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

In the Matter of:	)	
	)	GC Docket No. 02-278
Petition of Renaissance Systems and Services,	)	
LLC for Retroactive Waiver of 47 C.F.R. §	)	GC Docket No. 05-338
64.1200(a)(4)(iv)	)	

RENAISSANCE SYSTEMS AND SERVICE, LLC'S APPLICATION FOR FULL COMMISSION REVIEW

Bart T. Murphy
ICE MILLER LLP
2300 Cabot Drive, Suite 455
Lisle, Illinois 60532
(630) 955-6392

Heather L. Maly
ICE MILLER LLP
200 W. Madison St., Ste. 3500
Chicago, IL 60606
(312) 726-8107

TABLE OF CONTENTS

Page

Introduction 1

Background 5

Renaissance Systems and Services, LLC 5

TCPA and the Junk Fax Prevention Act of 2005 6

October 30, 2014 Order 7

Supplemental Order 9

RSS's Petition for Retroactive Waiver 10

ARGUMENT 11

I. The Bureau's Denial of RSS's Petition for a Retroactive Waiver from Compliance With Section 64.1200(a)(4)(iv) Is Based on an Inaccurate Factual Finding 11

II. RSS is Similarly Situated to the Parties Who Have Received a Retroactive Waiver from Compliance with Section 64.1200(a)(4)(iv), and Therefore, RSS is Entitled to the Retroactive Waiver Its Seeks 13

CONCLUSION 15

Petitioner Renaissance Systems and Service, LLC ("RsS") respectfully asks the full Commission, pursuant to Section 1.115 of the Commission's rules,[1] to review, overrule and vacate the December 9, 2015 Order issued by the Consumer and Governmental Affairs Bureau as to RSS in response to RSS's Petition for Retroactive Waiver of 47 C.F.R. §64.1200(a)(4)(iv) (the "Bureau's Order").[2] As explained below, RSS is entitled to the relief it seeks because the Bureau's Order conflicts with a clear and definitive ruling of this Commission.

Introduction

In 2006, the Commission issued a ruling in which it stated in a footnote that all *unsolicited* faxes must contain an opt-out notice, explaining how a recipient can avoid receiving any additional advertisements by fax from that sender.[3] That ruling created confusion over whether the requirement of an opt-out notice applies to all fax advertisements, or instead only to *unsolicited* faxed advertisements – that is, advertisements that the recipient has not already agreed to receive by fax.

Several entities filed petitions for declaratory relief asserting that the TCPA did not apply to faxes sent with consent as such faxes were not unsolicited and that the Commission lacked the authority to issue the regulation requiring an opt-out notice on faxes sent with consent. On October 30, 2014, the Commission issued an order on the petitions holding that the TCPA does apply to faxes sent with consent and that the Commission had the authority to issue the

---

[1] 47 C.F.R. §1.115.

[2] *See Junk Fax Prevention Act: Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. §64.1200(a)(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, Order, DA 15-1402 (rel. Dec. 9, 2015) ("Bureau Order").

[3] *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration,* 21 FCC Rcd 3787 (2006) (the "Junk Fax Order").

regulation requiring an opt out notice on faxes sent with consent.[4] The Commission did however recognize that confusion existed regarding whether the opt out notice is required on faxes sent with consent and granted retroactive waivers to petitioners from compliance with the regulation requiring an opt-out notice.[5] The Order addressed that confusion in another matter, ruling that the opt-out notice is required in *all* faxed advertisements. The Commission also found that the parties before it who, in fact, were confused (as to whether the Commission's 2006 footnote limited the opt-out statement requirement) were reasonably confused, and therefore, entitled to a retroactive waiver from compliance with respect to any faxed advertisements sent without an opt-out notice to a recipient who had consented to receiving advertisements by fax. Importantly here, the Commission also stated in its October 30, 2014 Order that non-parties who are similarly situated to the parties in that matter may also submit petitions for waivers from compliance with the regulation.

In 2015, RSS was sued in a class action lawsuit on the grounds that RSS allegedly faxed advertisements that did not contain the required opt-out statement. Thereafter, RSS filed its petition for a retroactive waiver from that requirement, based on the fact that RSS is similarly situated to the parties who received the waiver in the 2014 matter. On December 9, 2015, the Acting Bureau Chief of the Consumer and Governmental Affairs Bureau issued an order denying RSS's petition for waiver stating that "[T]he petitioners [RSS] admit to being unaware of the opt-out notice requirement and, therefore, not similarly situated to the initial waiver recipients . . .."[6] The Bureau's Order also stated:

---

[4] *See Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Old Requirement for Faxes Sent with the Recipient's Prior Express Permission,* CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014) (the "Order").

[5] *Id.*

[6] *Bureau Order*, ¶2.

> In this Order, we also deny Ivoclar Vivadent, Inc., Renaissance Systems and Services, LLC, athenahealth, Inc., Ohio National Mutual, Inc., and Prevention Pharmaceuticals, Inc.'s petitions for waiver on the grounds that petitioners are not similarly situated to the initial waiver recipients. In each of the five petitions, petitioners admit a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express permission or consent.[7]

In support of this finding, the Bureau cites, in footnote 65 of its Order, to RSS's Petition at Page 2. This finding is simply wrong. RSS did not admit in its Petition that it was not aware of the TCPA and/or the Commission's rules requiring an opt out notice on faxes sent with consent. Contrary to the Bureau's Order, page two of RSS's Petition makes no such admission. Page two of RSS's Petition merely states in relevant part: "Until the Law Suit was filed and it engaged counsel to defend it, RSS **was not aware of the Commission's October 30, 2014 Order** or the need to seek a waiver from compliance with the Regulation, or it would have filed this Petition at an earlier date." (emphasis added). RSS's Petition only admits that until it was hit with the Lawsuit, it was unaware of the Commission's October 30, 2014 Order requiring it to file a petition for a retroactive waiver. RSS is no different than the Petitioners who were granted waivers. RSS falls squarely within the parameters set by this Commission for obtaining a retroactive waiver, and the Bureau's Order to the contrary should be overruled and vacated, and RSS should be granted the retroactive waiver it seeks.

BACKGROUND

Renaissance Systems and Services, LLC

RSS is dedicated to providing electronic solutions that add value to the dental community by lowering the cost of doing business through the promotion of e-commerce. RSS is located in

[7] *Id.* ¶20.

Indianapolis, Indiana. On June 17, 2015, RSS was named as a defendant in a putative class action lawsuit[8] (the "Lawsuit") alleging that it violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited facsimile advertisements to the plaintiff and a putative class. RSS's normal practice is to contact prospective customers via telephone and obtain consent from them to send sales materials and information via facsimile before sending any such materials via facsimile. RSS believed that in light of the fact the recipient consented to receive the material via facsimile, that it was permissible to send the material in that manner and that nothing further, including providing the opt out notice, was required.[9] As such, RSS is similarly situated to the parties granted a retroactive waiver by the Commission in that it was confused by 47 C.F.R. §64.1200(a)(4)(iv) (the "Regulation") and the applicability and scope of the Regulation.

TCPA and the Junk Fax Prevention Act of 2005

The TCPA and the Junk Fax Prevention Act of 2005 ("JFPA")[10] prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."[11] An "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[12]

---

[8] *G. Neil Garrett, D.D.S., P.C. v. Renaissance Systems and Services, LLC*, No. 15 CV 5349 (USDC N.D. Ill).

[9] *Declaration of Eric Joseph In Support of Renaissance Systems and Services. LLC's Application for Review ("Joseph Dec."),* ¶5. (Attached hereto as Exhibit A).

[10] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. 5 227 *et seq.*

[11] 47 U.S.C. 55 227(a)(5) and (b)(1)(C).

[12] *Id.* § 227(a)(5).

The Regulation states that a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice."[13] In addition to the Regulation, the Commission also adopted rules implementing the JFPA.[14] A footnote in the Junk Fax Order states that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements."[15] This footnote led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice requirement to faxes sent with the prior express permission of the recipient. Since the adoption of the Regulation, plaintiffs and their attorneys have seized on the controversy and uncertainty surrounding the scope and applicability of the rules regarding solicited faxes, to bring numerous class action lawsuits under the TCPA. As a result, various businesses sought clarification on the Regulation, challenged the Commission's authority to issue the Regulation, and alternatively sought retroactive waivers of its opt-out notice requirement for solicited faxes.

October 30, 2014 Order

On October 30, 2014, the Commission issued an Order addressing this confusion.[16] The Commission clarified this outstanding issue in the Order. Specifically, in the Order, the Commission "confirm[ed] senders of fax ads must 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."[17] The Commission noted that the inconsistency between the footnote contained in the *Junk Fax Order* and the Regulation caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express

---

[13] *See* 47 C.F.R. 5 64.1200(a)(4(iv); *see also* Junk Fax Order, 21 FCC Rcd at 3812, para. 48.
[14] *See Junk Fax Order*.
[15] *Junk Fax Order*, 21 FCC Rcd at 3810 n.154 (emphasis added).
[16] *See Order*.
[17] *See Order* ¶ 1.

permission. The use of the word "unsolicited" in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient. The Commission further noted that all petitioners seeking waiver make reference to the confusing footnote language in the record.[18]

In addition to clarifying the mandate of the Regulation, the Commission granted to the parties in that matter waivers that relieved them from the obligation to provide an opt-out notice in all fax advertisements that predate the Commission's ruling, provided that those faxes were sent with the consent of the recipient. Significantly here, the Commission also agreed in that Order to permit other similarly situated entities – like RSS – to also seek such waivers. The Commission indicated in the Order that it would grant additional retroactive waivers due to the previous uncertainty to similarly situated parties.[19]

> [W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide

---

[18] *Id.*

[19] The Commission detailed the reasons for such uncertainty in the Order: "Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. 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. Specifically, the footnote stated that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.' The use of the word 'unsolicited' in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. 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." *See* Order ¶¶ 24-25 (internal footnotes omitted).

> these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.
>
> [W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule)[20]

The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest.[21] Specifically, there is good cause to waive the Regulation with respect to recipients who have provided "prior express invitation or permission" to receive fax advertisements and where the sender was confused by the applicability of the opt-out notice requirement.[22] Also, the waiver serves the public interest because it would be "unjust or inequitable" to subject parties, like RSS to "potentially substantial damages" stemming from confusion over the Commission's regulations.[23] The Commission invited "similarly-situated parties" to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes.[24]

Supplemental Order

Pursuant to the Order, the Commission allowed similarly situated parties to seek waiver requests for a limited period.[25] On August 28, 2105, the Bureau granted over 100 waiver requests to parties similarly-situated to the initial waiver recipients due to uncertainty whether the opt-out notice requirement applies to faxes sent with the recipient consent.[26] In granting the waivers, the

---

[20] *See* Order ¶¶ 1 and 22.
[21] *See Order* ¶¶ 26-28.
[22] *See Order* ¶¶ 24, 28.
[23] *See Order* ¶¶ 27-28.
[24] *See Order* ¶30.
[25] *See* Order ¶ 30.
[26] *See Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Old Requirement for Faxes Sent with the Recipient's Prior Express Permission,* CG Docket Nos. 02-278, 05-338, Order, DA 15-976 (rel August 28, 2015) (the "Supplemental Order").

Bureau held that "the Commission has established that petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence."[27] The Bureau next noted that "[a]ll 117 petitions reference the contradictory language in the Commission's fax opt-out decision, thus qualifying them for the presumption of confusion or misplaced confidence articulated by the Commission."[28] The Bureau rejected arguments that the Commission required "actual, specific claims of confusion" to obtain a waiver.[29] Rather, it was enough to merely reference the confusion language to obtain the presumption of confusion.[30] In granting the 117 waivers, the Bureau further confirmed that the waivers were in the public interest.[31] The Commission did not deny any waiver requests at that time.[32]

RSS's Petition for Retroactive Waiver

In June 2015, RSS filed a petition for a retroactive waiver due to its own confusion over the opt-out language and the potential significant and damaging liability of the pending lawsuit.[33] In December 2015, the Bureau addressed another set of waiver requests, this time granting five waiver requests and denying five waiver requests, including RSS's request.[34] RSS's waiver request was denied because the Bureau held that RSS and the other petitioners admitted a lack of awareness of the TCPA and/or Commission rules that require them to include opt-out notices on

---

[27] *Supplemental Order* ¶15, citing the *Order* ¶¶24-26.
[28] *Id.* ¶16.
[29] *Id.* ¶19.
[30] *Id.*
[31] *Id.* ¶¶ 13, 14, 16, 19.
[32] *See Supplemental Order.*
[33] *See Petition of Renaissance Systems and Services, LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv),* CG Docket Nos. 02-278, 05-338 (filed June 24, 2015) ("RSS Petition") (Attached hereto as Exhibit B).
[34] *See Bureau Order.*

faxes sent to recipients who provided prior express permission or consent.[35] The Bureau denied RSS's request for waiver claiming RSS admitted ignorance of the law, which the Bureau held does not entitle it to a waiver.[36]

ARGUMENT

I. The Bureau's Denial of RSS's Petition for a Retroactive Waiver from Compliance With Section 64.1200(a)(4)(iv) Is Based on an Inaccurate Factual Finding

RSS is similarly-situated to the parties who were granted retroactive waivers under the Order, and thus, RSS is entitled to a retroactive waiver from compliance with Section 64.1200(a)(4)(iv). The Bureau denied RSS's petition for a retroactive waiver entirely upon its erroneous conclusion that "petitioners admit a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express permission or consent."[37] This is simply not accurate. As shown below, RSS never once acknowledged any ignorance of the confusion created by the footnote in the Commission's 2006 ruling. The only lack of awareness that RSS ever acknowledged pertained to the Commission's October 30, 2014 ruling requiring it to request a waiver (and that was acknowledged to explain RSS's minor delay in seeking a retroactive waiver); and, in fact, RSS referred several times in its petition to confusion as to whether opt-out notices were required in faxes to recipients who had consented to receiving such faxes.

Specifically, in its petition, RSS pled the following:

- "RSS recently retained counsel to defend it in the Law Suit and as a result it now brings this Petition seeking a retroactive waiver of compliance with the Regulation. Until the Law Suit was filed and it engaged counsel to defend it, RSS was not aware of the Commission's October 30, 2014 Order or the need to seek a waiver from compliance with the Regulation, or *it would have filed this Petition at an earlier date*."[38]

---

[35] *Bureau Order* ¶20.
[36] *Id.*
[37] *Id.*
[38] *RSS Petition*, p. 2, (emphasis added).

- "RSS was not aware of the Commission's October 30, 2014 Order until recently when it retained counsel to defend it in the Law Suit. *Otherwise RSS would have filed this Petition at an earlier date.*[39]

These are the only two statements in RSS's petition wherein it admits any lack of awareness. And it could not be clearer that, in these two statements, RSS is acknowledging only that it was unaware of the October 30, 2014 Order which required it to seek a retroactive waiver. These are not statements of ignorance regarding the TCPA or rules requiring opt-out notices, as the Bureau incorrectly held.[40]

Furthermore, the Bureau itself imposed a lower bar, recognizing the inherent confusion between the Regulation and the footnote and holding that it was enough merely to reference the confusion language to obtain the presumption of confusion.[41] In its petition to the Bureau, RSS did exactly that:

- Since the adoption of the Regulation, plaintiffs and their attorneys have seized on the controversy and uncertainty surrounding the scope and applicability of the rules regarding solicited faxes, to bring numerous class action lawsuits under the TCPA.[42]

- In response to the admitted uncertainty about whether the opt-out notice applied to solicited faxes, the Commission granted retroactive waivers to certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices.[43]

- The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest. Specifically, there is good cause to waive the Regulation with respect to recipients who have provided "prior express invitation or permission" to receive fax advertisements and where the sender was confused by the applicability of the opt-out notice requirement.[44]

---

[39] *Id.*, p. 5, (emphasis added).
[40] *Bureau Order* ¶20.
[41] *Id.*
[42] *RSS Petition*, p. 2.
[43] *Id.*
[44] *Id.* p. 3.

- This footnote led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice requirement to faxes sent with the prior express permission of the recipient.[45]

The plain language from RSS's petition quoted above demonstrates conclusively that RSS never admitted ignorance of the TCPA or the Commission rules creating confusion over the opt-out notice requirement. Accordingly, the Bureau's Order, based solely upon its inaccurate conclusion that RSS had pled such ignorance, is improper and should be vacated, and the full Commission should grant RSS a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) as applied to any alleged advertising faxes sent by RSS to recipients who provided prior consent to receiving such faxes.

II. RSS is Similarly Situated to the Parties Who Have Received a Retroactive Waiver from Compliance with Section 64.1200(a)(4)(iv), and Therefore, RSS is Entitled to the Retroactive Waiver It Seeks

Although the Bureau denied RSS's petition for a retroactive waiver solely on the grounds that RSS pled ignorance that RSS, in fact, never pled, RSS asks the Commission not only to vacate the Bureau's improper ruling, but also to grant RSS the retroactive waiver it seeks. Accordingly, RSS will demonstrate below its entitlement to that retroactive waiver.

The Commission may suspend, revoke, amend, or waive any of the Commission's rules if good cause is shown.[46] Generally, the Commission may grant a waiver of its rules in a particular case if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.[47] Furthermore, waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve

---

[45] *Id.* p. 4.
[46] 47 C.F.R. § 1.3; *see also* 47 C.F.R. § 1.925(b)(3)(i)-(ii).
[47] *See* Order ¶23; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

the public interest than would strict adherence to the general rule.[48] As shown, both rationales apply to RSS's request.

First, RSS is similarly situated to the petitioners previously granted retroactive waivers in the Order and Supplemental Order. Specifically, RSS is alleged to have sent faxes that did not contain proper opt-out notices. RSS contends that these faxes were sent with the prior express permission of the recipients.[49] RSS simply did not understand that the opt-out notice requirement applied to solicited faxes, such as the ones it sent. As with the parties previously given waivers, it finds itself subject to massive liability, as well as litigation costs, based on the application of a provision of the Regulation which the Commission has recognized is confusing.

Further, a grant of the requested waiver is in the public interest. The TCPA and the Commission's TCPA rules are intended "to allow consumers to stop unwanted faxes."[50] That purpose is not served where, as here, the recipients of the faxes have given permission to RSS to send sales materials via facsimile, and importantly, those recipients were capable of contacting RSS for purposes of opting out of future fax communications. RSS sent faxes only after receiving verbal consent from the customer to do so. In light of the Commission's *admitted* confusion as to the scope/applicability of the Regulation and RSS's actual confusion as to the scope/applicability of the Regulation, the grant of a waiver would better serve the public interest than the strict adherence to the rule.

Moreover, denial of the waiver would be inequitable and could impose unfair liability on RSS based upon confusion as to the meaning of the Regulation -- liability that Congress never intended to create. Such a waiver is also in line with the stated purpose of the Order. The

---

[48] *See Order* ¶23; *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).
[49] *Joseph Dec.* ¶¶4-5.
[50] *Junk Fax Order* ¶ *48.*

Commission has made clear that the avoidance of civil liability to businesses that may have inadvertently violated the Regulation trumps the public interest to consumers to recover under the TCPA:

> The record in this proceeding demonstrates that a failure to comply with the rule—which as noted above could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages[. . . .] This 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. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance 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.[51]

The public interest would also be harmed by requiring parties like RSS to divert substantial resources and staff away from ordinary business operations to resolve unnecessary litigation efforts stemming only from uncertainty over the Commission's regulations, resources that will primarily go to plaintiff's lawyers. Absent a waiver, RSS could be subjected to substantial statutory damages for allegedly failing to comply with a rule that the Commission has acknowledged was the subject of confusion.

Finally, RSS is only seeking a waiver for facsimiles sent prior to April 30, 2015.[52]

Accordingly, RSS respectfully submits that the public interest would be served by the granting of its Petition for a retroactive waiver of the Regulation.

CONCLUSION

For the reasons stated above, Renaissance Systems and Services, LLC respectfully requests that the full Commission grant it a retroactive waiver from compliance with 47 C.F.R.

---

[51] *Order* ¶ 27 (internal footnotes omitted).
[52] *Order* ¶21.

64.1200(a)(4)(iv) for any solicited fax or fax sent with the consent or permission of the recipient, which it sent (or which was sent on its behalf) after the effective date of the Regulation.

Dated: January 8, 2016

Respectfully submitted,

RENAISSANCE SYSTEMS AND SERVICES, LLC.

By: /s/ Bart T. Murphy
By one of its attorneys

Bart T. Murphy
ICE MILLER LLP
2300 Cabot Drive, Suite 455
Lisle, Illinois 60532
(630) 955-6392

Heather L. Maly
ICE MILLER LLP
200 W. Madison St., Ste. 3500
Chicago, IL 60606
(312) 726-8107

EXHIBIT A

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

In the Matter of:	)	
	)	GC Docket No. 02-278
Petition of Renaissance Systems and Services,	)	
LLC for Retroactive Waiver of 47 C.F.R. §	)	GC Docket No. 05-338
64.1200(a)(4)(iv)	)	
	)	

DECLARATION OF ERIC JOSEPH IN SUPPORT OF RENAISSANCE SYSTEMS AND SERVICES, LLC'S APPLICATION FOR REVIEW

Pursuant to 28 U.S.C. § 1746, I, Eric Joseph, hereby affirm under penalties of perjury the following:

1. I am the Chief Operating Officer of Renaissance Systems and Services, LLC ("RSS"). This Declaration is based on my personal knowledge and familiarity with the proceedings and facts contained.

2. RSS is dedicated to providing electronic solutions that add value to the dental community by lowering the cost of doing business through the promotion of e-commerce.

3. On June 17, 2015, RSS was named as a defendant in a putative class action lawsuit (the "Lawsuit") filed in the Northern District of Illinois captioned *G. Neil Garrett, D.D.S., P.C. v. Renaissance Systems and Services, LLC* (No. 15 CV 5349), alleging that it violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited facsimile advertisements to the plaintiff and a putative class. As such, it is potentially subject to massive liability, as well as litigation costs.

4. RSS does not send mass blast facsimiles. It is RSS's policy and practice to obtain a recipient's prior express consent and permission prior to sending a fax to that recipient.

5. RSS believed that it was complying with the TCPA and the Junk Fax Order. RSS

only sent faxes with the consent of the recipient. As such, RSS did not believe that the faxes were unsolicited faxes requiring opt-out notices under the TCPA and the Junk Fax Order.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 7, 2016

Eric Joseph

EXHIBIT B

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

In the Matter of:	)	
	)	GC Docket No. 02-278
Petition of Renaissance Systems and Services,	)	
LLC for Retroactive Waiver of 47 C.F.R. §	)	GC Docket No. 05-338
64.1200(a)(4)(iv)	)	
	)	

PETITION OF RENAISSANCE SYSTEMS AND SERVICES, LLC FOR RETROACTIVE WAIVER

Pursuant to the Federal Communications Commission's rules, 47 C.F.R. §1.3, and Paragraph 30 of the Commission's *Order,* CG Docket Nos. 02-278 and 05-338, FCC 14-164 (rel. October 30, 2014) ("Order"), Petitioner Renaissance Systems and Services, LLC ("RSS"), respectfully requests the Commission to grant it a retroactive waiver from compliance with 47 C.F.R. §64.1200(a)(4)(iv) (the "Regulation"), with respect to any alleged advertising faxes it sent with the recipient's prior express invitation or permission but without the opt-out notice identified in the Regulation.

I. Introduction

RSS is dedicated to providing electronic solutions that add value to the dental community by lowering the cost of doing business through the promotion of e-commerce. RSS is located in Indianapolis, Indiana. On June 17, 2015, RSS was named as a defendant in a putative class action law suit[1] (the "Law Suit") alleging that it violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited facsimile advertisements to the plaintiff and a putative class. RSS is similarly situated to the parties granted a retroactive waiver by the Commission in the Order. RSS's normal practice is to contact prospective customers via telephone and obtain

[1] *G. Neil Garrett, D.D.S., P.C. v. Renaissance Systems and Services, LLC*, No. 15 CV 5349 (USDC N.D. Ill).

consent from them to send sales materials and information via facsimile before sending any such materials via facsimile. RSS believed that in light of the fact the recipient consented to receive the material via facsimile, that it was permissible to send the material in that manner and that nothing further, including providing the opt out notice, was required.

RSS recently retained counsel to defend it in the Law Suit and as a result it now brings this Petition seeking a retroactive waiver of compliance with the Regulation. Until the Law Suit was filed and it engaged counsel to defend it, RSS was not aware of the Commission's October 30, 2014 Order or the need to seek a waiver from compliance with the Regulation, or it would have filed this Petition at an earlier date.

Since the adoption of the Regulation, plaintiffs and their attorneys have seized on the controversy and uncertainty surrounding the scope and applicability of the rules regarding solicited faxes, to bring numerous class action lawsuits under the TCPA. As a result, various petitioners sought clarification on the Regulation, challenged the Commission's authority to issue the Regulation, and alternatively sought retroactive waivers of its opt-out notice requirement for solicited faxes. On October 30, 2014, the Commission released the Order addressing this confusion.[2] In response to the admitted uncertainty about whether the opt-out notice applied to solicited faxes, the Commission granted retroactive waivers to certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. Since the waivers granted in the Order were limited to the listed petitioners, the Commission agreed to permit other, similarly situated entities, like RSS, to also seek such waivers.

---

[2] *See Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Old Requirement for Faxes Sent with the Recipient's Prior Express Permission,* CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014).

The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest.[3] Specifically, there is good cause to waive the Regulation with respect to recipients who have provided "prior express invitation or permission" to receive fax advertisements and where the sender was confused by the applicability of the opt-out notice requirement.[4] Also, the waiver serves the public interest because it would be "unjust or inequitable" to subject parties, like RSS to "potentially substantial damages" stemming from confusion over the Commission's regulations.[5] The Commission invited "similarly-situated parties" to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes.[6] Accordingly, a waiver is appropriate here.

II. The Current Statutory and Regulatory Framework

The TCPA and the Junk Fax Prevention Act of 2005 ("JFPA"),[7] prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."[8] An "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[9]

The Regulation states a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice."[10] In addition to

---

[3] *See Order* ¶¶ 26-28.
[4] *See Order* ¶¶ 24, 28.
[5] *See Order* ¶¶ 27-28.
[6] *See Order* ¶30.
[7] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. 5 227 *et seq.*
[8] 47 U.S.C. 55 227(a)(5) and (b)(1)(C).
[9] *Id.* § 227(a)(5).
[10] *See* 47 C.F.R. 5 64.1200(a)(4(iv); *see also* Junk Fax Order, 21 FCC Rcd at 3812, para. 48.

the Regulation, the Commission also adopted rules implementing the JFPA.[11] A footnote in the Junk Fax Order states that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements."[12] This footnote led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice to solicited faxes sent with the prior express permission of the recipient. The Commission clarified this outstanding issue in the Order.

Specifically, in the Order, the Commission "confirm[ed] senders of fax ads must 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."[13] The Commission indicated in the Order that it is now prepared to grant additional retroactive waivers due to the previous uncertainty[14]:

> [W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement 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 our rules.

---

[11] *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration,* 21 FCC Rcd 3787 (2006) (the "Junk Fax Order").

[12] *Junk Fax Order*, 21 FCC Rcd at 3810 n.154 (emphasis added).

[13] *See* Order ¶ 1.

[14] The Commission detailed the reasons for such uncertainty in the Order: "Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. 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. Specifically, the footnote stated that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.' The use of the word 'unsolicited' in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. 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." *See* Order ¶¶ 24-25 (internal footnotes omitted).

> [W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule)[15]

As noted above, RSS was not aware of the Commission's October 30, 2014 Order until recently when it retained counsel to defend it in the Law Suit. Otherwise RSS would have filed this Petition at an earlier date.

III. The Commission Should Grant a Retroactive Waiver of Section 64.1200(a)(4)(iv) for Any Solicited Faxes Sent by RSS.

As demonstrated below, RSS is similarly-situated to the parties who were granted retroactive waivers under the Order. As such, the Commission similarly should grant RSS a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) as applied to alleged advertising faxes sent to recipients who had provided prior express invitation or permission for such faxes.

The Commission may suspend, revoke, amend, or waive any of the Commission's rules if good cause is shown.[16] Generally, the Commission may grant a waiver of its rules in a particular case if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.[17] Furthermore, 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.[18] As shown, both rationales apply.

First, a grant of the requested waiver is in the public interest. The TCPA and the Commission's TCPA rules are intended "to allow consumers to stop unwanted faxes."[19] That purpose is not served where, as here, the recipients of the faxes had given permission to RSS to

---

[15] *See* Order ¶¶ 1 and 22.
[16] 47 C.F.R. § 1.3; *see also* 47 C.F.R. § 1.925(b)(3)(i)-(ii).
[17] *See* Order ¶23; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).
[18] *See* Order ¶23; *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).
[19] Junk Fax Order ¶ 48.

send sales materials via facsimile, and importantly, were capable of contacting RSS for purposes of opting out of future fax communications. The recipients of the sales materials knew how to contact RSS to stop the receipt of sales materials via facsimile if they wanted to do so. RSS only sent faxes after receiving verbal consent from the customer to do so. In light of the Commission's *admitted* lack of clarity as to the scope/applicability of the Regulation, the grant of a waiver would better serve the public interest than the strict adherence to the rule.

Moreover, denial of the waiver would be inequitable and could impose unfair liability on RSS based upon confusion as to the meaning of the Regulation, claims that Congress never intended to create. Such a waiver is also in line with the stated purpose of the Order. The Commission made it clear that the avoidance of civil liability to businesses that may have inadvertently violated the Regulation trumps the public interest to consumers to recover under the TCPA when it expressly stated that:

> The record in this proceeding demonstrates that a failure to comply with the rule—which as noted above could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages[. . . .] This 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. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance 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.[20]

The public interest would also be harmed by requiring parties like RSS to divert substantial resources and staff away from ordinary business operations to resolve unnecessary litigation efforts stemming only from uncertainty over the Commission's regulations. Further, absent a waiver, RSS could be subjected to substantial statutory damages for allegedly failing to comply with a rule that the Commission has determined was the subject of confusion.

Accordingly, RSS respectfully submits that the public interest would be served by the granting of its Petition for a retroactive waiver of the Regulation.

IV. Conclusion.

For the reasons stated above, Renaissance Systems and Services, LLC respectfully requests that the Commission grant it a retroactive waiver from compliance with 47 C.F.R. 64.1200(a)(4)(iv) for any solicited fax or fax sent with the consent or permission of the recipient, which it sent (or which was sent on its behalf) after the effective date of the Regulation.

Dated: June 25, 2015

Respectfully submitted,

RENAISSANCE SYSTEMS AND SERVICES, LLC.

By: /s/ Bart T. Murphy
By one of its attorneys

Bart T. Murphy
ICE MILLER LLP
2300 Cabot Drive, Suite 455
Lisle, Illinois 60532
(630) 955-6392

Heather L. Maly
ICE MILLER LLP
200 W. Madison St., Ste. 3500
Chicago, IL 60606
(312) 726-8107

[20] Order ¶ 27 (internal footnotes omitted).