

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

In the Matter of:	)	
	)	
Petition for Declaratory Ruling to Clarify	)	
Statutory Basis for Rule 64.1200(a)(3)(iv)	)	CG Docket No. 02-278
and/or for Ruling Regarding Substantial	)	
Compliance with Section 64.1200(a)(4)(iii)	)	CG Docket No. 05-338
and (iv) and/or Waiver	)	

**REPLY OF ADVANCED CARE SCRIPTS, INC.**  
**IN SUPPORT OF PETITION FOR WAIVER**

Advanced Care Scripts, Inc. writes in response to Jefferson Radiation Oncology’s (“Jefferson”) comment, filed December 17, 2015, opposing ACS’s November 12, 2015 Petition to the Federal Communications Commission (“Commission”). Jefferson, the named plaintiff in a putative class action against ACS, relies on meritless arguments that the Commission has already addressed and rejected.

Jefferson principally argues that ACS is not entitled to a waiver because, unlike other petitioners, ACS was not “confused” by the TCPA or the Commission’s regulations. Rather, Jefferson claims that ACS had no knowledge of the TCPA’s requirements, pointing to selected excerpts from the deposition of Steve Lynch, ACS’s corporate representative, who testified that he has not personally read the TCPA. But Jefferson ignores evidence and testimony from Mr. Lynch that ACS relied on a third party—Westfax, Inc.—to broadcast its faxes and ensure that it complied with state and federal law. Although Mr. Lynch and other employees of ACS may not have personally read the TCPA, they reasonably relied on Westfax, which provided the opt-out language, to ensure that language met regulatory requirements. Thus, ACS is in precisely the same situation as a previous petitioner, Magna Chek, *see* CG Docket Nos. 02-278, 05-338 (filed Mar. 28, 2014), which also contracted with and relied on Westfax to provide the necessary opt-

out language, and therefore had the same confusion. The Commission granted Magna Chek's waiver petition on October 30, 2014. The Commission's reasoning in granting Magna Chek's waiver applies equally here.

Moreover, the Commission has never held that petitioners are entitled to waivers *only* if they have closely read and reviewed the TCPA or implementing regulations themselves (as opposed to relying on others who performed the services). The addition of that specific requirement would also be at odds with the Commission's recent order, which denied five petitions because those entities "admit[ted] to being unaware of the opt-out notice requirement..."<sup>1</sup> Jefferson has (and cannot) claim that ACS was unaware of an opt-out notice requirement. As Mr. Lynch has testified, ACS has understood since it began contracting with Westfax for fax services in 2008 that it was required to provide a mechanism for fax recipients to stop receiving faxes and, on that basis, added Westfax's recommended opt-out-language to the faxes. And as Westfax itself has explained to the Commission, it was confused by the TCPA's requirements. Thus, the presumption that petitioners confused by the opt-out notice requirement are entitled to a waiver applies equally here. As it has for Magna Chek and 145 other entities, the Commission should grant ACS's Petition.

**I. ACS IS ENTITLED TO THE SAME ADMINISTRATIVE TREATMENT AS TO MAGNA CHEK, WHICH WAS GRANTED A WAIVER ON IDENTICAL GROUNDS**

ACS simply asks for the same administrative treatment received by prior petitioners. Specifically, the Commission has already granted a waiver to a party that, like ACS, relied on the exact same fax broadcaster—Westfax—to ensure compliance with fax opt-out notice requirements. That party, Magna Chek, based its petition on the same argument—that it

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<sup>1</sup> FCC, 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, ¶ 2, CG Dkt. Nos. 02-278, 05-338 (filed Dec. 9, 2015) ("December 2015 Order").

reasonably relied on Westfax to supply language that complies with the TCPA and the Commission's regulations. As Magna Chek explained in its petition:

In 2011, Magna Check hired Westfax to begin sending faxes to prior customers and potential customers from whom Magna Check had received express consent to send advertising materials. Westfax told Magna Check what language was necessary to place on the fax advertisement, and Magna Check relied on Westfax's expertise and experience in adopting the recommendation.

Petition of Magna Chek, Inc. for Declaratory Ruling and/or Waiver, at 2-3, CG Docket Nos. 02-278, 05-338 (filed Mar. 28, 2014). As Magna Chek further explained, its purported non-compliance with the opt-out notice requirement "was based on its reliance on an experienced fax transmitter, Westfax, who directed Magna Chek to put an opt-out provision on its faxes and provided the opt-out language to Magna Chek." *Id.* at 10. And like ACS, Magna Check included an opt-out provision but did not indicate that failure to comply with the removal request within 30 days is unlawful. *Id.* Also like ACS, Magna Chek never suggested that its employees had personally read and reviewed the TCPA. Nor did Magna Check suggest that its employees were personally confused by the 2006 Order. *See id.* at 11 ("Further, the inconsistencies between the TCPA and the Commission's regulations added confusion as to which provisions applied to faxes sent to recipients who consented to receive the faxes."). Rather, Magna Check, like ACS, has been accused of violating the TCPA because it relied on Westfax to ensure its compliance with the TCPA.<sup>2</sup> Thus, there is simply no material difference between ACS's Petition and the Magna Chek petition that would support reaching a different result. Just as the Commission granted Magna Chek a waiver in its October 2014 Order, it should do the same with ACS now.

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<sup>2</sup> The Commission also has granted waivers in other contexts to petitioners who reasonably relied on the experience and expertise of a third party. *See In re Rath Microtech Complaint Regarding Electronic Micro Systems, Inc., Emergency Telephones*, 16 FCC Rcd 16710, 16713-14 (Sept. 17, 2001) (granting waiver of telephone labeling requirements and on-hook impedance limitations where petition misunderstood the Commission's rules as a result of its reliance on a third party).

## **II. ACS WAS AWARE OF AN OPT-OUT NOTICE REQUIREMENT AND REASONABLY RELIED ON WESTFAX TO ENSURE COMPLIANCE WITH REGULATORY REQUIREMENTS**

Jefferson has failed to rebut the presumption that ACS, like Magna Chek and other successful petitioners, is entitled to a waiver because of confusion caused by the 2006 Order. As the Commission noted recently in an August 28, 2015 Order, “petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence.”<sup>3</sup> That presumption can be rebutted with (1) evidence “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,” *see* 2014 Order ¶ 26,<sup>4</sup> or (2) an admission by the petitioner “to being unaware of the opt-out notice requirement.” December 2015 Order ¶ 2. Jefferson’s argument attempts to fit the second exception, contending that ACS “had no knowledge of the TCPA or any Commission Orders prior to the litigation” and that its failure to comply with the statute was because of this ignorance. (Jefferson Comment at 3-4.)

But the Commission has never required petitioners’ corporate representatives to have read the TCPA (or the Commission’s regulations) closely themselves. The Commission made this clear in its August 2015 Order when it rejected the argument that plaintiffs must “plead specific, detailed grounds for individual confusion.” August 2015 Order ¶ 19. Unlike the five petitioners who were denied waiver in the December 2015 Order, ACS *was* aware of an opt-out notice requirement in some form—because Westfax told ACS that such a requirement existed

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<sup>3</sup> FCC, 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, ¶ 15, CG Dkt. Nos. 02-278, 05-338 (filed Aug. 28, 2015) (citing 2014 Order, 29 FCC Rcd at 14009–10) (“August 2015 Order”).

<sup>4</sup> FCC, 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, CG Docket Nos. 02-278, 05-338 (Oct. 30, 2014) (“2014 Order”).

and provided certain language to ACS in order to meet it. Specifically, as ACS's Mr. Lynch testified during his deposition, when ACS hired Westfax to send faxes on its behalf, Westfax informed ACS that it was required to include instructions and a phone number where fax recipients could call to be removed from any fax list:

Q: And how is it that Westfax instructed you as to the disclaimer information, as you referred to, and the need for it to be on your form?

A: So we sent them a template of what we wanted to send out. They responded and said we had to have a disclaimer on the bottom allowing practices to opt out of, of the fax communications, and they provided us the language that we should put on the, on the bottom of the page.

...

Q: And was that early on in the fax campaign?

A: That was prior to the first fax we sent out through WestFax.

Q: Okay. And did you comply with the request?

A: We did.

Declaration of Scott M. Voelz, Ex. A at 59:16-23, 61:14-18. As Mr. Lynch further explained, ACS understood that the opt-out notice requirement was required as a matter of law:

Q: Did Westfax tell you that the reason why you needed the opt-out language was in order to comply with the TCPA?

A: I don't recall that was the -- what they said. I know that there was some legal requirement to have that opt-out language on the bottom of the page.

*Id.* at 63:16-64:1. Since using Westfax's services, ACS has consistently maintained that it relied on the expertise of Westfax to ensure compliance with applicable state and federal law. *Id.* at 61:9-63:13; 64:10-13 ("Q: Did you rely upon WestFax solely in determining whether or not the opt-out language was correct? A: Yes.").

As Westfax has itself explained to the FCC, it was confused by the TCPA's requirements—even after it began providing fax services to ACS. Westfax, Inc. Petition for

Consideration and Clarification, at 6, CG Dkt. Nos. 02-278, 05-338 (filed Sept. 24, 2009) (“The FCC made it very clear an opt-out notice is required but is very technical and confusing as to what disclosure complies with the opt-out notice requirements.”). Because Westfax was authorized and directed to send faxes on ACS’s behalf, to the extent the Commission requires “actual evidence” of confusion, Westfax’s confusion and misapprehension of the TCPA’s requirements should be imputed to ACS. *See* 3 C.J.S. Agency § 547. It would make little sense to hold otherwise, penalizing ACS for having hired and relied on a fax broadcaster which, by its own admission, was confused by the TCPA’s regulatory requirements, when ACS’s own confusion indisputably would have sufficed to obtain a waiver. Jefferson’s argument, then, is unfair, unreasonable, and inconsistent with the FCC’s prior holdings. It should be rejected.

### **III. ACS’S PETITION IS NOT TIME BARRED**

The Commission also should reject Jefferson’s argument that ACS’s Petition is untimely because it filed its Petition on November 12, 2015, rather than before April 30, 2015. The Commission has already rejected this argument on two occasions, holding that granting waivers to parties that have filed petitions after April 30, 2015 does not contradict the purpose or intent of the Commission’s instructions. *See* August 2015 Order ¶ 20; December 2015 Order ¶ 18. Like those petitioners, ACS only seeks a waiver for faxes sent before April 30, 2015, and does not seek unique or special treatment.<sup>5</sup>

In claiming that ACS’s decision to defend itself in this litigation “clearly indicate[s] that it has waived any opportunity for a retroactive waiver,” Jefferson effectively argues that petitioners like ACS must choose between defending themselves in civil court and seeking relief

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<sup>5</sup> Jefferson alleges that it received a fax advertisement from ACS on April 10, 2015. This is irrelevant to ACS’s compliance with the October 2014 Order. As the Commission stated, it provided fax senders “six months from [October 30, 2014]” to comply with the opt-out notice requirement for solicited faxes. 2014 Order ¶ 29. Thus, the Commission was aware and generally contemplated that fax senders might seek waivers for faxes sent up through April 30, 2015.

from the administrative agency that implements the statute at issue. The two cannot, and should not, be linked, nor has the FCC done so in evaluating past petition requests.

Finally, Jefferson's argument that granting ACS's Petition could lead other parties to wait until 2019 to file petitions is similarly nonsensical. Entities facing lawsuits for having allegedly sent faxes that violate the TCPA have every incentive to file a petition because a waiver will impact those claims. It makes no sense for parties to "wait and see" if they will get sued before seeking a waiver. This is further supported by the docket—the number of petitioners seeking a waiver of 64.1200(a)(4)(iv) has declined since May 2015. As it has done twice before, the Commission should reject this argument.

#### **IV. GRANTING ACS A WAIVER IS IN THE PUBLIC INTEREST**

The Commission also should deny Jefferson's final argument that granting ACS a waiver would "violate public policy." (Jefferson Comment at 8.) This argument is incorrect for several reasons. First, as discussed above, ACS relied on a third party fax broadcaster, which has told the FCC it was itself confused, to supply the opt-out language.<sup>6</sup> ACS has acted in good faith, and Jefferson does not state anything to establish otherwise.

Second, ACS's practices did not result in significant actual harm. The faxes themselves provided significant benefits to the medical community, as several recipients noted in ACS's Petition. Moreover, ACS sent faxes that clearly and conspicuously provided (1) instructions as to how to stop receiving future faxes and (2) a free contact number to request at any time to be removed. Any fax recipient could easily prevent any unwanted faxes, and a minority of recipients did so using the free number provided. Moreover, granting a waiver to ACS would

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<sup>6</sup> Jefferson's assertion about the supposed amount of ACS's profits—likely asserted by Jefferson in an attempt to undermine ACS's reliance on a third party—is both factually incorrect and irrelevant.

only apply to recipients who expressly solicited those faxes and were able to revoke their consent at any time.

Third, the public interest supports a waiver because ACS uses faxes to notify medical providers in targeted practice areas when new medications become available through ACS's pharmacy network. Because their patients suffer from life-threatening diseases, it is important to these providers that they receive such information as quickly as possible. These faxes serve an important public health functions by helping doctors provide their patients with the best available treatments as quickly as possible. As such, granting a waiver to ACS is supported by good cause and would serve the public interest.

**V. CONCLUSION**

For the reasons stated herein and in its Petition, ACS is similarly situated to the petitioners that have been granted retroactive waivers. ACS respectfully requests that the Commission grant it a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) with respect to any fax sent prior to April 30, 2015 with the invitation or permission of the recipient.

Respectfully submitted,

ADVANCED CARE SCRIPTS, INC.

By Counsel

/s/ Scott M. Voelz

Scott M. Voelz

O'Melveny & Myers LLP

400 South Hope Street

Los Angeles, California 90071-2899

Tel.: (213) 430-6000

Fax: (213) 430-6407

svoelz@omm.com

Randall W. Edwards

O'Melveny & Myers LLP

Two Embarcadero Center, 28th Floor  
San Francisco, California 94111  
Tel.: (415) 984-8700  
Fax: (415) 984-8701  
[redwards@omm.com](mailto:redwards@omm.com)

*Attorneys for Advanced Care Scripts, Inc.*