

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

In the Matter of	)	
	)	
Petition of RadNet Management, Inc.,	)	CG Docket No. 02-278
RadNet, Inc.,	)	
Beverly Radiology Medical Group III,	)	
Pronet Imaging Medical Group, Inc.,	)	CG Docket No. 05-338
Breastlink Medical Group, Inc., and	)	
Beverly Radiology Medical Group, Inc.	)	
	)	
for Retroactive Waiver of	)	
47 C.F.R. § 64.1200(a)(4)(iv)	)	

**REPLY IN SUPPORT OF RADNET MANAGEMENT INC. AND ITS AFFILIATES’  
PETITION FOR WAIVER**

RadNet Management Inc. and its affiliates (collectively “RadNet” or “Petitioner”) respectfully submit these reply comments in support of their Petition for Waiver<sup>1</sup> and in response to Comments<sup>2</sup> filed by Scott Z. Zimmerman on behalf of Edward Simon, a plaintiff in a purported class action lawsuit against RadNet. For reasons stated below and in RadNet’s initial Petition for Waiver, the Federal Communications Commission (“FCC” or “Commission”) should grant RadNet waiver from the opt-out requirement of 47 C.F.R. § 64.1200(a)(4)(iv) insofar as it may have sent fax advertisements with the prior express invitation or permission of the recipients.

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<sup>1</sup> *Petition of RadNet Management, Inc., et al., for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Jan. 16, 2015) (“RadNet Petition” or “Petition for Waiver”).

<sup>2</sup> *Edward Simons Comments on Petition for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by “RadNet Entities,”* CG Docket Nos. 02-278, 05-338 (February 13, 2015) (“Simon Comments” or “Comments”).

## I. INTRODUCTION

The voluminous Comments filed by Simon evince a misunderstanding of the purpose and scope of the FCC's October 30, 2014 *Fax Order* ("2014 *Fax Order*").<sup>3</sup> As such, the Comments fail to distinguish RadNet from the dozens of other "similarly situated" entities that have already received waivers from the Commission. The Comments also constitute a meritless collateral attack on the Commission's settled authority to grant waivers from its own regulations. The Commission has already rejected similar challenges to its waiver authority in the *2014 Fax Order*, and there is no cause to revisit that determination in this proceeding.<sup>4</sup> Accordingly, the Commission should find that "good cause" exists to grant RadNet the waiver requested in its Petition because RadNet is "similarly situated" to other petitioners who were granted waivers by the Commission in the *2014 Fax Order*.

## II. DISCUSSION

### A. The Commission Has the Authority to Grant Waivers from Its Own Regulations.

The Commission has the authority to grant waivers from its regulations for "good cause."<sup>5</sup> In its *2014 Fax Order*, the Commission specifically addressed and "reject[ed] any implication that by addressing the petition filed in this matter while related litigation is pending,

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<sup>3</sup> See *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirements for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket No. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) (the "2014 *Fax Order*").

<sup>4</sup> See *2014 Fax Order* at ¶ 21.

<sup>5</sup> See *2014 Fax Order* at ¶ 21-23; see also 47 C.F.R. 1.3; see also *Northeast Cellular Tele. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). ("The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.")

we have ‘violate[d] the separation of powers vis-à-vis the judiciary.’”<sup>6</sup> Simon makes similar separation of powers claims in his Comments, which the Commission should likewise reject.<sup>7</sup>

In support of its challenge to the Commission’s settled authority to grant waivers from its own regulations, Simon cites and misinterprets a Reconstruction-era case, *United States v. Klein*, involving Congressional legislation prohibiting a presidential pardon from being admitted into evidence in support of a claim against the federal government.<sup>8</sup> The Supreme Court invalidated the legislation, ruling that Congress had encroached upon the executive’s exclusive power to grant pardons.<sup>9</sup>

By granting a waiver to its regulations, the Commission would not be encroaching on established executive prerogatives (or even those of the judiciary). Rather, under the Supreme Court’s modern jurisprudence, courts *defer* to an agency’s construction of statutes.<sup>10</sup> Congress has explicitly delegated the Commission the authority to interpret the TCPA.<sup>11</sup> Thus, it is Simon, and not RadNet, who is urging the Commission to upset the separation of powers by attempting to strip the Commission of its authority to interpret to TCPA and apply its own regulations. Moreover, by granting a waiver from its regulations, the Commission would not be directing a decision in a particular court case because the granting of such waiver will not determine

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<sup>6</sup> *2014 Fax Order* at ¶ 21.

<sup>7</sup> *Simon Comments* at 11. This petition is not the proper venue for challenging the Commission’s *2014 Fax Order*. See e.g. *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013) (The Hobbs Act provides that the courts of appeals have exclusive jurisdiction to determine the validity of FCC orders.).

<sup>8</sup> See *Simon Comments* at 11.

<sup>9</sup> See *United States v. Klein*, 80 U.S. 128, 147-148 (1872) (“To the executive alone is intrusted [sic] the power of pardon; and it is granted without limit. . . and to deny them their legal effect . . . certainly impairs the executive authority and directs the court to be instrumental to that end.”)

<sup>10</sup> See e.g. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (noting that the executive agency remains the “authoritative interpreter” of the statutes which Congress has delegated it such authority.)

<sup>11</sup> See 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”).

whether a violation of the TCPA has, in fact, occurred. The Commission’s *2014 Fax Order* explicitly stated that the granting of a waiver should not be “construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.”<sup>12</sup> As RadNet stated in its Petition for Waiver, such factual determinations “are properly left for the District Court.”<sup>13</sup>

Simon also cites a recent decision involving the EPA’s interpretation of the Clean Air Act<sup>14</sup> in support of his contention that the FCC has no authority to grant waivers from its regulations interpreting the TCPA.<sup>15</sup> As other commenters in this docket have noted, this decision, *Natural Resources Defense Council v. EPA*, involved a different agency without express authority to waive the effect of its own rules and regulations.<sup>16</sup> Furthermore, the court in *NRDC* held that the EPA exceeded its authority by creating an affirmative defense in a private right of action.<sup>17</sup> In contrast, this petition seeks a waiver from the Commission’s own regulation. Such relief would not require the Commission to establish a new affirmative defense or otherwise affect or limit the scope of available statutory remedies in a private right of action. Instead, RadNet requests a limited waiver from the Commission’s own regulations “where strict

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<sup>12</sup> See *2014 Fax Order* at ¶ 31.

<sup>13</sup> See *RadNet Petition* at 4. Simon’s reply is littered with factual assertions, including that his client never gave his permission to receive fax advertisements. As explained in more detail below, Simon’s attempt to litigate such factual issues in this administrative proceeding is improper and should be rejected.

<sup>14</sup> *Nat’l Res. Def. Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).

<sup>15</sup> See *Simon Comments* at 13-18.

<sup>16</sup> See *Reply Comment of Senco Brands, Inc.*, CG Docket No. 05-338, at 3-4 (Jan. 20, 2015).

<sup>17</sup> See *NRDC*, 749 F.3d at 1057.

compliance would not be in the public interest.”<sup>18</sup> Accordingly, the D.C. Circuit’s ruling on the EPA has no bearing on the Commission’s authority in this proceeding.<sup>19</sup>

B. RadNet Is ‘Similarly Situated’ to Petitioners That Have Already Been Granted Waivers and Therefore Is Entitled to the Same Waiver.

Simon makes numerous, yet unavailing, claims about why RadNet is not “similarly situated” to the petitioners granted waivers in the *2014 Fax Act*. Simon’s “kitchen-sink” of factual arguments on this issue display a fundamental misunderstanding of the Commission’s reasons for granting the initial waivers. Rather than focusing on the factual particularities in individual petitions, the Commission based its decision on the fact that the rule making process “may” have caused confusion among the petitioners, and thus, a limited waiver would best serve the public interest.<sup>20</sup> The Commission did not engage in any fact finding on issues such as consent, and it did not require any specific forms of proof when it granted waivers to the initial petitioners. It would be improper and unjust for the Commission to impose a higher evidentiary burden on RadNet and other subsequent petitioners than was placed on the initial petitioners. Despite their lack of relevance to this administrative proceeding, RadNet will specifically address some of Simon’s contentions.

First, Simon claims that RadNet has not identified which of its affiliates sent solicited faxes. Simon apparently takes issue with the fact that RadNet is seeking a waiver on behalf of its

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<sup>18</sup> See *Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009). The case is from the same court that issued the EPA decision to which Simon cites as evidence that the FCC has no authority to issue waivers.

<sup>19</sup> Simon also cites language from a recent District Court decision, *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014), to support its dubious claim that Commission cannot issue a waiver that impacts private rights of action. See *Simon Comments* at 12-13. As other petitioners in this docket have noted, this decision does not bind the Commission, nor is it persuasive. See *Reply Comments of EatStreet, Inc.*, CG Docket Nos. 02-278; 05-338 at 4 n.15 (January 20, 2015).

<sup>20</sup> *2014 Fax Order* at ¶ 24 (noting that the Commission’s use of “‘unsolicited’ in this one instance *may* have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice[.]”) (emphasis added); see also *id.* at ¶ 25 (“[T]he lack of explicit notice *may* have contributed to confusion or misplaced confidence about this requirement.”) (emphasis added).

affiliated entities. The Commission, however, already granted waivers to UnitedHealth Group Inc. and Allscripts, both of which requested waivers on behalf of their “affiliates and subsidiaries.”<sup>21</sup> The Commission, when granting those waivers, did not engage in fact-finding on whether the named petitioner or one of its affiliates sent faxes. To subsequently deny RadNet’s Petition for Waiver on this basis would be unjust and arbitrary.

Next, Simon claims that RadNet is not subject to “potentially substantial damages.” This contention is absurd. Simon himself has sued RadNet in a purported class action in which he demanded “not less than \$5,000,000.”<sup>22</sup> In any event, the *2014 Fax Order* did not require petitioners to quantify their exposure or liability to receive the waiver. Instead, the Commission granted waivers because of the “potentially substantial” consequences of lawsuits filed by TCPA plaintiffs, such as the action filed by Simon against RadNet.<sup>23</sup>

Simon also claims that RadNet’s Petition for Waiver should not be granted because RadNet did not provide sufficient evidentiary proof of Simon’s consent to receiving faxes. When it granted waivers to similarly situated entities in its *2014 Fax Order*, the Commission did not require those petitioners to provide proof that the faxes were solicited. The Commission did not engage in any fact finding on the issue of consent and did not require any specific forms of proof when it granted waivers to the initial petitioners.<sup>24</sup> As stated above, the Commission directly acknowledged that the waiver should *not* be construed as making findings of fact as to

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<sup>21</sup> See *Petition of UnitedHealth Group Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278; 05-338 (July 11, 2014); *Petition of Allscripts-Misy’s Healthcare Solutions et al.*, CG Docket Nos. 02-278; 05-338 (Sept. 30, 2014).

<sup>22</sup> See *RadNet Petition* at 6.

<sup>23</sup> See *2014 Fax Order* at ¶ 27.

<sup>24</sup> See *2014 Fax Order* at ¶ 31 n.104. (The record indicates that whether *some* of the petitioners had acquired prior express permission of the recipient *remains a source of dispute* between the parties.) (emphasis added). This fact is also disputed in Simon’s lawsuit against RadNet and will be decided by the District Court.

whether particular faxes were solicited; that is the role of the District Court.<sup>25</sup> Thus, the sort of factual discovery demanded by Simon is irrelevant to this proceeding.<sup>26</sup>

Simon also claims that the waiver should not be granted because RadNet has only submitted “empty conclusions” that they were confused by the rulemaking process.<sup>27</sup> Again, the Commission did not require any proof that individual petitioners were confused by the conflicting language in the statutes. Rather, the Commission pointed to the *industry-wide* confusion as the rationale for granting the waiver.<sup>28</sup> RadNet, like the petitioners already granted waivers, cited the confusing language from the 2006 rulemaking and explicitly claimed that it was similarly confused.<sup>29</sup> In granting the initial waivers in the 2014 *Fax Order*, the FCC noted that their decision was based, in part, on the fact that it “found nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement . . . but nonetheless failed to do so.”<sup>30</sup> The same is true in this proceeding. Simon cannot show any evidence that RadNet was aware of this opt-out requirement, yet knowingly failed to comply with it. Moreover, this language certainly does not impose an affirmative obligation on RadNet to provide such proof in this proceeding. As stated previously, it would be improper and unjust for the Commission to impose a higher evidentiary burden on RadNet and other subsequent petitioners than was placed on the initial petitioners that have already been granted waivers.

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<sup>25</sup> See *2014 Fax Order* at ¶ 31.

<sup>26</sup> Should the Commission decide to participate in Simon’s scheme to hijack this administrative proceeding in order to litigate its purported class action case, RadNet is prepared to present evidence that it did and does, in fact, only send fax advertisements to recipients who gave RadNet prior express invitation or permission to send such faxes.

<sup>27</sup> See *Simon Comments* at 23.

<sup>28</sup> See *supra* note 20 and accompanying text.

<sup>29</sup> See *RadNet Petition* at 5.

<sup>30</sup> *2014 Fax Order* at ¶ 26.

C. RadNet’s Requested Waiver for Solicited Faxes Is in the “Public Interest.”

Simon also claims that RadNet’s Petition for Waiver was based solely on the “established business relationship” (“EBR”) justification for sending the faxes, and therefore, the waiver should not be granted to RadNet. Despite Simon’s attempt to manipulate and parse language from the Petition for Waiver, RadNet specifically asked for a waiver for *solicited* faxes sent with express permission.<sup>31</sup> Simon concedes the very same point on Page 1 of his reply comments, noting that “RadNet Entities seek a ‘retroactive waiver’ of § 64.1200(a)(4)(iv), which requires opt-out notices on faxes sent with *prior express invitation or permission.*”<sup>32</sup> The Commission has already determined that such a waiver for solicited faxes would better serve the “public interest” than strict enforcement of the regulation.<sup>33</sup>

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<sup>31</sup> See *RadNet Petition* at 7 (“[R]adNet respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) insofar as RadNet may have sent fax advertisements before April 30, 2105 lacking the required opt-out notice to recipients that had *provided prior express invitation or permission.*”) (emphasis added).

<sup>32</sup> *Simon Comments* at 1 (emphasis added). The EBR justification is only implicated when sending unsolicited faxes. 47 CFR § 1200(a)(4)(i)-(iii). Simon’s argument appears to be that, somehow, these two categories are mutually exclusive, such that RadNet could not have sent any solicited faxes to anyone with whom it also had an EBR. See *Simon Comments* at 25. In any event, as stated above, whether or not the faxes in our case were sent with permission or pursuant to an EBR are findings of fact that are not relevant to the FCC’s waiver.

<sup>33</sup> See *2014 Fax Order* at ¶ 27 (“On balance, however, we find it serves the public interest in this instance to grant a 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.”)

#### IV. CONCLUSION

For the reasons set forth above and in the initial RadNet Petition, RadNet respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) insofar as RadNet may have sent fax advertisements before April 30, 2105 lacking the required opt-out notice to recipients that had provided prior express invitation or permission.

Dated: February 20, 2015

Respectfully submitted,

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