

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

In the Matter of)	
Junk Fax Prevention Act of 2005)	CG Docket No. 02-278
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 05-338
Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission)	

**MCKESSON CORPORATION’S OPPOSITION TO TCPA PLAINTIFFS’
APPLICATION FOR REVIEW**

McKesson Corporation (“McKesson”) submits this Response to the Application for Review filed by the TCPA Plaintiffs¹ on September 28, 2015 (the “Application”).

INTRODUCTION

This Application is another attempt by the TCPA Plaintiffs to collaterally attack the Commission’s order granting waivers to certain entities from 47 C.F.R. § 64.1200(a).² The arguments made in the Application have already been considered extensively—and dismissed as meritless—by both the Commission in issuing the *Fax Order* and the Consumer and

¹Although the term “TCPA Plaintiffs” is undefined in the Application, McKesson understands it to refer to the applicants listed on page i of the Application: Beck Simmons, LLC; Physicians Healthsource, Inc.; Radha Geismann, M.D., P.C.; Sandusky Wellness, LLC; Alan L. Laub, DDS, Inc.; North Branch Pizza & Burger Co.; True Health Chiropractic, Inc.; Alan Presswood, D.C., P.C.; Carradine Chiropractic Center, Inc.; Christopher Lowe Hicklin, DC, PLC; J. Barrett Company, Central Alarm Signal, Inc.; St. Louis Heart Center, Inc.; Eric B. Fromer Chiropractic, Inc.; Arnold Chapman; Shaun Fauley; Keith Bunch Associates, LCC; Michael C. Zimmer, D.C., P.C.; Wilder Chiropractic, Inc.; Law Office of Stuart R. Berkowitz; Proex Janitorial, Inc.; and Italia Foods, Inc.

² *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd. 13998 (2014) (“*Fax Order*”).

Governmental Affairs Bureau (the “Bureau”) in its order granting further waiver petitions.³ The Commission should deny the Application.

BACKGROUND

In its *Fax Order*, the Commission stated that its rules require “senders of fax ads [to] include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.”⁴ At the same time, however, the Commission “recognize[d] that some parties who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether [the Commission’s] requirement[s] for opt-out notices applied to them.”⁵ The Commission accordingly “grant[ed] retroactive waivers of [its] opt-out requirement[s] to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by [its] rules.”⁶ The Commission expressly invited “[o]ther, similarly situated entities [to] request retroactive waivers from the Commission, as well.”⁷

Numerous parties, including McKesson on November 25, 2014, requested such waivers.⁸ McKesson’s request established that it was entitled to a waiver because McKesson is, in all material respects, identically situated to the parties already granted waivers in the *Fax Order*.⁹ Private parties involved in litigation with McKesson and other entities in a putative Telephone Consumer Protection Act (TCPA) class action nonetheless filed comments opposing

³ See *Fax Order; In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 5120879 (CGAB Aug. 28, 2015) (“*Bureau Order*”).

⁴ *Fax Order* ¶ 1; see 47 C.F.R. § 64.1200(a)(4)(iv).

⁵ *Fax Order* ¶ 1.

⁶ *Id.*

⁷ *Id.* ¶ 22.

⁸ See *Bureau Order* ¶ 1 n.2.

⁹ See *Petition of McKesson Corporation for Waiver*, CG Docket Nos. 02-278, 05-338, at 3-4 (filed Nov. 25, 2014) (“*McKesson Petition*”).

McKesson's request.¹⁰ In response, on January 20, 2015, McKesson submitted a reply in support of its request noting that "[e]ach of [TCPA] plaintiffs' arguments . . . was either expressly rejected by the *Fax Order* or [] fundamentally inconsistent with that order's waiver analysis."¹¹

The Bureau thereafter issued an order on August 28, 2015, granting the waivers requested by McKesson and others and specifically rejecting the TCPA Plaintiffs' arguments.¹²

ARGUMENT

The Application raises three questions for review:

1. Whether the *Fax Order* should be overturned because the Commission did not have authority to issue it;
2. Whether the Bureau ignored a factual record rebutting a "presumption of confusion"; and (specifically relevant to McKesson)
3. Whether a "presumption of confusion" is rebutted by an FCC letter directed to McKesson in 2008.¹³

As explained below, none of these arguments has merit, and each amounts to an impermissible collateral attack on the *Fax Order*.

I. THE COMMISSION SHOULD REJECT TCPA PLAINTIFFS' ATTEMPT TO COLLATERALLY ATTACK THE *FAX ORDER*.

The Application argues that "[t]he TCPA does not authorize the Commission to 'waive' its regulations in a private right of action."¹⁴ Both the Commission and Bureau correctly rejected that argument, and there is no basis for a different result here.

¹⁰ See, e.g., *TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke's Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZooDoc, Inc.*, CG Docket Nos. 02-278, 05-338 (filed Jan. 13, 2015) (TCPA Plaintiffs' Comments).

¹¹ *Reply in Support of McKesson Corporation's Petition for Waiver*, CG Docket Nos. 02-278, 05-338, at 3 (filed Jan. 20, 2015) ("McKesson Reply").

¹² *Bureau Order* ¶¶ 13, 17-19.

¹³ Application 2.

¹⁴ *Id.* at 5; see TCPA Plaintiffs' Comments 19.

In its *Fax Order*, the Commission “reject[ed] any implication that by addressing the petitions filed in this matter while related litigation is pending, we have ‘violate[d] the separation of powers vis-à-vis the judiciary,’ as one commenter has suggested.”¹⁵ The “commenter” to which the Commission referred was Brian J. Wanca, the same attorney who has submitted the Application here and who has filed putative class action lawsuits against McKesson and many others.¹⁶ The Commission explained that, in addressing requests for waivers from the Commission’s TCPA rules, it was acting pursuant to its congressionally delegated authority to administer the TCPA.¹⁷ Moreover, the Commission noted, “the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.”¹⁸

Similarly, the *Bureau Order* “dismiss[ed] arguments that by granting waivers while litigation is pending [the Bureau] violate[d] the separation of powers as several commenter[s] have suggested.”¹⁹ The Bureau further explained that “[a]s the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, [the Bureau is] interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency.”²⁰

¹⁵ *Fax Order* ¶ 21.

¹⁶ Compare *Fax Order* ¶ 21 n.77, with TCPA Plaintiffs’ Comments 41, Application 23.

¹⁷ *Fax Order* ¶ 21 (citing 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”)).

¹⁸ *Id.*; accord *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 59 (2007) (rejecting argument that “an agency cannot determine through regulation when a private party may bring a federal court action”).

¹⁹ *Bureau Order* ¶ 13.

²⁰ *Id.*

Both the Commission and Bureau recognized the Commission’s longstanding authority to waive application of its own rules for “good cause shown.”²¹ When Congress expressly gave the FCC authority to promulgate regulations construing the TCPA,²² it did so against the backdrop of that waiver authority. When the Commission exercises that authority, it does not “intervene in a private right of action” in court, as TCPA Plaintiffs suggest,²³ but rather “define[s] the scope of when and how” *its own* rules apply.²⁴ That is the very definition of administrative action and falls squarely within the Commission’s authority.

II. TCPA PLAINTIFFS’ PURPORTED “CONTEMPORANEOUS RECORD” DOES NOT REBUT A PRESUMPTION OF CONFUSION.

TCPA Plaintiffs also contend that “proceedings following the 2006 Junk Fax Order demonstrate [that] regulated parties immediately understood that the plain language of the 2006 rules required opt-out notice[s] on faxes sent with permission”²⁵ By contending that there was no confusion and therefore no basis for granting any retroactive waivers, TCPA Plaintiffs are yet again attempting to collaterally attack the *Fax Order*. That is reason enough to reject the argument here.

In any event, the comments and statements to which TCPA Plaintiffs refer—none of which were made by McKesson—are entirely beside the point. Neither the Commission nor the Bureau based its waiver analysis on past comments by companies and trade associations regarding their purported understanding of TCPA regulatory requirements. Instead, the waivers were based on the “inconsistency” between the Commission’s rule and a statement made in the

²¹ *Fax Order* ¶ 23; *Bureau Order* ¶ 14; *see also Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“The FCC has authority to waive its rules if there is ‘good cause’ to do so. 47 C.F.R. § 1.3. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”); 47 U.S.C. § 227(b)(2).

²² 47 U.S.C. § 227(b)(2).

²³ TCPA Plaintiffs’ Comments 19; Application 5.

²⁴ *Fax Order* ¶ 21.

²⁵ Application 9; *see also* TCPA Plaintiffs’ Comments 33-34.

order promulgating it (as well as a defect in the related notice of proposed rulemaking).²⁶ As the *Bureau Order* noted:

[T]he Commission found two reasons for confusion or misplaced confidence among affected parties that the opt-out notice rule did not apply to fax ads sent with recipient consent: (1) *inconsistency between a Junk Fax Order* footnote and the rule, and (2) the notice provided prior to 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.²⁷

TCPA Plaintiffs also assert that “[t]here is no evidence any person was ever actually confused by the footnote 154 of the 2006 order.”²⁸ This argument was considered and correctly rejected by the Bureau. The *Bureau Order* granted waivers based on the general “confusion or misplaced confidence” caused by “the contradictory language in the Commission’s fax opt-out decision” and the fact that the Commission did not “make explicit that [it] contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.”²⁹ In fact, the *Bureau Order* actively “reject[s] arguments that the Commission made actual, specific claims of confusion a requirement to obtain [a] waiver.”³⁰ Individualized evidence of confusion is not required for a waiver, and “[t]he Commission did not require petitioners to plead specific, detailed grounds for individual confusion . . .” to be entitled to a presumption.³¹

III. THE 2008 FCC LETTER DESCRIBED BY TCPA PLAINTIFFS DOES NOT REBUT A PRESUMPTION OF CONFUSION WITH REGARD TO MCKESSON.

As TCPA Plaintiffs themselves have previously acknowledged, McKesson specifically stated that it “‘did not believe that . . . solicited facsimiles required opt-out notices’ when it sent

²⁶ *Fax Order* ¶ 25; *Bureau Order* ¶ 14.

²⁷ *Bureau Order* ¶ 14 (emphasis added).

²⁸ Application 13.

²⁹ *Bureau Order* ¶¶ 14, 16.

³⁰ *Id.* at ¶ 19.

³¹ *Id.*

it[s] faxes.”³² Nonetheless, the Application repeats TCPA Plaintiffs’ argument that because the FCC sent a letter to one business unit of McKesson in 2008 attaching a copy of 47 C.F.R. § 64.1200, “the company is no longer entitled to a ‘presumption’ that it was confused about what the plain language of those rules require[s].”³³ That argument lacks merit.

The letter to which TCPA Plaintiffs refer says *nothing* about the requirement to include opt-out notices at all, much less any requirement to include such notices on faxes to recipients who had given prior express consent to receive them.³⁴ Instead, that letter addressed only the TCPA’s general prohibition on sending “*unsolicited* advertisements” by fax.³⁵ Nothing in that letter “demonstrat[es] that” McKesson “understood that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission.”³⁶

Nor is it relevant that the FCC appended a copy of its regulations to the letter it sent to the McKesson business unit.³⁷ Neither the Bureau nor Commission granted waivers on the basis that the FCC had failed to send copies of its rules to waiver applicants, nor was there any claim that those applicants were unable to access the relevant volume of the *Code of Federal Regulations*. Instead, waivers were granted based on the “inconsistency” between the Commission’s regulations and a statement in the Commission’s order promulgating them (as well as defects in the preceding notice of proposed rulemaking).³⁸ The mailing of a photocopy of certain regulations to a McKesson business unit is entirely immaterial and cannot establish

³² TCPA Plaintiffs’ Comments 24 (quoting McKesson Petition 2).

³³ Application 21-23; TCPA Plaintiffs’ Comments 22-23.

³⁴ See TCPA Plaintiffs’ Comments, Ex. A at 1.

³⁵ *Id.* (emphasis added).

³⁶ *Fax Order* ¶ 26.

³⁷ *Cf.* Application 22; TCPA Plaintiffs’ Comments 22-23.

³⁸ *Bureau Order* ¶ 14; *Fax Order* ¶ 25.

that McKesson understood the purported “plain language” of rules that the Commission itself admits were susceptible to “confusion or misplaced confidence.”³⁹

CONCLUSION

The TCPA Plaintiffs’ Application should be denied.

Respectfully submitted,

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³⁹ *Fax Order* ¶ 25.