

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	CG Docket No. 02-278
Petition of SCRIP HOLDING CO. for)	
Retroactive Waiver of)	CG Docket No. 05-338
47 C.F.R. § 64.1200(a)(4)(iv))	

PETITION FOR RETROACTIVE WAIVER BY SCRIP, INC.

Pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s *Order*, CG Docket No. 05-338, FCC 14-164 (rel. Oct. 30, 2014), Petitioner Scrip Inc. (“Petitioner”), by its attorneys, Rock Fusco & Connelly, LLC, respectfully request that the Commission grant a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the “Regulation” or “2006 Order”) with respect to faxes that have been transmitted by Petitioner with the prior express consent or permission of the recipients or their agents (“Solicited Faxes”) after the effective date of the Regulation, but prior to the full compliance deadline of April 30, 2015, set by the Commission in its *2014 Anda Commission Order* (“2014 Order”). *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 14-164, Order, 29 F.C.C. Rcd. 13998 (F.C.C. Oct. 30, 2014). In the 2014 Order, the FCC granted a waiver to Anda, retroactively waiving the requirement that Anda include an “opt-out notice” on the face of its sent, solicited faxes. Within that same 2014 Order, the FCC invited similarly situated parties, such as Petitioner, to file requests for the same relief. *Id.* The Commission recently granted more than 100 such waivers in its August 28, 2015 Order (“2015 Order”), including several petitions for waivers filed after April 30, 2015, on the grounds that all such petitions concerned only facsimiles sent prior to April 30, 2015. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 05-338, Order, 2015 WL 5120879 (F.C.C. Aug. 28, 2015). Petitioner now seeks a similar

waiver for facsimiles it sent prior to the April 30, 2015 deadline with consent.

I. THE COMMISSION’S 2006, OCTOBER 30, 2014, AND AUGUST 28, 2015 ORDERS

In 2006, the Commission adopted rules concerning opt-out notices to be provided on fax advertisements regardless of whether or not the fax advertisement was solicited or when the recipient had consented to receive it. *See* the Commission’s 2006 Junk Fax Order, 47 C.F.R. § 64.1200(a)(4)(iv) (“2006 Order”).

As the Commission acknowledged in the 2014 Order, confusion and conflicting statements led to controversy and uncertainty surrounding the regulations created by the 2006 Order. After the promulgation of the 2006 Order, plaintiffs and their attorneys have seized on that uncertainty and filed numerous class action lawsuits for TCPA violations. Such lawsuits, including the Litigation discussed *infra*, have been brought against legitimate companies for engaging in consensual communications where the fax recipients had provided consent to receive faxes by the senders. Many of these class action lawsuits seek millions of dollars in damages based on the Commission’s conflicting statements pertaining to the Regulation.

On October 30, 2014, the Commission issued Order FCC 14-164 in this docket regarding the requirement that opt-out notices be provided on *all* fax advertisements, conforming to the rules adopted by the 2006 Order. In its 2014 Order, the Commission granted retroactive waivers of the opt-out requirement to the petitioners to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the Commission’s] rules.” 2014 Order, ¶ 1. The Commission found good cause to grant the retroactive waivers based on potential confusion in the interpretation of the 2006 Order:

The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided

prior express permission.

* * *

Further, some commenters question whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(4)(iv). Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient. (2014 Order, ¶¶ 24-25 (citations omitted))

The Commission found that granting the requested retroactive waivers would serve the public interest, noting that the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.” 2014 Order, ¶ 27. Because there may have been a mistaken belief by some parties that the opt-out notice requirement did not apply, the “confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement.” *Id.* (citations omitted). The Commission stated that “[o]ther, similarly situated parties may also seek waivers such as those granted in this Order”, although it is expected that within six months all fax senders are “to be aware of and in compliance with the requirement.” 2014 Order, ¶ 30. The Commission directed that parties making similar waiver requests make every effort to file within six months of the release of the Order. *Id.*

On August 28, 2015, the Consumer and Governmental Affairs Bureau of the FCC issued Order 15-976 in this docket. In its 2015 Order, the Commission addressed more than 100 waiver requests submitted in response to the 2014 Order. 2015 Order, ¶ 1. The Commission granted a waiver to all petitioners for facsimiles sent with prior consent prior to April 30, 2015. *Id.* In particular, the 2015 Order made special note that it granted waivers to those petitioners that filed after the April 30, 2015 deadline. *See* 2015 Order, ¶ 20. The Commission found that because the petitioners (1) sought waivers only for faxes sent before April 30, 2015, (2) the parties are similarly situated as the initial waiver recipients of the 2014 Order, and (3) the granting of waivers would

not contradict the purpose or intent of the 2014 Order, the Commission would grant petitions filed after the April 30, 2015 deadline. *Id.* The Commission emphasized that the waivers granted (1) only apply to facsimiles sent prior to April 30, 2015 and (2) only where consent existed. 2015 Order, ¶ 21.

II. PETITIONER RESPECTFULLY REQUESTS A RETROACTIVE WAIVER PURSUANT TO THE ORDER

A. The Commission Should Grant Petitioner A Waiver.

Petitioner respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Facsimiles sent by Petitioner after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown. Generally, the Commission may grant a waiver of its rules in a particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest. Further, a waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule. As shown, both rationales apply and Petitioner is entitled to a waiver under this standard for the same reasons the Commission granted waivers in its 2006, 2014, and 2015 Orders.

B. The Allegations in the TCPA Lawsuit Against Petitioner

Petitioner is a defendant in a putative class action lawsuit alleging violations of the TCPA. The named plaintiff filed suit on June 30, 2015. The Litigation, *Wilder Chiropractic, Inc., v. Scrip, Inc., et al.*, Case No. 1:15-cv-05778, is currently pending in the United States District Court for the Northern District of Illinois. The plaintiff in the Litigation seeks to recover damages on behalf of itself and others similarly situated in part on grounds that Petitioner sent faxes in violation of the TCPA by failing to include the proper opt-out language, regardless of whether consent was given.

See Litigation Dkt. 1. Plaintiff seeks to recover on behalf of all persons who received faxes that did not contain an opt-out notice, regardless of whether the recipients had provide prior express permission to receive such faxes. *Id.*

Petitioner has filed its Answer and Affirmative Defenses in the Litigation. *See* Litigation Dkt. 11. Petitioner asserts as an Affirmative Defense in the Litigation that it is not liable under the TCPA because, among other reasons, the plaintiff and other members of the putative class consented to receive the alleged facsimiles in their prior dealings and/or sales interactions with Petitioner. *Id.* Petitioner expects to produce in the discovery phase of the Litigation documentation evincing the established relationship between it and the fax recipients and the recipients' consent to receive faxes from Petitioner, including explicit requests *for* fax advertisements from Petitioner.

C. Petitioner Is Similarly Situated to Parties Granted Waivers By the Order

Petitioner is similarly situated to the parties that were granted retroactive waivers by the 2014 and 2015 Orders. In the Litigation, Petitioner is alleged to have sent faxes that did not contain proper opt-out notices. But Petitioner contends that faxes were sent with the prior express permission of the recipients. Simply put, at the time it sent the faxes at issue, in 2012 and 2013, Petitioner did not understand the opt-out notice requirement to apply to solicited faxes. As with the parties previously granted waivers, Petitioner finds itself potentially subject to massive liability, as well as the costs of litigation, based on the application of a provision of the 2006 Order over which the Commission has recognized there was confusion.

D. Petitioner Seeks Only a Waiver of Facsimiles Sent Prior to April 30, 2015.

In its 2014 Order, the Commission repeated that any facsimiles sent after April 30, 2015 would be granted a waiver for violating the opt-out requirement, regardless of consent. 2014 Order, ¶ 29. “We emphasize that full compliance ... is expected from waiver recipients six months from

the release date of this Order now that any potential for confusion on this point has been addressed and interested parties have been given additional notice of this requirement.” *Id.* The Commission reinforced the its 2014 Order by granting the waiver for 117 petitioners, but restating that full compliance is expected as of the April 30, 2015 deadline. 2015 Order, ¶ 21.

Petitioner only seeks a limited waiver for those faxes sent prior to the April 30, 2015 deadline. Since that deadline, Petitioner has not sent a single advertising facsimile that lacks the opt-out language or violates the 2006 Order in any other way. Indeed, based on an initial, internal investigation, Petitioner has no record of sending *any* facsimile advertisements since 2013. Put another way, the only fax advertisements sent by Petitioner occurred during the time when actual confusion over the 2006 Order reigned in the marketplace, as the Commission recognized in its 2014 Order. When Petitioner sent the consented-to faxes, it was under the reasonable belief that they did not require the opt-out language. It has since taken note, and heeded, the Commission’s clarifying 2014 and 2015 Orders.

E. A Limited Retroactive Waiver is Appropriate

The Commission may grant a waiver where, as here, the underlying purpose of the rule(s) would not be served or the factual circumstances mandate a waiver to avoid application of the rule that would be inequitable, unduly burdensome or contrary to the public interest. 47 C.F.R. § 1.925(b)(3)(i)-(ii). *See also* 47 C.F.R. § 1.3 (the Commission may waive any provision of its rules for good cause shown when it concludes that a waiver would serve the public interest, considering all relevant factors). The stated purpose of Section 64.1200 is to allow consumers to stop unwanted faxes. This purpose would not be furthered by subjecting Petitioners to potentially massive liability for faxes that did not contain proper opt-out notices where the recipients had provided prior express permission to receive such faxes and confusion existed over the rules relating to such

faxes. Accordingly, the grant of a limited and retroactive waiver to Petitioner would serve the public interest in that the factors that weighed in favor of the grant of retroactive waivers to the parties addressed by the 2014 and 2015 Orders are similarly applicable here, and good cause exists for the grant of a retroactive waiver to Petitioner. In particular, the granting of the waivers to the petitions filed after April 30, 2015 are particularly similar to this petition. 2015 Order, ¶ 20.

Petitioner here seeks waiver of only those faxes sent prior to April 30, 2015. Since Petitioner was confused about the notice requirement, as it had consent from the fax recipients, it is likewise similarly situated to those other petitioners. Petitioner has shown, and the Commission previously recognized, that confusion existed in the marketplace when it transmitted fax advertisements without opt-out language. Since the Commission has recognized that confusion in the marketplace existed, and the waiver sought is only for faxes transmitted prior to April 30, 2015, Petitioner's waiver should be granted.

Moreover, as the Commission recognized in the 2015 Order, it is not necessary for the Commission to wade into the general dispute between plaintiffs of the various asserted class action lawsuits, nor into the Litigation specifically, in acting on this Petition. 2015 Order, ¶¶ 13 and 17. The Commission also previously noted that granting a waiver should not "be construed in any way to confirm or deny whether the [petitioner], in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action." 2014 Order, ¶ 31.

There is no public interest in strict enforcement of the Regulation that created confusion in its application to fax recipients who had provided "prior express invitation or permission" to be sent faxes. In contrast, the public interest would be harmed by requiring parties like Petitioner to divert substantial capital, time and human resources from its lawful businesses to engage in unnecessary litigation because of past confusion over the Commission's Regulation. A waiver is

thus appropriate here.

There is also no public interest in strict enforcement of the deadline in the 2014 Order. (“... [W]e expect that parties will make every effort to file within six months of the release of this order.” 2014 Order, ¶ 2). As the Commission recognized in the 2015 Order, the waiver is intended for facsimiles sent prior to April 30, 2015. Granting a waiver to Petitioner would uphold the intent of the 2014 Order and ensure that it is not prejudiced by the confusion created by the 2006 Order. Petitioner’s late filing is due to the fact that it had not sent a facsimile advertisement in years, and had no reason to seek a waiver prior to April 30, 2015, as it was unaware of any potential claim against it as of that date. The Litigation in which Petitioner is currently a defendant was not filed until June 30, 2015, and was not served on Petitioner until July 9, 2015, more than two months after the Commission’s April 30, 2015 deadline. *See* Litigation Dkt. 10, “Summons.” Because Petitioner had no notice of the claim against it prior to the Commission’s April 30, 2015 deadline, it would be inequitable and against the public interest to strictly enforce that deadline against Petitioner.

F. Petitioner’s Ongoing Compliance With the 2006 Order

Petitioner understands the importance of compliance with the Commission’s rules and regulations, including the 2006, 2014, and 2015 Orders. As noted above, based on an internal review of its records, it no longer sends facsimile advertisements. Furthermore, Petitioner has consulted with the undersigned attorney regarding proper “opt-out” notice requirements, and has implemented procedures to ensure that if it elects to send facsimile advertisements in the future, each will contain the requisite notice.

III. CONCLUSION

For the foregoing reasons, Petitioner hereby respectfully requests that the Commission grant

it a retroactive waiver from liability under the TCPA and the FCC's regulations and orders relating to facsimile advertisements sent prior to April 30, 2015 to recipients who had provided prior express invitation or permission/consent to receive such faxes, but where such facsimile advertisements did not contain opt-out notices in compliance with Section 64.1200(a)(4)(iii) and (iv).

Date: September 17, 2015

Respectfully submitted,

SCRIP INC.

By: /s/ Patrick W. Chinnery

Matthew P. Connelly
Patrick W. Chinnery
Rock Fusco & Connelly LLC
321 N. Clark St., Ste. 2200
Chicago, Illinois 60654
312-494-1000
Counsel for Petitioners