Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of:	)	
	)	
	)	
Petition of athenahealth, Inc. for Waiver	)	CG Docket No. 02-278
of Section 64.1200(a)(4)(iv) of the	)	
Commission's Rules	)	CG Docket No. 05-338

PETITION OF ATHENAHEALTH, INC. FOR RETROACTIVE WAIVER

athenahealth, Inc. ("Athena") respectfully requests that the Commission grant a retroactive waiver to Athena and its agents and employees, pursuant to 47 C.F.R. § 1.3, of 47 C.F.R. § 64.1200(a)(4)(iv) (the "Rule") with respect to faxes sent by or on behalf of Athena with the prior express consent or permission of the recipients or their agents after the effective date of the Rule. The bases for this request are set forth herein.

I. INTRODUCTION

A. Statutory and Regulatory Framework

The Telephone Consumer Protection Act ("TCPA") prohibits, *inter alia*, the sending of unsolicited advertisements to telephone facsimile machines, subject to certain exceptions. 47 U.S.C. § 227(b)(1)(C). "Unsolicited advertisement" is defined to mean only "material advertising the commercial availability of or quality of any property, goods, or services which is transmitted to any person *without that person's prior express invitation or permission*, in writing or otherwise." 47 U.S.C. § 227(a)(5) (emphasis added). The TCPA further exempts from its scope unsolicited

advertisements "from a sender with an established business relationship with the recipient," in which instance the statute requires the unsolicited advertisement to include certain "opt-out" language. 47 U.S.C. § 227(b)(1)(C)(i)-(iii).

The Rule states that fax advertisements "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice." But, in certain other rulemaking, the Commission stated that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements." 21 FCC Rcd 3787, 3818, para. 42 n.154 (emphasis added). "Unsolicited advertisements," however, are limited by the terms of the TCPA to advertisements transmitted without express invitation or permission.

This apparent conflict led to widespread confusion. In FCC Order 14-164 (the "14-164 Order"), the Commission recognized this confusion, and granted a retroactive waiver of the Rule to certain petitioners facing lawsuits premised, in part, on the failure to include opt-out language in faxes sent with prior express invitation or permission. *See* 14-164 Order, ¶¶ 1, 27 n.98. The 14-164 Order, which was released on October 30, 2014, further afforded those similarly situated to the 14-164 petitioners an opportunity to request retroactive waiver, with the "expect[ation] that parties will make every effort to file within six months" of the release. *Id.* at ¶ 2.

B. Lawsuit Against Athena

Athena provides electronic billing and related services for medical professionals and practices. In 2012 – two years before Order 14-164 was released –

faxes bearing Athena's logo were sent to medical professionals and practices. The faxes were sent only after the recipients were contacted by telephone and asked if they would like to receive an invitation to a presentation regarding the Affordable Care Act and other changes to federal law.[1] If the person contacted was interested in receiving an invitation, they were asked to supply their e-mail address. If, and only if, they did not wish to supply an e-mail address, they were asked to supply a fax number for transmission of the invitation. If the person supplied a fax number for transmission of the invitation, the faxes were sent to them.

On July 10, 2015, Athena was served with a putative class action lawsuit filed in the Circuit Court for Saint Louis County, Missouri.[2] A copy of the lawsuit is attached as Exhibit A. In the lawsuit, the plaintiff alleges it received the faxes referenced above, and that the faxes did not include opt-out language.[3] The plaintiff – a serial TCPA litigant[4] – purports to state a claim for violation of the TCPA and related rules and regulations, and also for common law conversion and violation of the Missouri Merchandising Practices Act. Each of the plaintiff's claims stems from transmission of the faxes, which even the plaintiff acknowledges "was

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[1] Under the specific circumstances present here, Athena denies the faxes constituted "advertisements" at all, but does not ask the Commission to determine that issue.

[2] The Petition also names ten "John Doe" defendants, without further elucidation as to who those defendants may be. Consequently, out of abundance of caution, Athena requests that the waiver sought here include Athena's agents and employees.

[3] The lawsuit also makes other allegations, including that Athena did not obtain consent to send the faxes, which Athena will deny at the appropriate juncture.

[4] A review of Missouri cases alone reveals ten cases filed since 2011 in which this plaintiff alleges violation of the TCPA.

made based on either [Athena's] own misunderstanding of the law and/or based on the representations of others on which [Athena] reasonably relied." Petition, Ex. A, ¶ 48. Athena's time to answer or otherwise respond to the lawsuit has not yet expired.

The class definition is not entirely clear, but according to the Petition and a contemporaneously-filed motion to certify class (Exhibit B), the putative class members number in the hundreds or thousands. The class definition purports to include all recipients of the faxes (and other, unidentified faxes) within the four years preceding the filing of the Petition, without regard to consent, invitation, or existing business relationship.

Clearly, resolving all the factual and legal contentions in the Petition and motion to certify class is beyond the scope of the Commission's authority. However, Athena respectfully requests a retroactive waiver of the Rule with respect to the faxes that fall within the scope of the Petition and motion to certify class.

II. LEGAL STANDARD FOR WAIVER

47 CFR § 1.3 provides that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." A waiver may be granted if: "(1) special circumstances warrant deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule." Order 14-164, ¶ 23.

III. THIS REQUEST SHOULD BE GRANTED

The Commission already has determined that the confusion over the Rule was generated, at least in part, by the Commission's own rulemaking. Order 14-164, ¶¶ 24-25. This includes both the apparent inconsistency between the two rules discussed above, and the fact the Commission's notice of rulemaking by which it eventually adopted the Rule "did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient." *Id.* Thus, the Commission concluded that there was "good cause for retroactive waiver of the [Rule]." *Id.* at ¶ 26.

The Commission continued to find that granting waiver can serve the public interest. The Commission noted that the confusion over the Rule could result in ruinous damages. *Id.* at ¶ 27. "Moreover," the Commission continued, "the TCPA's legislative history makes clear [the Commission's] responsibility to balance legitimate business and consumer interests," and that responsibility would be disserved by subjecting parties to devastating legal consequences as a result of confusion. *Id.*

The same outcome should obtain here. The faxes at issue in this case were sent two years prior to the issuance of Order 14-164, and thus well before the clarification offered by that Order. Notably, even the plaintiff acknowledges in its Petition that Athena's alleged transmission of the faxes "was made based on either [Athena's] own misunderstanding of the law and/or based on the representations of others on which [Athena] reasonably relied." Petition, Ex. A, ¶ 48. Moreover, like

the petitioners subject of Order 14-164, Athena faces potentially ruinous class-action litigation filed by a serial TCPA plaintiff who in fact gave consent to receive the faxes. As well, to the extent the Commission considers it germane in making its determination, Athena has imposed new internal procedures to ensure opt-out language is included in all future fax advertisements, regardless of consent, invitation, or existing business relationships. Those procedures will be in full effect on or by August 14, 2015.

Finally, Athena has made "every effort" to apply for retroactive waiver within the six-month window provided in Order 14-164, though it acknowledges that it is a bit beyond the April deadline. Athena has never before been a party to a TCPA action, and consequently was not monitoring the FCC's orders. Athena also, upon receiving the Petition, promptly contacted counsel and sought retroactive waiver as soon as feasible under the circumstances. Indeed, it has been less than a month since it was served with the Petition. Under the circumstances, granting Athena the retroactive waiver it requests will be just, and will promote the public interest.

IV. CONCLUSION

For the foregoing reasons, Athena respectfully requests that the Commission grant it, and its agents and employees, a retroactive waiver from the provisions of 47 C.F.R. § 64.1200(a)(4)(iv).

Respectfully submitted,

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