

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

In the Matter of)	
Petition for Waiver Of American)	
Homepatient, Inc.)	CG Docket No. 02-278
)	
)	CG Docket No. 05-338
)	

**REPLY OF AMERICAN HOMEPATIENT, INC. IN SUPPORT OF ITS
PETITION FOR RETROACTIVE WAIVER**

Pursuant to 47 C.F.R. § 1.3 and the Commission’s Order, CG Docket Nos. 02-278, 05-338, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (the “Waiver Order”), Petitioner American Homepatient, Inc. (“Homepatient”) respectfully submits the following reply in support of its Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Regulation”), to the extent the Regulation might apply to any faxes transmitted by Homepatient (or on its behalf) with the prior express permission of the recipients or their agents.

The Commission has clarified that an opt-out notice is required under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”), and the Regulation, 47 C.F.R. § 64.1200(a)(4)(iv), for facsimile advertisements sent with the recipients’ prior express permission or invitation and that the opt-out notice must comply with the requirements of 47 U.S.C. § 227(b)(1)(C) and (2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii). Waiver Order at ¶ 1. Simultaneously, the Commission recognized that “good cause”—specifically, the state of justified, industry-wide confusion that gave rise inadvertent violations, potentially resulting in substantial liability or costs—exists for granting a retroactive waiver of this requirement. *Id.* at ¶¶ 23-28, 48, *ref., Rules and Regulations Implementing the Telephone Consumer Protection Act*

of 2005, Report and Third Order on Reconsideration, 21 FCC Rcd 3787, 3812, n. 154 (2006) (“Junk Fax Order”). Accordingly, the Commission retroactively waived its Regulation for twenty-seven petitioners and invited “similarly-situated” parties to seek the same relief.

Homepatient is similarly situated to the original parties who were already granted retroactive waivers. Homepatient is facing a putative class action lawsuit by Radha Geismann, MD, P.C. (“Geisman” or “Plaintiff”) for allegedly faxing a one-page document on June 22, 2013, *Radha Geismann, MD, P.C. v. American Homepatient, Inc.*, No. 4-14-cv-001538 RLW, Dkt. #1 (E.D.Mo.) (filed on Sep. 8, 2014) (*Geismann*).

One of Homepatient’s defenses is that it obtained prior express consent before sending the subject fax. Answer And Jury Demand, *Geismann*, Dkt. # 12 at p. 13 (E.D. Mo.) (filed on Oct. 13, 2014). Homepatient also maintains that the fax is not an “advertisement” and does not “promote a commercial product or service.” Motion to Dismiss, *Geismann*, Dkt. # 10 at p. 6-8.

Only one filing has been submitted in opposition to this Petition: by the firm representing the named plaintiff in the putative class action pending against Homepatient. See TCPA Plaintiffs’ Comments On Thirty-One Petitions for Retroactive Waiver Filed On Or Before April 30, 2015 (“Comments”). For the reasons set forth below, and in Homepatient’s Petition, the Commission should reject these arguments, and grant the retroactive waiver sought by Homepatient.

I. The Commission Has The Authority To Grant A Retroactive Waiver.

Respondents cannot circumvent, appeal or challenge the Waiver Order via their “Comments. See, e.g., *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013). Indeed, the Commission already has considered and rejected Respondents’ arguments in the Order. Waiver Order at ¶ 21.

Respondents' attempt to collaterally attack the Order is procedurally improper and without merit. However, even if the Waiver Order could be collaterally attacked in this proceeding, Respondents have failed to assert a single valid argument to demonstrate any lack of authority on the part of the Commission to retroactively waive its Regulation. Indeed, 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, *accord Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) ("[t]he Commission has authority under its rules, see 47 C.F.R. § 1.3, to waive requirements not mandated by statute where strict compliance would not be in the public interest."); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *see also* Waiver Order ¶ 23, n.82, *citing* 47 C.F.R. § 1.3, *Northeast Cellular*, 897 F.2d 1164.

Respondents, similarly, cite no case law to support their position. Initially, the *NRDC* decision has no bearing on the instant proceeding, but involved a different administrative agency and different regulatory scheme. *See Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1063-64 (D.C.Cir. 2014)(holding that the EPA did not have the authority to create an affirmative defense to a particular statutory cause of action). Indeed, the D.C. Circuit had already confirmed that the Commission has the authority to waive its own regulations that are not mandated by statute where strict compliance would not be in the public interest. *Nat'l Ass'n of Broadcasters*, 569 F.3d at 426. Similarly, the *Physicians Healthsource, Inc.* decision does not provide a basis for declining to waive the Regulation—indeed, this decision is neither binding nor persuasive. *See Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 2014 WL 7109630, at *14 (W.D. Mich. 2014). In *Stryker*, the court based its decision on the incorrect assumption that the opt-out notice requirement for solicited faxes is in the TCPA itself—despite its total absence from the statute.

Id. Moreover, that court failed, totally, to address the Commission’s well-established authority to waive its own regulations. *Id.*

For all these reasons, as it concluded in the Order, the Commission has the authority to grant retroactive waivers of the opt-out notice requirement with respect to advertising faxes sent with the prior express permission or invitation of the recipients.

II. Homepatient Is Similarly Situated To The Parties To Whom The Commission Has Already Granted Retroactive Waivers.

Homepatient is in the same position as those who were granted waivers in the Order. First, like the petitioners to whom retroactive waivers have already been granted, Homepatient has been accused of sending faxes without the requisite opt-out notice prior to April 30, 2015 and after the Junk Fax Order. Petition at 2; *see also* Waiver Order at ¶ 1. Second, Homepatient has asserted that the subject faxes were sent with the recipients’ prior express permission. Petition at 5; Waiver Order at ¶ 11. Third, but-for a retroactive waiver of the Regulation, Homepatient could face costs or liability—that are potentially substantial and class-wide—for sending faxes after obtaining the recipients’ prior express permission. Petition at 2, 5-6; Waiver Order at ¶ 27. Fourth, given that Homepatient sent the subject faxes after the Junk Fax Order, it was subject to the same confusion and “misplaced confidence” as the original petitioners; and, consequently, lacked legal certainty that an opt-out notice is required for solicited faxes. Petition at 6; Waiver Order at ¶¶ 24-26.

Contrary to the Respondents’ argument, the Commission has already determined that these factors are sufficient to render Homepatient similarly situated to the petitioners who have already received waivers. Waiver Order at ¶¶ 1-2, 11, 22-31; *cf.*, Comments at 8-10.

Of significance, the Commission did not require the original petitioners to demonstrate actual “substantial liability;” indeed, given the early stages of the lawsuit against Homepatient,

such a showing is not possible. Similarly, Commission did not require the original petitioners to make any showing that they had “in fact” obtained prior express permission to send faxes. Indeed, the Commission expressly declined to “confirm or deny whether petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” Waiver Order at ¶ 31; *see also e.g.*, Petition For Declaratory Ruling And/Or Waiver Of Unique Vacations, Inc., Petition of UnitedHealth Group Incorporated For Declaratory Ruling and/or Waiver, Petition of Carfax, Inc. for Declaratory Ruling and/or Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, Petition of Stericycle, Inc. for Declaratory Ruling and/or Waiver Regarding 47 C.F.R. §64.1200(a)(4)(iv).

Simply, Homepatient is “similarly situated” to the original petitioners and, as such, should be granted a retroactive waiver of the Regulation.

III. Individualized Evidence of Subjective Confusion Is Not Required.

A showing of “actual confusion” is not required to obtain the waiver already granted to the original petitioners. The Commission has made explicit that confusion is *presumed* based on the contradictory footnote and lack of clear notice. The Order is not unclear in this regard. Therefore, discovery into “actual confusion” is unnecessary.

The Commission clearly articulated the sole basis of its decision to grant the original petitioners retroactive waiver of the Regulation: that the “lack of explicit notice...and the ensuing contradictory footnote...resulted in a confusing situation for businesses,” generally. Waiver Order at ¶ 27. The combination of these factors “*presumptively* establishes good cause for retroactive waiver of the rule.” *Id.* at ¶ 26 (emphasis added). That “confusing situation”—not individualized evidence of particular petitioners’ confusion—warrants the grant of a waiver. *Id.*

Moreover, the Commission did not make any factual findings concerning individual, subjective confusion on the part of the original petitioners at issue in the Waiver Order, nor did it require or describe any evidence concerning the state of mind of the original petitioners. Waiver Order at ¶¶ 22-31. To the contrary, the Commission pointed primarily to the fact that “all petitioners make reference to the confusing footnote language” in their petitions, *id.* at ¶ 24, and to the fact that “we find nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.” *Id.* at ¶ 26.

Evidence of actual, subjective confusion is not required and discovery into this issue should not be allowed. Indeed, require a more burdensome showing from Homepatient would be unfair and might implicate due process concerns with regard to this waiver process.

IV. Good Cause Exists To Grant Homepatient’s Petition.

The Comments do nothing to rebut the good cause which exists for granting Homepatient’s petition. First, as Homepatient previously asserted: the special circumstances detailed in the Order weigh in favor of its Petition. Petition at 6. Specifically, the “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of explicit notice—left Homepatient with “no legal certainty that an opt-out notice is required for solicited faxes.” Petition at 5. In other words: Homepatient was “confused” as to whether, and in which specific situations, it was required to include an opt-out notice on faxes sent with prior express permission. *Id.* at 5-6.

Second, the public interest favors waiving the Regulation in Homepatient’s case. Specifically, Homepatient’s alleged failure to include an opt-out notice on the subject fax—sent

after the Junk Fax Order—could leave it vulnerable to substantial costs or liability despite its reasonable confusion regarding the applicability and scope of the Regulation.

For all of these reasons, Petitioner American Homepatient, Inc., respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in the Waiver Order, dated October 30, 2014.

Respectfully submitted,

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