

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

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

**REPLY IN SUPPORT OF GREENWAY HEALTH’S PETITION FOR WAIVER**

Greenway Health, LLC and its predecessors, affiliates, and subsidiaries (collectively “Greenway”) 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 Brian Wanca on behalf of Physicians Healthsource, Inc., (“Physicians Healthsource”) a plaintiff in a purported class action lawsuit against Greenway. For the reasons stated below and the Greenway Petition, the Federal Communications Commission (“Commission”) should grant Greenway a 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.

**I. INTRODUCTION**

The Comments show Physicians Healthsource misunderstands the purpose and scope of the Commission’s October 30, 2014 *Fax Order* (“2014 Fax Order”).<sup>3</sup> As such, the Comments fail to distinguish Greenway from the dozens of other “similarly situated” entities that have

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<sup>1</sup> *Petition of Greenway Health, LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (April 29, 2015) (“Greenway Petition”).

<sup>2</sup> *TCPA Plaintiffs’ Comments on Thirty-One Petitions for Retroactive Waiver Filed on or Before April 30, 2015*, CG Docket Nos. 02-278, 05-338 (May 22, 2015) (“Comments”).

<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).

already received waivers from the Commission. The Comments also constitute an impermissible and 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 now.<sup>4</sup> Accordingly, the Commission should find that “good cause” exists to grant Greenway the waiver requested in the Greenway Petition because Greenway 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, we have ‘violate[d] the separation of powers vis-à-vis the judiciary.’”<sup>6</sup> Physicians Healthsource makes similar separation of powers claims in its Comments, which the Commission should likewise reject.<sup>7</sup> The Greenway Petition is not the proper venue for challenging the Commission’s *2014 Fax Order*, and the Commission should reject this improper collateral attack on its final order.<sup>8</sup>

By granting a waiver to its regulations, the Commission would not be encroaching on established judicial prerogatives. Rather, under the Supreme Court’s jurisprudence, courts *defer*

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<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.”).

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

<sup>7</sup> *Comments* at 7.

<sup>8</sup> See e.g. *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013) (The Hobbs Act provides that the federal courts of appeal have exclusive jurisdiction to determine the validity of Commission orders.).

to an agency’s construction of statutes.<sup>9</sup> Congress has explicitly delegated to the Commission the authority to interpret the TCPA.<sup>10</sup> 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 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>11</sup> As stated in the *Greenway Petition*, such factual determinations “are properly left for the District Court.”<sup>12</sup>

Physicians Healthsource also cites a recent decision involving the Environmental Protection Agency’s (“EPA”) interpretation of the Clean Air Act<sup>13</sup> in support of his contention that the Commission has no authority to grant waivers from its regulations interpreting the TCPA.<sup>14</sup> As other commenters in this docket have noted, the *Natural Resources Defense Council v. EPA* decision involved a different agency without express authority to waive the effect of its own rules and regulations.<sup>15</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>16</sup> In contrast, this petition seeks a waiver from the Commission’s own regulation. Such relief would

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<sup>9</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>10</sup> See 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”).

<sup>11</sup> See *2014 Fax Order* at ¶ 31.

<sup>12</sup> See *Greenway Petition* at 4.

<sup>13</sup> *Nat’l Res. Def. Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).

<sup>14</sup> See *Comments* at 6-7.

<sup>15</sup> See *Reply Comment of Senco Brands, Inc.*, CG Docket No. 05-338, at 3-4 (Jan. 20, 2015).

<sup>16</sup> See *NRDC*, 749 F.3d at 1057.

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, Greenway requests a limited waiver from the Commission's own regulations "where strict compliance would not be in the public interest."<sup>17</sup> Accordingly, the D.C. Circuit's ruling in *NRDC* on the EPA's action has no bearing on the Commission's authority in this proceeding.<sup>18</sup>

B. Greenway Is 'Similarly Situated' to Petitioners That Have Already Been Granted Waivers and Therefore Is Entitled to the Same Waiver.

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 in the industry, and thus, a limited waiver would best serve the public interest.<sup>19</sup> The Commission did not engage in any fact finding on issues such as confusion or damages. The Commission properly recognized that, for sake of judicial economy, those findings can and should be made by the courts currently adjudicating the lawsuits filed against the petitioners.<sup>20</sup> Despite their lack of relevance to this administrative proceeding, Greenway will specifically address some of Physicians Healthsource's contentions.

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<sup>17</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 *NRDC* decision, which Physicians Healthsource cites as evidence that the Commission has no authority to issue waivers.

<sup>18</sup> Physicians Healthsource 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 the Commission cannot issue a waiver that impacts private rights of action. See *Comments* at 7. 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>19</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).

<sup>20</sup> See *supra* note 11 and accompanying text.

Physicians Healthsource claims that Greenway should not be granted a waiver because “[m]ost Petitioners” failed to claim that they were actually confused by the rulemaking process.<sup>21</sup> The Commission did not require any specific 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>22</sup>

Moreover, Physicians Healthsource’s generalized claim is not true in the case of the Greenway Petition. Greenway directly cited the confusing language from the 2006 rulemaking and explicitly claimed that it was similarly confused.<sup>23</sup> In granting the initial waivers in the 2014 *Fax Order*, the Commission 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>24</sup> The same is true in this proceeding. Physicians Healthsource cannot show any evidence that Greenway understood this opt-out requirement, yet knowingly failed to comply with it.<sup>25</sup> Furthermore, this language certainly does not impose an affirmative obligation on Greenway to provide such proof in this proceeding. It would be improper for the Commission to impose a higher evidentiary burden on Greenway than was placed on the initial petitioners who have already been granted waivers.

Finally, Physicians Healthsource claims that Greenway is not subject to “significant” damages. This contention is absurd. Physicians Healthsource has sued Greenway in a purported

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<sup>21</sup> See *Comments* at 8.

<sup>22</sup> See *supra* note 19 and accompanying text.

<sup>23</sup> See *Greenway Petition* at 5 (“Like the petitioners in the 2014 Fax Order, Greenway was confused by conflicting language from the 2006 Junk Fax Order.”); see also *Greenway Petition* at 2 & n.7 (citing footnote 154 from the 2006 *Junk Fax Order*).

<sup>24</sup> 2014 *Fax Order* at ¶ 26.

<sup>25</sup> See *Comments* at 9.

class action in which it demanded at least \$500 per violation.<sup>26</sup> Physicians Healthsource is seeking class certification so that it can assert numerous claims and hopefully collect a “significant” judgment against Greenway.

However, 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 class action lawsuits filed by TCPA plaintiffs, such as the action filed by Physicians Healthsource against Greenway.<sup>27</sup>

### III. CONCLUSION

For the reasons set forth above and in the Greenway Petition, Greenway respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) insofar as Greenway may have sent fax advertisements before April 30, 2015 to recipients that had provided prior express invitation or permission that lacked the required opt-out notice.

Dated: May 29, 2015

Respectfully submitted,

GREENWAY HEALTH, LLC

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<sup>26</sup> See *Greenway Petition* at 6.

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