act, TEX. BUS. & COMM. CODE Section 17.41 (DTPA).³⁴ The court found the principals of Blastfax jointly and severally liable for continuing to send junk faxes even after the court had notified them that their conduct violated the TCPA.³⁵ The court imposed damages under the TCPA of \$459,375 and \$20,000 in attorney’s fees.³⁶ The amount in *Blastfax* was substantially lower than the amount that the Commission imposed on Malcolm, but that does not make the Commission’s decision excessive, arbitrary, or capricious. The court in *Blastfax* chose to impose an amount on the basis of what it deemed to be the “average cost [per page] of receiving an unwanted fax.”³⁷ The Commission chose instead to assess a fine that was based on and consistent with the statutory guidelines. It was within the Commission’s discretion to do so.

13. Second, the Commission’s reasonably imposed forfeiture is presumptively constitutional because it was not arbitrary or capricious. As the D.C. Circuit has explained, when an agency’s decision to impose a penalty is not arbitrary and capricious, that “goes most of the way to compelling rejection of [any Eighth Amendment challenge to that penalty].”³⁸ The court further noted that “[a] penalty that is not far out of line with similar penalties imposed on others and that generally meets the statutory objectives seems highly unlikely to qualify as excessive in constitutional terms.”³⁹ Here, as explained above and at greater length in the *NAL*, the forfeiture is reasonable and well in line with penalties the Commission has imposed in similar cases.⁴⁰

14. Further, the analysis through which the Commission determined to impose the forfeiture against Malcolm was not arbitrary or capricious. As discussed above, Malcolm had notice (in the form of the *Citation*) that his conduct was unlawful, and that penalties of up to \$16,000 per violation were

³¹ *Id.* at 2482, para. 12.

³² *Id.* at 2482, para. 12.

³³ *Id.* at 2482, para. 12. The Commission would also have taken account of Malcolm’s ability to pay. See *NAL*, 29 FCC Rcd at 2480-81, para. 10. However, Malcolm made no showing concerning that factor in his untimely response to the *NAL*. See *Forfeiture Order*, 31 FCC Rcd at 1652, para 2.

³⁴ *Texas v. American Blastfax, Inc.*, 164 F.Supp.2d 892 (W.D. Tex. 2001).

³⁵ See Petition at 3-4, citing *Blastfax*, 164 F.Supp.2d at 898, 903. Malcolm and the principals in *Blastfax* are both culpable under the TCPA. The “notice” in *Blastfax* involved a previous order by the court in the same case finding that Blastfax violated the TCPA and Blastfax continued to violate the TCPA after receiving such notice. Here, Malcolm received “notice” from the Commission in the *Citation* that his conduct violated the TCPA and he continued to violate the TCPA even after receiving such notice.

³⁶ *Blastfax*, 160 F.Supp.2d at 901. The court also imposed the statutory maximum of \$10,000 in penalties for violating the DTPA. *Id.*

³⁷ *Id.* The court in *Blastfax* relied on an expert witness who presented evidence about the cost of receiving unwanted faxes. The Commission is not compelled to accept evidence presented to another tribunal in another case.

³⁸ *Collins*, 736 F.3d at 527.

³⁹ *Id.*

⁴⁰ *NAL*, 29 FCC Rcd at 2481, nn.37-40.

possible for any future violations. Malcolm did not seek Commission guidance, and the Commission subsequently received more than 350 complaints concerning similar misconduct by Malcolm's businesses.⁴¹ The record showed 115 violations affecting 26 customers, and evidence in the record suggests that these represent a fraction of the unsolicited faxes that Malcolm and his companies sent.⁴² Moreover, the Commission could have imposed separate penalties for faxes consumers received from Malcolm after having requested to opt out, but we elected not to do so.⁴³

15. In order to determine the appropriate forfeiture amount, the Commission addressed the "degree of culpability" and "history of prior offenses," as well as the egregious character of the violations at issue.⁴⁴ The Commission also discussed Malcolm's indifference to the repeated do-not-fax requests made by the recipients of his illegal facsimiles, the large volume of illegal facsimiles, and the extensive text and graphics included in many of the facsimiles.⁴⁵ These qualities made Malcolm's facsimiles particularly egregious, consuming undue amounts of paper and ink as well as impeding the right of consumers to use their fax machines in a lawful manner.⁴⁶ The Commission also highlighted the rude and dismissive nature of Malcolm's responses to consumers as reported in consumer complaints.⁴⁷ For example:

- "I was verbally abused . . . after asking them to stop sending me faxes."⁴⁸
- "I have also told them that I was going to have to report them to the FCC and they then hung up on me."⁴⁹
- "They have sent us faxes for years. We call them every time we receive a fax and ask them to remove us. On one occasion I called several times and they hung up on me, laughed at me, and never removed us from their list."⁵⁰

16. Although Malcolm contends that his offense was not serious,⁵¹ the available statutory penalties that Congress established, and the Commission's findings concerning the prolonged, disruptive, and egregious nature of Malcolm's misconduct, belie that claim.⁵²

⁴¹ *Forfeiture Order*, 31 FCC Rcd at 1653, para. 6; *NAL*, 29 FCC Rcd at 2477-78, 2482, paras. 4, 12; *Citation* at para 3. Any confusion on Malcolm's part is of his own making and we find no support for his claim that he acted in "good faith" with "some basis" to believe that these faxes did not violate the law. *See* Petition at 2-3. If Malcolm had any doubt regarding his conduct with respect to the violations, the *Citation* provided an opportunity to respond and to meet with the Bureau to discuss the violations. *Citation* at 3. Malcolm, however, never responded or sought to meet with the staff. Thus, any confusion regarding whether the fax advertisements at issue in this case violated the Act or Rules rests solely with Malcolm.

⁴² *NAL*, 29 FCC Rcd at 2482, paras. 12-13.

⁴³ *Id.* at 2482, para. 14.

⁴⁴ *Id.* at 2484-85, para. 20.

⁴⁵ *See id.* at 2482-83, paras. 13-14.

⁴⁶ *See id.* at 2482, para. 13.

⁴⁷ *See id.* at 2479-80, para. 8.

⁴⁸ FCC Form 1088A—Junk Fax Complaint from S. Pagano (May 13, 2013).

⁴⁹ FCC Form 1088A—Junk Fax Complaint from K. Durham (June 17, 2013).

⁵⁰ FCC Form 1088A—Junk Fax Complaint from A. Orтели (May 21, 2013).

⁵¹ *See* Petition at 4-5 (Malcolm asserts that at most his illegal faxes were "annoying").

⁵² Even crediting Malcolm's assertion that he was not sending the faxes in connection with any consumer fraud or deceptive trade practice (Petition at 4 & n.3), he does not meet his burden of showing the forfeiture imposed was grossly disproportional to the gravity of his offense. The fact that his violations could have been even more

(continued....)

17. In short, the record shows that: (1) there were a significant number of consumer complaints supporting our action in this case; (2) affected customers were unable to stop the unwanted faxes;⁵³ (3) Malcolm's faxes did not include an opt-out notice required by the rules;⁵⁴ (4) consumers' requests to stop the faxes were met with rude responses and inaction;⁵⁵ (5) faxes Malcolm sent were laden with graphics, and so used significant amounts of toner—costing businesses money and making fax machines unavailable for extended periods of time;⁵⁶ and (6) the faxes disrupted medical practices, and possibly interfered with patient care.⁵⁷ On this record, the forfeiture the Commission imposed—which fell within statutory limits—was reasonable and not grossly disproportional to the gravity of the underlying offense.⁵⁸

C. Malcolm Fails to Show that the Commission's Forfeiture Will Deprive Him of a Future Ability to Make a Living

18. Malcolm claims in the Petition that the forfeiture would destroy his economic livelihood.⁵⁹ First, the fact that a fine may challenge Malcolm's future economic livelihood is not, in itself, dispositive in showing that the fine was unconstitutional.⁶⁰ Second, Malcolm has not adequately supported that claim.

19. Malcolm states that his "present level of income"⁶¹ and present assets⁶² are insufficient to satisfy the forfeiture—and that he presently has no expectation of receiving "any inheritance or gift of any amount."⁶³ But as the First Circuit has explained, "a defendant's inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional, nor is it even the correct inquiry."⁶⁴ For one thing, "even if there [were] 'no sign' that [Malcolm] could satisfy the forfeiture in the future, there is always a possibility that [he] might be fortunate enough 'to legitimately

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reprehensible does not detract from the gravity of the offenses he did commit.

⁵³ *NAL*, 29 FCC Rcd at 2479, para. 6.

⁵⁴ *Id.* at 2478-79, para. 5.

⁵⁵ *Id.* at 2479, paras. 6-7.

⁵⁶ *Id.* at 2479, 2482, paras. 8, 13.

⁵⁷ *Id.* at 2482, para. 13.

⁵⁸ Insofar as Malcolm claims he believed in good faith (or at least could have believed in good faith) that his conduct was lawful (Petition at 3), the Commission reasonably disagreed in view of the *Citation* Malcolm received and evidence that the vast majority of the complainants here had no relationship whatsoever with Malcolm's companies. *Forfeiture Order*, 31 FCC Rcd at 1653, paras. 4, 6.

⁵⁹ Petition at 5.

⁶⁰ See *Viloski*, 814 F.3d at 111-12 ("Whether a forfeiture would destroy a defendant's livelihood is a component of the proportionality analysis, not a separate inquiry. Accordingly, a forfeiture that deprives a defendant of his livelihood might nonetheless be constitutional, depending on his culpability or other circumstances." (footnote omitted)); see also *Bajakajian*, 524 U.S. at 333-34 ("The test for the [constitutional] excessiveness of a punitive forfeiture involves *solely* a proportionality determination." (emphasis added)). But see *United States v. Levesque*, 546 F.3d 78, 85 (1st Cir. 2008) (treating possible deprivation of livelihood as an independently relevant consideration, separate and apart from the question of gross disproportionality).

⁶¹ Malcolm Declaration at para. 8.

⁶² *Id.* at para. 4.

⁶³ *Id.* at para. 7.

⁶⁴ *Levesque*, 546 F.3d at 85.

come into money.”⁶⁵ In addition, Malcolm offers no basis for the Commission to conclude that his estimated “present” income (for the year 2015) is representative of his future earning potential. His reported wages for 2013, for example, are considerably greater than his estimate of his present income. And Malcolm presents no evidence concerning his educational background, physical capacity, or professional skills that might enable the Commission to assess his future earning potential. Nor did Malcolm provide evidence about his assets.

20. We note as well that Malcolm and his companies DSM, LLC, and Somaticare, LLC, are jointly and severally liable for the forfeiture. Although Malcolm makes vague claims concerning the assets of DSM (suggesting they are not sufficient to satisfy the forfeiture),⁶⁶ those claims are unsubstantiated. Malcolm makes no showing at all concerning Somaticare, beyond stating that it “was not in business” during 2013.⁶⁷ In short, when (1) there may be assets available from Malcolm’s companies to pay the forfeiture, (2) he has made no reliable showing concerning his future earning potential or present assets, and (3) he may yet come into funds with which to pay the forfeiture in the future, Malcolm has not come close to showing that the forfeiture will deprive him of his future livelihood.

21. Accordingly, even if we were to consider the substance of Malcolm’s Petition, we would find no reason to modify or cancel the forfeiture.⁶⁸

III. CONCLUSION

22. Upon review of the Petition and the entire record, we conclude that Malcolm’s Petition failed to meet the requirements of Section 1.106 of the Rules.⁶⁹ Reconsideration is appropriate when the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.⁷⁰ Malcolm’s Petition fails to raise new issues that were not already addressed by the Commission or new facts or arguments which the petitioner did not previously present to the Commission despite having an opportunity to do so.⁷¹ We further conclude that the public interest does not require us to reconsider our

⁶⁵ *Id.* at 85.

⁶⁶ See Malcolm Declaration at para. 5.

⁶⁷ Malcolm Declaration at para. 1 n.1.

⁶⁸ Malcolm argues that for the Commission to “establish a violation of §227(b)(1)(C) proof of intent is required.” Petition at 3. For “intent” Malcom cites Section 503(b)(1)(B) requiring a finding that a person must have “willfully or repeatedly” violated the Act or Rules before the Commission may impose a forfeiture. See *id.*; see also 47 U.S.C. § 503(b)(1). Malcolm is wrong with respect to “intent” and the “willfully or repeatedly” standard proscribed in Section 503(b)(1)(B). It is well established that “the term ‘willful’ means that the violator knew it was taking the action in question, irrespective of any intent to violate the Communications Act, while ‘repeatedly’ means more than once.” *Peninsula Communications, Inc.*, 17 FCC Rcd 2832, 2835 (2002) (footnotes citing Commission precedent omitted). In this case, Malcolm’s admission that he “constructively pushed the button that sent the offending faxes” evidences that Malcolm knew he was “taking the action in question,” which meets the requirement that the conduct must be willful. Petition at 3. Further, the forfeiture in this case is based on proof of Malcolm sending 115 unsolicited advertisements to the telephone facsimile machines of 26 consumers making the violations “repeated.”

⁶⁹ 47 CFR § 1.106.

⁷⁰ See 47 CFR § 1.106(c); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, 18257, para. 2 (EB 2000) (citing *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)); see also *Ely Radio, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 7608, 7610, para. 6 (EB 2012) (articulating the standard of review for Petitions for Reconsideration).

⁷¹ 47 CFR § 1.106(c).

previous findings.⁷² Moreover, even if we were to consider the merits of Malcolm's arguments, we would find no basis for reconsideration. We therefore find that the Commission properly decided the matters raised, and we uphold the *Forfeiture Order* for the reasons stated therein.

IV. ORDERING CLAUSES

23. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act and Section 1.106 of the Rules, the Request for Reconsideration filed by Scott Malcolm, DSM Supply, LLC, and Somaticare, LLC, is hereby **DISMISSED**, or in the alternative **DENIED**.⁷³

24. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act and Section 1.80 of the Rules,⁷⁴ Scott Malcolm, DSM Supply, LLC, and Somaticare, LLC, **ARE JOINTLY AND SEVERALLY LIABLE FOR A MONETARY FORFEITURE** of one million eight hundred forty thousand dollars (\$1,840,000) for willfully and repeatedly violating Section 227(b)(1)(C) of the Act and Section 64.1200(a)(4) of the Rules.

25. **IT IS FURTHER ORDERED** that a copy of this Order on Reconsideration shall be sent by first class mail and certified mail, return receipt requested, to Scott Malcolm's attorney, Lawrence Fischman, Glast, Phillips & Murray, PC, 14801 Quorum Drive, Suite 500, Dallas, TX 75254.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷² See 47 CFR § 1.106(c).

⁷³ 47 U.S.C. § 405; 47 CFR § 1.106.

⁷⁴ 47 U.S.C. § 503(b); 47 CFR § 1.80.