

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	CG Docket No. 02-278
)	
Petition for Waiver)	CG Docket No. 05-338
of Virbac Corporation)	

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission’s (“FCC” or the “Commission”) regulations, 47 C.F.R. § 1.3, Virbac Corporation (“Virbac”) respectfully requests that the Commission grant Virbac a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s regulations, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Rule”) with respect to any facsimiles that have been transmitted by or on behalf of Virbac prior to April 30, 2015.

This request for waiver is being submitted pursuant to the Commission’s recent Order granting a number of retroactive waivers of the Opt-Out Rule and inviting “similarly situated parties” to seek similar waivers.¹ As the Commission has already determined that good cause exists for such retroactive waiver requests and grant of the waiver would serve the public interest, Virbac respectfully requests that the Commission expeditiously grant its petition for waiver.²

I. BACKGROUND

Virbac is a company that develops, manufactures and distributes a wide range of products and services intended for the prevention and treatment of common pathologies in pets. Virbac

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petition 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 No. 02-278, 05-338, Order, FCC 14-164, ¶30 (rel. Oct. 30, 2014) (“*Fax Order*”).

² See *Fax Order* at ¶22; see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

offers a broad range of products designed to support veterinarians in providing quality care to pets. As part of its offerings, Virbac provides important information about its products and services via facsimile to those customers and merchants who have consented to receive such communications.

The Telephone Consumer Protection Act of 1991 (“TCPA”) prohibits the use of a fax machine to send an “unsolicited advertisement.”³ In 2005, Congress enacted the Junk Fax Prevention Act to “require the sender of an *unsolicited* fax advertisement to provide specified notice and contact information on the fax that allows recipients to ‘opt out’ of any future fax transmissions from the sender.”⁴ Therefore, Virbac did not believe that that any of its solicited faxes required opt-out notices. However, as a consequence of this regulatory uncertainty, Virbac – like so many other companies – now finds itself a defendant in a putative class action lawsuit filed in federal court which alleges violations of the TCPA.⁵

The named plaintiff in that case, along with the putative class, seeks damages for alleged violations of the TCPA on the grounds that, among other things, Virbac allegedly sent facsimile transmissions to the named plaintiff and the putative class which did not bear the opt-out notice required by the Opt-Out Rule.⁶ This petition for waiver does not ask the Commission to resolve the factual and legal questions raised in the pending litigation; these issues properly remain

³ Pub. L. No. 102-243, 105 Stat. 2394, *codified* at 47 U.S.C. § 227.

⁴ 47 C.F.R. § 64.1200(a)(4)(iv)(emphasis added); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, fn. 154 (“*Junk Fax Order*”) (2006) (stating that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements” (emphasis added)).

⁵ *See Fauley v. Virbac Corporation*, Case No. 15-cv-09125 (N.D. Ill.). References to “DE ___” refer to ECF docket entries in the case. Plaintiff Shaun Fauley is a serial TCPA litigant, having filed over half a dozen TCPA cases in federal court alone within the past six months. Plaintiff Fauley’s attorneys also have a habit of holding onto faxes for years—in this case, over three years—before filing suit.

⁶ *See* Class Action Complaint, DE 1 ¶¶ 16, 31.

within the jurisdiction of the federal district court. By this filing, Virbac seeks only to obtain the same retroactive waiver of the Opt-Out Rule that the Commission granted to multiple petitioners in the Fax Order and to 117 applicants that subsequently filed waiver petitions.⁷

II. GRANT OF THE VIRBAC RETROACTIVE WAIVER REQUEST IS IN THE PUBLIC INTEREST.

As the Commission concluded in the Fax Order, good cause exists for a retroactive waiver of the Opt-Out Rule insofar as it relates to the failure to comply with the Opt-Out Rule's opt-out notice requirements for facsimile transmissions sent with the prior express invitation or permission of recipients.⁸

The Commission recognized that this good cause is based, first, on the "inconsistency" between a footnote to the Junk Fax Order and the Opt-Out Rule; the Commission stated that this inconsistency has "caused confusion or misplaced confidence" regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission.⁹ This acknowledged inconsistency has contributed to substantial uncertainty surrounding the opt-out notice requirements for *solicited* fax advertisements. Like the petitioners granted retroactive waivers in the Fax Order, there is "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."¹⁰ As a "similarly situated party" – *i.e.*, an entity that sent solicited fax transmissions that lacked an opt-out notice – good cause exists to resolve this inconsistency by granting Virbac's request for a retroactive waiver.

⁷ See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 8598 (2015) ("Waiver Petition Order") (granting 117 waiver petitions).

⁸ Fax Order at ¶22.

⁹ Junk Fax Order at fn. 154; see also Fax Order at ¶24.

¹⁰ Fax Order at ¶26.

Grant of the retroactive waiver request would also be in the public interest. Virbac notes that the Commission has already decided that such retroactive waivers will serve the public interest because the “confusion or misplaced confidence . . . left some businesses potentially subject to significant damage awards” and that “on balance . . . it serves the public interest . . . to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.”¹¹ Based on this finding, the FCC granted a retroactive waiver to all of the petitioners explicitly referenced in the Order and further invited other “similarly situated parties” to seek retroactive waivers as well.¹²

Though Virbac is filing this waiver petition outside of the April 30, 2015 cutoff date in the Fax Order, the faxes at issue in the abovementioned lawsuit were sent on June 22, 2012 and October 25, 2013—well before the April 30, 2015 cutoff. Importantly, the Commission’s April 30, 2015 date was not a hard cutoff date for *filing petitions*—indeed, the Commission noted simply that “we expect that parties will make every effort to file within six months of the release of this Order.”¹³ The Commission subsequently granted waiver petitions filed as late as June of 2015 on the basis that “[t]hese petitions sought waiver for faxes sent prior to the April 30, 2015 deadline” and “[a]s such, granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver

¹¹ *Fax Order* at ¶27.

¹² *Id.* at ¶30.

¹³ *Fax Order* at ¶ 2.

recipients.”¹⁴ Given that the faxes at issue in Virbac’s ongoing litigation were sent *years* before April 30, 2015, Virbac is similarly situated to the initial waiver recipients.¹⁵

The FCC’s rationale in granting retroactive waivers to the petitioners referenced above applies equally to Virbac because the uncertainty surrounding the Opt-Out Rule could potentially expose it to frivolous lawsuits and monetary damage awards. The Commission has acknowledged that substantial confusion previously existed with respect to the opt-out requirements for solicited fax advertisements. Thus, not only does good cause exist to grant Virbac a waiver of the Opt-Out Rule, but such a grant would be in the public interest.

¹⁴ Moreover, several petitions for waiver filed subsequent to the release of the *Waiver Petition Order* have been filed with the Commission and placed on Public Notice. *See, e.g., Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, Public Notice, DA 15-1077 (rel. Sept. 25, 2015) (including petitions filed by McVey Associates, Inc., Dental Fix Rx LLC, Scrip Holding Co., and SourceMedia LLC).

¹⁵ *See Waiver Petition Order* ¶ 20.

III. CONCLUSION

For the foregoing reasons, Virbac respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) effective through April 30, 2015.

November 9, 2015

Respectfully Submitted,

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