

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	CG Docket No. 02-278
)	
Petition for Waiver of ACT, Inc.)	CD Docket No. 05-338
)	
)	

PETITION FOR WAIVER OF ACT, INC.

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INTRODUCTION

ACT, Inc. (“ACT”) respectfully requests that the Commission grant ACT a waiver from Section 64.1200(a)(4)(iv) of the Commission’s regulations with respect to any facsimiles that have been transmitted by or on behalf of ACT prior to the date of this Petition. The referenced regulation was promulgated pursuant to the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 (the “TCPA”), and requires *solicited* fax advertisements to include the same opt-out notice as *unsolicited* fax advertisements.

ACT submits this waiver request in light of the Order that the Commission released in the referenced Dockets on October 30, 2014 (the “October 30 Order”). ACT is one of many companies that have inappropriately been subjected to putative class action lawsuits for sending alleged facsimile advertisements, regardless of whether the facsimiles were solicited or unsolicited. For reasons that follow, the public interest favors granting the requested waiver.

BACKGROUND

As the Commission knows, putative class action lawsuits are pending across the country that seek windfall recoveries for alleged violations of the TCPA’s prohibition on sending unsolicited facsimile advertisements. The lawsuits rely upon the TCPA provision that allows for statutory damages based on any violation of Section 277(b) “or the regulations prescribed [there]under,” 47 U.S.C. § 277(b)(3), and routinely target both unsolicited and solicited faxes even though the TCPA was not intended to regulate solicited faxes. It is common for these lawsuits to seek millions of dollars in statutory damages for alleged violations that, at best, had a negligible effect on the recipients of the facsimiles. The named plaintiffs in such cases often participate in name only, deferring entirely to their counsel in the hopes of getting a monetary “incentive” award on top of any statutory damages.

ACT is currently a defendant in one such TCPA lawsuit.¹ The named plaintiff in ACT's case has served as a named plaintiff in at least six other TCPA fax lawsuits, and plaintiff's counsel has filed numerous putative TCPA class actions. Not surprisingly, plaintiff's counsel previously submitted comments in these Commission proceedings objecting to any relief being granted to any of the petitioners whose petitions are addressed in the Commission's October 30 Order.²

ACT is a non-profit company headquartered in Iowa. Established in 1959, ACT provides a range of education-related services and programs in support of its mission. Among other services, ACT develops and administers the ACT test (the "ACT test"), a curriculum-based educational tool that assesses students' academic readiness for college. Colleges and universities use scores from the ACT test to help make admission, placement and financial aid decisions. High schools use ACT scores, *inter alia*, to counsel students on college readiness and their applications for college admission.

The ACT test is administered in all 50 states, principally in high schools. Approximately 1.8 million high school students in the class of 2014 took the ACT test, and approximately 27,000 U.S. high schools had one or more students register for the test.

There are six national testing dates for the ACT test. Schools routinely communicate with ACT before, during, and after each test date on subjects such as test registration, the nature of the test, accommodations for disabled test takers, available test centers, use of scores on the ACT test, and student test results. Many high schools have provided their fax numbers to ACT, and schools request and receive information from ACT in various ways, including by facsimile communication, regular mail, and/or electronic mail.

¹ See *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 4:12-civ-40088-TSH (D. Mass.).

² See Comments Submitted by Bellin & Associates, CG Docket Nos. 02-278 & 05-338 (Feb. 13, 2014).

The TCPA lawsuit in which ACT is the defendant was brought by Bais Yaakov of Spring Valley, a small, private religious high school in New York. Bais Yaakov alleges in its complaint that it received three unsolicited facsimiles from ACT in 2012. Two of the facsimiles encouraged school counseling staff to remind their students about upcoming ACT test registration deadlines, and the third invited Bais Yaakov to apply to serve as an ACT testing site. Bais Yaakov alleges that ACT sent similar unsolicited or solicited facsimiles to thousands of other “persons” (*i.e.*, high schools) across the United States, all of whom Bais Yaakov seeks to represent in a putative class action that seeks millions of dollars in statutory damages.

This Petition does not ask the Commission to resolve specific questions regarding the particular faxes sent by ACT, such as whether Bais Yaakov or any other entity invited the faxes or gave ACT permission to send them, or whether the faxes are “advertisements” within the meaning of the TCPA. Those types of factual determinations are properly left for the district court. ACT seeks only a limited retroactive waiver from 47 C.F.R. § 64.1200(a)(4)(iv), consistent with the waiver that the Commission has provided to similarly situated entities.

ARGUMENT

The TCPA prohibits sending unsolicited advertisements via facsimile. 47 U.S.C. § 277(b)(1)(C). There is an exception for unsolicited advertisements faxed pursuant to an established business relationship between the sender and the recipient, so long as the fax includes an opt-out notice that meets various requirements. *Id.* The Commission’s rules impose the same opt-out notice requirement on faxes that are sent *with* the recipient’s prior express invitation or permission – *i.e.*, on faxes that are solicited, as opposed to unsolicited. *See* 47 C.F.R. § 64.1200(a)(4)(iv).

To the extent the recipients of ACT's faxes provided their prior express invitation or permission for ACT to send them the faxes, the faxes were, by definition, *solicited* not *unsolicited* and therefore fall outside the scope of Section 227(b) of the Act. This is true regardless of whether the faxes contained any opt-out notice. Such faxes are not "unwanted faxes,"³ and allowing a party to be subjected to liability for sending such faxes is not in the public interest. ACT therefore asks the Commission to waive compliance with Section 64.1200(a)(4)(iv) with respect to all faxes sent by or on behalf of ACT with a recipient's prior express invitation or permission.⁴

The Commission may waive any provision of its rules "for good cause shown." 47 C.F.R. § 1.3. Among other instances, good cause exists where the waiver of a rule's application would be consistent "with the public interest." *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). That is the situation here.

Indeed, the Commission has already held that a retroactive waiver from Section 64.1200(a)(4)(iv) would serve the public interest for various reasons. *See generally* October 30 Order at ¶¶ 22–31. Based upon this holding, the Commission granted waivers to multiple petitioners, *id.* at ¶ 36, and held that "similarly situated parties" could "also seek waivers such as those granted in th[e] [October 30] Order," *id.* at ¶ 30.

³ *See* Report and Order and Third Order on Reconsideration, CG Dockets No. 02-278 and 05-338, at ¶ 48, 21 FCC Rcd 3787 (2006).

⁴ ACT agrees with the two Commissioners who partially dissented from the October 30 Order that the Commission does not have statutory authority to require opt-out notices on fax advertisements sent at a recipient's request. The Commission has now issued its decision on that issue, however, which one or more of the petitioners covered by the October 30 Order presumably will appeal. Therefore, ACT is not seeking declaratory relief in this Petition.

ACT is similarly situated to the parties to whom waivers were granted in the Commission's October 30 Order. It is filing this Petition within six months of the release of that Order. *See* October Order at 1. ACT's waiver request should therefore be granted, for the reasons set forth in the Commission's Order. It does not serve the public interest, the TCPA's statutory purposes, or the interests of equity and justice to impose staggering aggregated statutory damages on ACT or any other regulated party based upon the sending of facsimiles that Congress never intended be covered by the Act.

CONCLUSION

The Commission should grant ACT a waiver from 47 C.F.R. § 64.1200(a)(4)(iv) for all facsimiles sent by ACT subsequent to the regulation's effective date and prior to the date of this Petition.

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Respectfully submitted,

/s/ Robert A. Burgoyne

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