

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

In the Matter of Reliant Services Group, LLC
d/b/a Reliant Funding Petition of for Retroactive
Waiver of C.F.R. § 64.1200(a)(4)(iv)

CG Docket No. 02-278

CG Docket No. 05-338

REPLY IN SUPPORT OF PETITION FOR RETROACTIVE WAIVER

Petitioner Reliant Services Group, LLC d/b/a Reliant Funding (“Reliant” or “Petitioner”), by and through undersigned counsel and pursuant to the Public Notice issued by the Federal Communications Commission (the “Commission”) on June 26, 2015 in Docket Nos. 02-278 and 05-338,¹ and Section 1.3 of the Commission’s Rules,² respectfully files this Reply in response to the lone comment (an opposition filed on June 18, 2015 (the “Comment”) by Joseph Jackson d/b/a J&D Builders (“J&D Builders”)) filed in response to Reliant’s request (the “Petition”) that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the “Regulation”) of its Rules³ with regard to the opt-out notice requirement on faxes sent by or on behalf of Petitioner that were solicited by the recipients.

Argument

In its Petition, Reliant showed why the Commission should grant a retroactive waiver of the Regulation: The Commission already determined in the October 30 Order that good cause exists for a waiver of the Regulation; the Commission expressly invited parties “similarly

¹ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (Oct. 30, 2014) (“October 30 Order”).

² 47 C.F.R. § 1.3.

³ 47 C.F.R. § 64.1200(a)(4)(iv).

situated” to the parties granted retroactive waivers in the October 30 Order to “make every effort” to file their own waiver request within six months; and Reliant is a similarly situated party and did so, filing its petition on June 16, 2015, shortly after it retained counsel. J&D Builders, which is the plaintiff in a TCPA suit against Reliant, opposes the Petition arguing that Reliant is not a similarly situated party; that Reliant’s Petition is untimely or unsupported; or that, in the alternative, the Commission should require discovery before acting on the Petition.⁴ None of these arguments has merit.

I. Reliant is Similarly Situated to the Other Petitioners.

Reliant showed in its Petition that it is “similarly situated” to the parties granted relief in the October 30 Order because like those parties, Reliant is alleged to have sent solicited facsimile advertisements that did not contain opt-out notices that comply with the Regulation where there was widespread “confusion or misplaced confidence” regarding whether the Regulation applied to solicited faxes, and is subject to potentially significant damages as a result.⁵ J&D Builders argues, however, that to be “similarly situated” requires more: that Reliant needed to explain its “business practices,” “faxing activity,” and “how it obtains consumers’ faxing information or consent” in order to “provide the Commission with enough supporting information to make an assessment of substantial similarity.”⁶ But the Commission imposed no such requirements in the October 30 Order.

In granting the retroactive waiver in the October 30 Order, the Commission nowhere relied on (or even inquired into) facts potentially unique to each petitioner, such as their business practices, faxing activity, or methods for obtaining fax numbers or consent. Rather, the

⁴ Comment at iii-iv.

⁵ *Id.* at 3; October 30 Order, 29 FCC Rcd at 14010.

⁶ Comment at 3-4.

Commission relied instead on two overriding common facts that placed all of the petitioners in a similar situation.

First, the Commission noted that the regulatory environment was inherently confusing: there was an inconsistency between a footnote in the Junk Fax Order (which states that the “opt-out notice requirement only applies to communications that constitute unsolicited advertisements”), and the body of the Junk Fax Order (which references a requirement 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”).⁷ Second, the Commission noted that as a result of this “inconsistent footnote,” all of the petitioners were “potentially subject to significant damage awards under the TCPA’s private right of action.”⁸ Just as those petitioners were all similarly situated to each other, so, too, is Reliant similarly situated to them: Reliant is, of course, subject to the same regulatory scheme, and (as evidenced by the purported class action suit filed against it by J&D Builders) potentially subject to the same significant damages under the TCPA’s private right of action.⁹

II. Reliant’s Petition Is Timely and Well Supported.

As Reliant explained in its Petition, the Commission explicitly found in the October 30 Order that the aforementioned “inconsistency between a footnote contained in the Junk Fax Order and the rule,” along with a “lack of explicit notice” regarding the Commission’s intent to

⁷ October 30 Order, 29 FCC Rcd at 14000, 14009 (internal quotation marks and citations omitted).

⁸ *Id.* at 14010-11.

⁹ J&D Builders notes that the Commission stated that “the risk of substantial liability in private rights of action is, by itself, [not] an inherently adequate ground for waiver.” Comment at 4 (quoting October 30 Order ¶ 28). J&D Builders omits the Commission’s subsequent statements where the Commission explained that it was not the risk of liability alone that justified the waiver granted in the October 30 Order, but rather the presence of that risk “in conjunction with other considerations” (such as the fact that enforcing the rule would have been “unjust or inequitable”) that justified the waiver. October 30 Order, 29 FCC Rcd at 14011. Those “other considerations” are the same here.

adopt the Regulation “presumptively establishes good cause for retroactive waiver of the rule” that Reliant seeks waived here.¹⁰ J&D Builders does not (nor could it) dispute what the Commission found. Rather, it asserts that it disagrees with the Commission’s October 30 Order,¹¹ and argues that good cause does not exist here because Reliant did not file its petition until June 16, 2015 and was purportedly “not confused” about the rule.¹² Both arguments are meritless.

First, J&D Builders mischaracterizes the deadline for filing waiver requests: While it implies that the Commission set a hard deadline when “the Commission stated that it expected parties to file waiver requests . . . by April 30, 2015,”¹³ what the Commission actually said is that it expected parties “to make every effort to file within six months of the release of this Order.”¹⁴ As explained in the Petition, Reliant did so, filing its Petition shortly after it retained counsel once the filing of J&D Builder’s TCPA suit brought to Reliant’s attention that its solicited faxes were subject to the opt-out notice requirement.¹⁵

Second, nowhere in the October 30 Order did the Commission link a requirement of proof of subjective confusion regarding the regulatory scheme with “good cause” as J&D Builders attempts to do in its Comment. Rather, as explained above, the finding of “good cause” was based expressly on two *objective* factors: the presence of contradictory language in the Commission’s Junk Fax Order, and the lack of explicit notice regarding the Commission’s intent to adopt the Regulation. While J&D Builders asserts that October 30 Order “is unclear whether

¹⁰ *Id.* at 14009-10.

¹¹ Comment at 7 n.26.

¹² *Id.* at 4-5.

¹³ *Id.* at 4.

¹⁴ October 30 Order, 29 FCC Rcd at 14011-12.

¹⁵ Petition at 4.

a petitioner must show it was *actually* confused about the law,”¹⁶ the October 30 Order is actually quite clear that a petitioner is *not* required to present evidentiary proof of actual confusion: the Commission predicated its ruling on the fact that the inconsistent footnote “*may have*” resulted in confusion and that the petitioners’ failure to comply with the Regulation “*could*” have been the result of “*reasonable* confusion,” and “resulted in a confusing situation.”¹⁷ That some petitioners professed actual confusion only underscored the objectively confusing nature of the Regulation. In any event, Reliant’s Petition states that until J&D Builders filed the TCPA suit and Reliant retained counsel, Reliant was not aware that there was any question about the legality of the opt-out notices on its solicited faxes.¹⁸ Thus, as was the case with the original petitioners, there is “nothing in the record here demonstrating that [Reliant] understood that [it] 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.”¹⁹

III. Discovery Regarding Actual Confusion is Not Required.

Premised on its incorrect statement that the October 30 Order is unclear about requiring proof of actual confusion, J&D Builders argues that before the Commission acts on the Petition, it should permit J&D Builders to take discovery regarding whether Reliant was aware of the Regulation.²⁰

To justify this request, J&D Builders first erects a false “rebuttable presumption” standard for lack of confusion it claims is suggested by the language of the October 30 Order.²¹

¹⁶ Comment at 6.

¹⁷ October 30 Order, 29 FCC Rcd at 14009-10 (emphases added).

¹⁸ Petition at 4-5.

¹⁹ October 30 Order, 29 FCC Rcd at 14010.

²⁰ Comment at 6.

²¹ *Id.* at 8.

But when the Commission wants to create a “rebuttable presumption” standard, it uses the phrase “rebuttable presumption” as it has done with regard to established business relationships, stating that “there shall be a *rebuttable presumption* that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well.”²² Since the phrase “rebuttable presumption” appears nowhere in the October 30 Order, there is no presumption to be rebutted through discovery.

Second, J&D Builders cites to a dissenting statement from Commissioner Pai in an unrelated order in support of its argument that J&D Builders “has a due process right to investigate whether Reliant was aware of the opt-out notice rule if that factor is dispositive of its private right of action under the TCPA.”²³ But nothing in that Order or the statement from Commissioner Pai remotely supports J&D Builder’s characterization. Rather, in that Order, the Commission declined applications to review the modification of certain protective orders governing access to confidential information, and Commissioner Pai asserted in a dissenting statement that the Commission should have given more serious consideration to the petitions because the modifications “t[ook] away the [petitioner]’s Due Process rights” by permitting access to confidential information while objections to such access remained pending, and that “[o]nce a party has accessed confidential information, the cat cannot be put back in the bag.”²⁴ None of this is remotely relevant to Reliant’s Petition.

²² See 47 C.F.R. § 64.1200(a)(4)(ii)(C) (emphasis added).

²³ Comment at 8 & n.29 (citing *In re Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket Nos. 14-57, 14-90, Order, 29 FCC Rcd 14267, 14269-70 (Nov. 10, 2014) (“*Comcast Order*”) (Pai, dissenting)).

²⁴ *Comcast Order*, 29 FCC Rcd at 14269-70 (Pai, dissenting).

Conclusion

Petitioner therefore respectfully requests that the Commission grant this Waiver Petition and the request for a retroactive waiver for Petitioner from liability under 47 C.F.R. § 64.1200(a)(4)(iv).

Respectfully submitted,

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