

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Petition of ZocDoc, Inc. for Retroactive)	CG Docket No. 02-278
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv))	
)	CG Docket No. 05-338
)	

PETITION FOR WAIVER BY ZOCDOC, INC.

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Dated: December 4, 2014

Pursuant to 47 C.F.R. § 1.3 and the Federal Communications Commission’s (“FCC” or “Commission”) Order released on October 30, 2014, in the above-captioned dockets (the “October 30 Order”), ZocDoc, Inc. (“ZocDoc”) respectfully requests that the FCC grant it a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) (the “Opt-Out Rule”) for all facsimile advertisements previously sent by ZocDoc with the recipients’ prior express permission but that did not meet the Opt-Out Rule’s opt-out notice requirements. ZocDoc has been the subject of two putative class action lawsuits for allegedly sending facsimile advertisements, despite the fact that ZocDoc made efforts to ensure that its faxes were sent only to individuals who consented to their receipt. As set forth below, there is good cause for granting the requested waiver.

I. Background

ZocDoc is a defendant in a putative class action lawsuit alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), that was pending in the United States District Court for the Southern District of New York and is now on appeal to the United States Circuit Court of Appeals for the Second Circuit. *See Geismann v. ZocDoc, Inc.*, Case No. 1:14-cv-07009-LLS (S.D.N.Y.); Case No. 14-3708 (2d Cir.). Although the district court entered judgment in favor of the individual plaintiff pursuant to the offer of judgment for full relief tendered by ZocDoc, the plaintiff persists in attempting to proceed on behalf of a class of individuals who allegedly received unsolicited faxes and individuals who allegedly received faxes that allegedly did not comply with the Opt-Out Rule.

In 2012, a putative class action was filed against ZocDoc in the United States District Court for the Northern District of Illinois alleging violations of the TCPA. *See James L. Orrington, II, DDS, PC v. ZocDoc, Inc. et al*, Case No. 12-cv-08747 (N.D. Ill.). That case was resolved individually. In both cases, ZocDoc intended to send the faxes only to those individuals

who had consented to receive facsimiles from ZocDoc. But ZocDoc does not ask the Commission to resolve the question of whether the plaintiff in *Geismann* or any other fax recipient consented to the receipt of faxes. ZocDoc merely asks the Commission for a waiver of the Opt-Out Rule requirements on par with the waiver the FCC has provided to similarly situated parties.

II. Request for retroactive waiver

In its October 30 Order, the FCC granted a retroactive waiver to all petitioners explicitly referenced in the Order and invited other “similarly situated parties” to seek retroactive waiver as well. *See* October 30 Order, at ¶ 30. Because the FCC’s findings in support of a retroactive waiver apply with equal force to ZocDoc and ZocDoc is in a similar position to the original petitioners, a retroactive waiver should be granted. ZocDoc therefore asks the Commission to waive compliance with Section 64.1200(a)(4)(iv) for all faxes previously sent by or on behalf of ZocDoc with the recipient’s consent.

The Commission may waive any provision of its rules for “good cause shown.” 47 C.F.R. § 1.3.¹ As the FCC concluded in the October 30 Order, good cause for a retroactive waiver exists here in part because the “inconsistency” between a footnote in an earlier FCC order (stating that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements” (emphasis added)) and the Opt-Out Rule has “caused confusion or misplaced confidence” regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission. *See* October 30 Order, at ¶ 24. The Commission correctly noted that

¹ The “good cause” for a waiver exists when “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.” *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990). The FCC already concluded in the October 30 Order that there are special circumstances in this case and the public interest is served by waiver. October 30 Order, at ¶¶ 24, 27.

this “confusion” has “left some businesses potentially subject to significant damage awards.” *Id.* at ¶ 27. While ZocDoc has thus far been able to avoid a significant damages award related to opt-out notices, it has now incurred the costs associated with defending two putative class action lawsuits and remains at risk should the Second Circuit reverse the district court judgment in *Geismann*. “[O]n balance . . . it serves the public interest . . . to grant retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.” *Id.*

Thus, for the same reasons set forth in the October 30 Order, there is good cause for granting a retroactive waiver to ZocDoc. *See generally* October 30 Order, at ¶¶ 22-31.

III. Conclusion

For the foregoing reasons, ZocDoc respectfully requests that it be granted a waiver from the opt-out notice requirements of 47 C.F.R. §64.1200(a)(4)(iv) for all facsimiles sent by ZocDoc after the regulation’s effective date and before the date of this Petition for which ZocDoc had the recipient’s consent.

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CERTIFICATE OF SERVICE

I, Blaine C. Kimrey, hereby certify that on this 4th day of December, 2014, a true and correct copy of the foregoing was served by U.S. mail to the following parties:

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