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

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

PETITION FOR RETROACTIVE WAIVER

Pursuant to 47 C.F.R. § 1.3 and Paragraph 30 of the Commission's *Order*, CG Docket Nos. 02-278, 05-338, FCC 14-164, *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2014) 29 FCC Rcd. 13998 (F.C.C.)* (Oct. 30, 2014) (the "*Order*"), Petitioners Competitive Health, Inc. ("Competitive") and First Access, Inc. ("First Access", and together with Competitive, "Petitioners") hereby request that the Commission grant Petitioners a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission's rules, 47 C.F.R. § 64.1200(a)(4)(iv), with respect to any faxes alleged to be advertisements which were sent with the recipients' prior express invitation or permission.

In the *Order*, the Commission clarified that the opt-out notice requirement under the Telephone Consumer Protection. Act, 47 U.S.C. § 227 (the "TCPA"), which is set forth in 47 U.S.C. § 227(b)(1)(C) and (b)(2)(D) of the statute, and in the implementing regulation, 47 C.F.R. § 64.1200(a)(4)(iv), applies to solicited fax advertisements (i.e., fax advertisements sent with the recipients' prior express invitation or permission). The Commission also granted a retroactive waiver of Section 64.1200(a)(4)(iv) to several petitioners who were facing lawsuits alleging that the petitioners had violated Section 64.1200(a)(4)(iv) by failing to include the "opt-out" language in advertising faxes. The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest. *See Order* ¶¶ 26-28. The Commission invited "similarly-situated parties" to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes. *See id.* ¶30.

As Petitioners demonstrate below, they are similarly situated to the petitioners who were granted retroactive waivers in the *Order*. Petitioners respectfully request that the Commission grant them a retroactive waiver of Section 64.1200(a)(4)(iv) for the same reasons that supported the Commission's retroactive waivers in the *Order*.

I. BACKGROUND

Competitive provides its clients with access to networks of contracted health care providers nationwide, including those health care providers who are contracted with its affiliate, First Access, to obtain discounted rates for health care services provided by those providers to patients covered by Competitive's clients' health plans. Competitive's clients are insurance companies, medical plans, self-insured employers and employer groups, and insurance agents. Competitive also provides those contracted health care providers and patients covered by Competitive's clients' health plans with information concerning the discounted rates to be charged/collected by those providers for health care services provided to those patients at the point of service. Competitive also provides repricing services to its clients so they know the correct amounts to which the contacted providers are entitled to be paid for their health care services pursuant to the applicable agreement. Competitive also offers referral services for those patients who are seeking to receive health care services from contracted providers.

First Access, an affiliate of Competitive, maintains a network of health care providers who have agreed to discount their fees for health care services provided to patients who are covered by health plans of Competitive's and First Access's clients (insurance companies, health plans, and self-insured employers and employer groups). Those providers are required to sign a provider agreement to become part of the network. First Access and Competitive frequently receive requests from patients, health plans, employers and employer groups, insurance companies, insurance agents and others for certain health care providers to become part of First Access's network, and in response First Access will call the provider's office to inquire if the provider would be interested in joining the network. If the provider is interested, First Access

will typically fax a provider agreement and related materials to the provider's office for the provider to complete and return to First Access to join the network.

In addition, Competitive and First Access will regularly communicate with the providers who have joined the network, including by facsimile, regarding the providers' participation in the network, their provision of health care services, the fees to be charged to their patients pursuant to the terms of the applicable provider agreement, and other aspects of the ongoing relationships between Competitive Health, its clients, the clients' covered patients, First Access, and the contracted providers.

The TCPA prohibits the use of any telephone facsimile machine, computer, or other device to send an "unsolicited advertisement" to a fax machine. 47 U.S.C. § 227(b)(1)(C). The TCPA was amended in 2005 by the Junk Fax Protection Act ("JPFA"). *See* Junk Fax Protection Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). Among other things, the JFPA established an exception to the TCPA's prohibition on unsolicited advertising faxes for companies that send fax advertisements to those with whom they have an established business relationship. See 47 U.S.C. § 227(b)(1)(C)(i). The JFPA also amended the TCPA to require the sender of an "unsolicited advertisement" to provide a specified notice on the fax that allows recipients to "opt out" of any future fax transmissions from the sender. *See id.* §§ 227(b)(1)(C)(iii) and 227(b)(2)(D).

The Commission amended its rules to incorporate the changes in the JFPA. See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005* (2006) 21 FCC Rcd. 3787 (F.C.C.) (2006) (the "*Junk Fax Order*"). Among other things, in the *Junk Fax Order*, the Commission adopted a rule that provided that a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice." 47 C.F.R. § 64.1200(a)(4)(iv). The Junk Fax Order, however, also stated in a footnote that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements." *Junk Fax Order, supra, 21 F.C.C. Rcd. 3787, 3818 n.154* (emphasis added).

Numerous parties filed petitions challenging the Commission's rule applying the opt-out notice requirement to solicited advertising faxes. The Commission resolved those petitions in the *Order*, issued on October 30, 2014. In the *Order*, the Commission acknowledged that the "inconsistent footnote" in the *Junk Fax Order* (which stated that the opt-out notice requirement applied only to *unsolicited* advertisements) "caused confusion or misplaced confidence regarding the applicability of the [opt-out notice] requirement." *Order* ¶¶ 24, 28. The Commission also acknowledged that "the lack of explicit notice" in the notice of proposed rulemaking that the Commission contemplated requiring opt-out notices on solicited fax advertisements "may have contributed to confusion or misplaced confidence." *Id.* ¶ 25.

The Commission stated that "this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule." *Order* ¶ 26. The Commission found that "granting a retroactive waiver would serve the public interest," because it would be "unjust or inequitable" to subject parties to "potentially substantial damages," given the confusion and misplaced confidence about the rule's applicability. *Id.* ¶¶ 27, 28.

The Commission "grant[ed] retroactive waivers of [its] opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by [its] rules." *Order* ¶ 29. The Commission stated that "[o]ther, similarly situated parties may also seek waivers such as those granted" in the *Order*, within six months of the date of the *Order*. *Id.* ¶ 30.

II. THE COMMISSION SHOULD GRANT PETITIONERS A RETROACTIVE WAIVER OF 47 C.F.R. § 64.1200(a)(4)(iv)

As demonstrated below, Petitioners are similarly situated to the parties who were granted retroactive waivers in the Order, and the Commission likewise should grant Petitioners a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) as applied to faxes which may be alleged to be advertisements which were sent to recipients who had provided prior express invitation or permission for such faxes.

The Commission's rules provide that the Commission may suspend, revoke, amend, or waive any of its rules at any time "for good cause shown." 47 C.F.R. § 1.3. In order to waive a

rule, the Commission must find that (a) "special circumstances warrant a deviation" from the rule; and (b) waiver would "better serve the public interest" than would application of the rule. *See* Order ¶ 23. The Commission found in the Order that both of these requirements were satisfied with respect to the petitioners' challenges of the application of the opt-out notice requirement to solicited faxes. *See id.* ¶¶ 26-27.

The same "special circumstances" identified by the Commission in the *Order* exist for the Petitioners.

Petitioners are similarly situated to the parties granted retroactive waivers in the Order. Claims have been asserted against Petitioners in connection with a putative class action lawsuit in which plaintiffs allege violations of the TCPA and the Commission's regulations based on alleged advertising faxes which did not include opt-out notices, which faxes have been claimed to have been sent by Petitioners. See Complaint, Eric B. Fromer Chiropractic, Inc. v. Spendwell Health, Inc. et al., Civil Action No. 2:14-cv-08728-AB-VBK (C.D. Cal. 2014) (filed November 10, 2014). The Petitioners' defenses to the claims in that action would include that the alleged recipients of the faxes — some of whom are members of the network established by First Access — provided their prior express invitation or permission to receive such faxes.

Moreover, the alleged advertising faxes at issue in the above litigation and the provider agreements and other communications faxed to prospective and actual health care providers as described above were sent after the Commission issued the *Junk Fax Order* — which included the "inconsistent" footnote stating that the opt-out notice requirement applied only to *unsolicited* advertising faxes — and before the Commission issued its October 30, 2014 *Order* clarifying the opt-out notice requirement. As the Commission has recognized, that footnote caused "confusion" and "misplaced confidence" regarding the applicability of the opt-out notice requirement to solicited faxes. *Order* ¶ 24. The Commission concluded that such confusion and misplaced confidence, coupled with questions about whether the Commission had provided adequate notice about its intent to adopt the opt-out notice requirement for solicited faxes, "presumptively establishes good cause for retroactive waiver of the rule." *Id.* ¶ 26.

In addition, granting a retroactive waiver to Petitioners would serve the public interest. *See Order* ¶ 27. The Commission found in the Order that the public interest requirement was satisfied because "a failure to comply with the rule which could be the result of reasonable confusion or misplaced confidence could subject parties to potentially substantial damages." *Id.* ¶ 27. The same is true here: Petitioners are subject to claims being brought against them arising out of a putative class lawsuit as referenced above and could face additional claims if the provider agreements and other communications faxed to properties and actual health care providers as discussed above. Absent a waiver, Petitioners could be subjected to substantial statutory damages for allegedly failing to comply with a rule that the Commission has determined was the subject of confusion.

For all of these reasons, Petitioners Competitive Health, Inc. and First Access, Inc. respectfully request that the Commission grant them the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission already has granted to other, similarly-situated parties.

Dated: April 3, 2015

Respectfully submitted,

COMPETITIVE HEALTH, INC.
and FIRST ACCESS, INC.

By: _____

Charles S. Fiedler
NOSSAMAN LLP
777 S. Figueroa Street, 34th Floor
Los Angeles, CA 90017
(213) 612-7800
(213) 612-7801 (fax)

Counsel for Competitive Health, Inc. and First Access, Inc.