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

In the Matter of	)	
	)	
Petition for Waiver of	)	CG Docket No. 02-278
Philadelphia Consolidated Holding Corp.,	)	
Philadelphia Indemnity Insurance Company,	)	
Tokio Marine Specialty Insurance Company ,	)	
Maguire Insurance Agency, Inc.,	)	CG Docket No. [illegible]
Gillingham and Associates, Inc.,	)	
PCHC Investment Corp.,	)	
Liberty American Insurance Group, Inc.,	)	
Liberty American Insurance Services, Inc.,	)	
Liberty American Select Insurance Company, and	)	
Liberty American Insurance Company	)	
	)	

REPLY COMMENTS

Philadelphia Consolidated Holding Corp., on its behalf and on behalf of each of its subsidiaries, Philadelphia Indemnity Insurance Company, Tokio Marine Specialty Insurance Company, Maguire Insurance Agency, Inc., Gillingham and Associates, Inc., PCHC Investment Corp., Liberty American Insurance Group, Inc., Liberty American Insurance Services, Inc., Liberty American Select Insurance Company, and Liberty American Insurance Company (collectively, "PCH"), through their undersigned counsel, respectfully submit their reply comments in the above-captioned proceeding. The lone commenter in response to PCH's Petition, Anderson + Wanca ("A+W"), the law firm representing the plaintiff in the purported class action litigation against certain PCH entities, has not—and cannot—refute PCH's demonstration that good cause exists to grant it a waiver of section 64.1200(a)(4)(iii)-(iv) for the

solicited facsimiles that it transmitted.[1] Therefore, PCH respectfully requests that the Commission grant it a retroactive waiver of the opt-out [redacted] 64.1200(a)(4)(iii)-(iv)[2] of the Commission's rules, 47 C.FR. § 64.1200(a)(4)(iii)-(iv), from the effective date of the regulation for any solicited facsimile sent by PCH on its own behalf or on behalf of a third party.

INTRODUCTION

PCH designs and markets various commercial property and casualty insurance products to businesses through insurance brokers; it does not—and did not—engage in fax blasting.[3] Like other petitioners to whom the Commission has granted waivers, good cause exists to grant PCH's Petition, and it is in the public interest to do so.

As an initial matter, in the *Waiver Order*,[4] the Commission already dismissed A+W's argument that the Commission lacked the authority to grant the requested waiver.[5] In addition, any due process right that A+W enjoys is satisfied through the comment process in this proceeding. Further, A+W's own pleading demonstrates the harm that PCH is experiencing as a

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1 *See* TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke's Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. (Jan. 13, 2015) (hereinafter "A+W Comments").

2 47 C.F.R. § 64.1200(a)(4)(iv) ("A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section."). In its Petition, PCH has sought a waiver of both sections 64.1200(a)(4)(iv) and (a)(4)(iii) since section 64.1200(a)(4)(iv) incorporates (a)(4)(iii).

3 PCH Petition at 2-3.

4 *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Docket No. 02-278; Junk Fax Prevention Act of 2005, Application for Review filed by Anda, Inc., Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket No. 05-338, FCC 14-164 (rel. Oct. 30, 2014) (the "Waiver Order").

5 *Id.* at para. 21.

result of the frivolous litigation, which, in turn, harms the public interest as it diverts resources away from PCH's daily business activities. Having satisfied the waiver standard, the Commission should grant PCH's Petition and reject A+W's attempts to litigate in this forum.

I. THE COMMISSION HAS THE AUTHORITY TO GRANT A WAIVER TO PCH

The Commission has the authority to grant PCH's Petition. In the *Waiver Order*, the Commission rejected A+W's contention—made in opposition to other petitioners—that granting the requested waivers would result in a violation of the separation of powers. The Commission concluded: "[b]y addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided [it] authority as the expert agency."[6]

In its comments, A+W argues, once again, that the Commission is not permitted to waive its regulations in a private right of action.[7] To support its specious theory, it points to *dicta*—not relevant to the legal holding—of a Michigan case, in which the court stated that an agency may not "'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court."[8] In that case, the court misses the mark: the court states that the "regulation remains in effect just as it was originally promulgated", but fails to acknowledge that the Commission itself found that there was uncertainty about the precise implementation of the rule due to a conflicting statement in the *Junk Fax Order*.[9] The court also ignores scores of precedent that the Commission is the agency with the expert

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6 *Id.*

7 A+W Comments at 21.

8 *Id.* (citing *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, ---F.Supp. 3d ---, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014)), *corrected Physicians Healthsource, Inc. v. Stryker Sales Corp.*, Slip Opinion, 2015 WL 139559 (Jan. 12, 2015).

9 *See Waiver Order* at para. 24 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787, at note 154 (2006) ("*Junk Fax Order*")).

authority to evaluate and implement its rules.[10] Finally, the court in the underlying proceeding between A+W's client and PCH implicitly recognized that the Commission has the authority to address the waiver, and as a result, stayed the case pending resolution of the Commission proceeding.[11] The Commission once again should reject A+W's argument, and grant PCH's Petition.

II. PCH HAS SATISFIED THE WAIVER STANDARD

PCH already has demonstrated—and A+W cannot refute—that good cause exists for the Commission to grant PCH a waiver of the opt-out requirement set forth in section 64.1200(a)(4)(iv) with regard to the solicited facsimiles that PCH transmitted. As PCH demonstrated, and the Commission concluded in other petitions, "special circumstances"—the conflicting statements in the rule and the Commission's order led to confusion in the interpretation of the rule—exist and granting the waiver would be in the public interest. Indeed, A+W's own comments underscore the tremendous burden that PCH has experienced, and will continue to experience, as a result of the litigation absent a waiver of the rule.

A. Special Circumstances Exist to Grant PCH the Requested Waiver

In its Petition, PCH highlighted the conflicting statements between the Commission's rules and the footnote in the *Junk Fax Order*,[12] which stated that the opt-out rule did not apply to solicited facsimiles.[13] Despite PCH's explicit reference to the conflicting—and confusing—statements between the Commission's rule and the *Junk Fax Order*, A+W still claims that PCH

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10 *See, e.g.*, 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."). *Waiver Order*, at para. 22 (*citing* 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)).

11 *See True Health Chiropractics, Inc. v. Philadelphia Consolidated Holding Corp.*, Civil Action No. 13-3541, Order (Sept. 18, 2014).

12 PCH Petition at 5-6.

13 *See Junk Fax Order*, 21 FCC Rcd 3787, at note 154.

has not demonstrated special circumstances, claiming that PCH (according to A+W) did not state that it was "confused." The Commission must reject A+W's nonsensical argument.

Further, as PCH explained in its Petition, all of the facsimiles at issue included contact information that substantially complied with the requirements of Sections 64.1200(a)(4)(iii)-(iv),[14] such that the recipient had the information that it needed to opt-out of any future faxes (though, as PCH noted in its Petition, PCH does not send multiple faxes to the same recipient, such that there is no need to opt out). Clearly, PCH in no way was trying to conceal its identity, and complied with the spirit and purpose of the rules.

B. Any Due Process Right A+W Has Is Satisfied Through this Proceeding

The Commission must reject A+W's attempts to litigate its court case before the Commission. A+W has the opportunity, and has exercised that opportunity, to submit comments in response to PCH's Petition, thus satisfying any alleged due process right that it may have in this proceeding. A+W proposes that the Commission take extraordinary measures – subpoenaing witnesses, producing evidence, or even staying this proceeding until it has completed discovery *in the case that the court already has stayed pending resolution of this Petition*. A+W does not have the right, however, to propound discovery or to litigate its own case before the Commission, and A+W's due process rights are served through this proceeding. PCH already has satisfied the waiver standard, and the Commission must deny A+W's extraordinary requests.

C. It is in the Public Interest to Grant PCH's Petition

PCH already has demonstrated that it is in the public interest to grant its Petition, and A+W's comments in opposition to PCH actually bolster PCH's argument. In its comments, A+W disingenuously argues that PCH is liable for a maximum of $58,500 (39 facsimiles).[15] A+W

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14 *See* PCH Petition at 3-4.

15 A+W Comments at 27.

purposefully ignores the substantial costs that PCH has incurred, both in terms of financial and personnel resources, and likely will continue to incur to defend itself in the litigation. In the court case, A+W propounded extensive discovery, not only on PCH, but also on third parties with which PCH did business. As a result, PCH has had to file Motions to Quash the requested discovery, and will have to refile such motions if the Petition is denied. The substantial resources that PCH has had to expend to defend itself in litigation, solely because it did not include the opt out language in the precise format specified by the Commission, has taken resources away from PCH's day-to-day operations: providing insurance. The public interest is better served by granting PCH's Petition, thus enabling PCH to return to focusing on its line of business, not wasting time defending a frivolous lawsuit.

Further, granting PCH's waiver does not undermine either the policy objectives of either the TCPA or Section 64.1200(a)(4)(iv). As stated above and in PCH's Petition, PCH only sent facsimiles in response to a specific request and provided complete contact information on each and every facsimile, thus providing the recipient with a means to opt out.[16] Thus, PCH satisfied the rule's objective of ensuring that facsimile recipients are able to opt-out of the receipt of future facsimiles.

The public interest would be better served by granting PCH's waiver than by strict adherence to the rule.

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16 *See* PCH Petition at 3-4.

III. CONCLUSION

The record in this proceeding supports PCH's Petition for a waiver of the opt-out requirement as applied to solicited facsimiles, and A+W has not presented any evidence to refute that good cause exists to grant the requested waiver. For the forgoing reasons, PCH respectfully requests that the Commission grant the requested waiver.

Respectfully submitted,

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