

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

In the Matter of Ohio National Mutual, Inc.
Petition for Retroactive Waiver of 47 C.F.R.
§ 64.1200(a)(4)(iv)

CG Docket No. 02-278

CG Docket No. 05-338

Petition For Reconsideration of December 9, 2015 Order Regarding Retroactive Waiver

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Summary

In its petition for retroactive waiver of Section 64.1200(a)(4)(iv) with regard to the opt-out notice requirement for solicited facsimile advertisements, Petitioner Ohio National Mutual, Inc., demonstrated that it was similarly situated to the petitioners granted waivers by the Commission on October 30, 2014, and therefore also entitled to waiver. Like those petitioners, Ohio National's petition referenced the confusion between the footnote and the rule in the Commission's 2006 Junk Fax Order and no record evidence demonstrates that Ohio National understood that it did, in fact, have to comply with the opt-out notice requirement for facsimile advertisements sent with prior express permission but nonetheless failed to do so.

In its December 9, 2015 Order, however, the Bureau mistakenly interpreted Ohio National's petition as supposedly admitted ignorance of the TCPA and the Commission's opt-out notice requirement for solicited fax advertisements, and denied Ohio National's petition on that basis. But in its October 30, 2014 Order, the Commission granted waiver requests to petitioners who expressly asserted that they were unaware of the opt-out notice requirement for solicited faxes, and the Bureau applied that same standard in its August 28, 2015 Order. Under that standard, Ohio National's petition should have been granted. In any event, Ohio National's petition was not intended to be read, and should not have been read, as seeking a waiver based on ignorance of the law. Rather, Ohio National used the same language as used by the Commission and the Bureau in describing what a petitioner must assert to qualify for a waiver, and dozens of petitioners who previously used that language were granted waivers by the Commission and the Bureau.

TABLE OF CONTENTS

Background.....2

Argument3

 A. In The *2014 Anda Commission Order*, The Commission Granted Waiver Requests To Petitioners Who Expressly Asserted They Were Unaware Of The Opt-Out Notice Requirement For Solicited Faxes, And The Bureau Applied That Standard In Its *August 28 Order*; Under That Standard, Ohio National’s Petition Should Have Been Granted.....3

 B. Ohio National’s Petition Was Not Intended To Be Read, And Should Not Be Read, As Seeking A Waiver Based On “Simple Ignorance” Of The Law6

 C. The Bureau Has Not Previously Read The Language Used By Ohio National As Seeking A Waiver Based On “Simple Ignorance” Of The Law And Had No Basis To Deviate With Respect To Ohio National’s Petition8

 D. The Bureau Granted Petitions In The *December 9 Order* That Made The Same Assertions As Made In The Ohio National Petition11

Conclusion13

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Petitioner Ohio National Mutual, Inc., on behalf of itself and its subsidiaries, (collectively “Ohio National” or “Petitioners”), by and through their undersigned counsel, and pursuant to Section 1.429 of the Rules,¹ hereby petitions the Consumer and Governmental Affairs Bureau (the “Bureau”) of the Federal Communications Commission (the “Commission”) for reconsideration of the Bureau’s Order released December 9, 2015² insofar as that Order denied Ohio National’s Petition for retroactive waiver of Section 64.1200(a)(4)(iv) (the “Regulation”) of its Rules³ with regard to the opt-out notice requirement for solicited facsimiles sent prior to April 30, 2015 to recipients by or purportedly on behalf, or marketing the products or services, of Ohio National. Specifically, Ohio National seeks reconsideration of the *December 9 Order* insofar as the Bureau determined that Ohio National was not “similarly situated” to the petitioners previously granted relief by the Commission in the *2014 Anda Commission Order*,⁴ and therefore did not qualify for a waiver.

¹ 47 C.F.R. § 1.429.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 (rel. Dec. 9, 2015) (the “*December 9 Order*”).

³ 47 C.F.R. § 64.1200(a)(4)(iv).

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd. 13998 (2014) (the “*2014 Anda Commission Order*”).

Background

As the Bureau recognized in its *December 9 Order*, on October 30, 2014, the Commission granted petitioners' requests for waiver of the solicited fax rule where (i) no record evidence "demonstrates that they 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" and (ii) "where the petitioners referenced the confusion between the footnote and the rule" in the 2006 Junk Fax Order.⁵ The Commission urged "similarly situated" parties to submit such waiver requests.⁶ Ohio National did so, filing its Petition on August 21, 2015.

In the *December 9 Order*, the Bureau stated that petitioners are "similarly situated" and "thus qualify for waivers" where: (i) "the faxes at issue were sent prior to the Commission's clarification in the *2014 Anda Commission Order*," (ii) the petitioners "assert their general lack of understanding that the rules applied to solicited faxes and/or refer to the confusion caused by the inconsistency between the text of the Junk Fax Order and the erroneous footnote," and (iii) "no record evidence rebuts the presumption of confusion or misplaced confidence."⁷

Ohio National satisfied each of these stated requirements, but its Petition was denied because the Bureau unaccountably misinterpreted a statement in Ohio National's petition as simply "admit[ting] to being unaware of the opt-out notice requirement."⁸ As a direct result, the Bureau therefore determined that Ohio National was not "similarly situated to the initial waiver

⁵ *December 9 Order* ¶ 14 (citing *2014 Anda Commission Order* ¶¶ 24-26).

⁶ *2014 Anda Commission Order* ¶¶ 2, 30.

⁷ *December 9 Order* ¶ 14.

⁸ *Id.* ¶ 2.

recipients” because “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”⁹

Argument

A. In The 2014 Anda Commission Order, The Commission Granted Waiver Requests To Petitioners Who Expressly Asserted They Were Unaware Of The Opt-Out Notice Requirement For Solicited Faxes, And The Bureau Applied That Standard In Its August 28 Order; Under That Standard, Ohio National’s Petition Should Have Been Granted.

In the *2014 Anda Commission Order*, the Commission granted waivers to the petitioners based on its finding there was “good cause” for retroactive waiver of the Regulation and the waiver would serve the public interest.¹⁰ The Commission explained that there were “two grounds” for its finding of “good cause”: (i) “the inconsistent footnote” in the Junk Fax Order and (ii) the “lack of explicit notice” that the opt-out requirement would apply to fax ads sent with the prior express permission of the recipient.¹¹ The Commission further explained that *because* good cause existed, the granting of waivers was based on “special circumstances,” rather than ignorance of the law: “We emphasize, however, that simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver. Rather, it is the inconsistent footnote, combined with the [lack of explicit notice] . . . along with particular facts and concerns relevant to the public interest at this time . . . [that] warrants deviation from the rule.”¹² In other words, the Commission presumed that the petitioners *were* unaware that the opt-out notice applied to solicited faxes because there was a “lack of explicit notice in the *Junk Fax NPRM*” to make the petitioners aware of the requirement, and “nothing in the record [] demonstrat[ed] that

⁹ *Id.* (citing *2014 Anda Commission Order* ¶ 26).

¹⁰ *2014 Anda Commission Order* ¶¶ 24-26.

¹¹ *Id.*

¹² *Id.* ¶¶ 24, 26.

the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement.”¹³

That this is the correct reading of the *2014 Anda Commission Order* is made plain by the Commission’s granting of the petition of Crown Mortgage Company—one of the “initial petitioners” to whom Ohio National had to be “similarly situated” to be granted waiver.¹⁴ In its Petition, Crown Mortgage Company asserted that it was entitled to a waiver because “*When the faxes were sent, nobody at Crown was aware of . . . the TCPA’s so-called ‘opt out language.’*”¹⁵ Likewise, initial petitioners Staples, Inc. and Quill Corporation noted in their petition that they “*could not have known*” of the opt-out notice requirement for solicited faxes when the faxes at issue were sent because the Commission’s Notice of Proposed Rulemaking failed to mention the intent to apply the requirement to solicited faxes.¹⁶ Thus, any subsequent petitioner who asserted that it was unaware of the opt-out language requirement for solicited faxes, absent record evidence to the contrary, would be “similarly situated” and therefore entitled to a waiver.

Applying this standard, in its *August 28 Order*¹⁷ the Bureau on delegated authority granted waiver requests to numerous petitioners who expressly and unequivocally asserted that they were “unaware” that the opt-out notice applied to solicited faxes because there was nothing

¹³ See *id.* ¶¶ 26, 28.

¹⁴ *Id.* ¶¶ 24-26.

¹⁵ Petition of Crown Mortgage Company at 4 n.2 (filed Feb. 24, 2014) (emphasis added). Indeed, Crown asserted not only that it was unaware of the opt-out notice requirement for solicited faxes, but also that it was “unaware of the TCPA,” and still was granted a waiver by the Commission. See *id.* Notably, Ohio National has not made the latter assertion.

¹⁶ Petition of Staples, Inc. and Quill Corporation at 24 (filed July 19, 2013) (emphasis added).

¹⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-976 (rel. Aug. 28, 2015) (the “*August 28 Order*”).

in the record demonstrating that those petitioners *were* aware of the opt-out notice requirement for solicited faxes and failed to comply notwithstanding. For example:

- Sinopec USA, Inc. asserted in its petition (which the Bureau granted) that it “was *not aware* that the requirement for opt-out language in the form required by Section 64.1200(a)(4)(iii) and (iv) applied to such faxes;”¹⁸
- Salix Pharmaceuticals, Inc. and Salix Pharmaceuticals, Ltd. asserted in their petition (which the Bureau granted) that they and their vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”¹⁹
- United Stationers Inc., United Stationers Supply Co., and Lagasse LLC asserted in their petition (which the Bureau granted) that “Petitioners sent facsimiles to recipients who had provided their prior express invitation or permission and were *not aware* that opt-out notices were required on such faxes;”²⁰
- Meadowbrook Insurance Group, Inc. asserted in its petition (which the Bureau granted) that “Meadowbrook was *unaware* of the October 30, 2014 Order until after it was sued and had a chance to analyze the issues in the lawsuit;”²¹
- GE Healthcare, Inc. asserted in its petition (which the Bureau granted) that it and its vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”²²
- Northwood, Inc. asserted in its petition (which the Bureau granted) that it “was *not aware* of the Commission’s October 30, 2014 Order until recently when it retained counsel to assist it in responding to a demand letter from a putative plaintiff sent to an affiliated entity;”²³
- Alma Lasers, Inc. asserted in its petition (which the Bureau granted) that “it sent certain faxes that were solicited or sent with express permission, and was *not aware* that the requirement for opt-out language in the form required by Section 64.1200(a)(4)(iii) and (iv) applied to those faxes.”²⁴

¹⁸ Petition of Sinopec USA, Inc. at 3 (filed Apr. 30, 2015) (emphasis added).

¹⁹ Petition of Salix Pharmaceuticals, Inc. and Salix Pharmaceuticals, Ltd. at 3 (filed Apr. 27, 2015) (emphasis added).

²⁰ Petition of United Stationers Inc., United Stationers Supply Co. and Lagasse LLC at 9 (filed May 18, 2015) (emphasis added).

²¹ Petition of Meadowbrook Insurance Group, Inc. and Meadowbrook, Inc. at 5 (filed May 29, 2015) (emphasis added).

²² Petition of GE Healthcare, Inc. at 3 (filed Apr. 15, 2015) (emphasis added).

²³ Petition of Northwood, Inc. at 5 (filed June 2, 2015) (emphasis added).

²⁴ Petition of Alma Lasers, Inc. at 4 (filed Nov. 14, 2014) (emphasis added).

- Versa Cardio, LLC asserted in their petition (which the Bureau granted) that it and its vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”²⁵

Indeed, when assessing the significance of limited opt-out notices on solicited faxes, the Bureau expressly stated that the presence of such limited opt-out notices suggested that such opt-out notices may have been included “as a matter of good business practice *rather than knowledge of the rule*.”²⁶ Thus, to the extent that the Bureau reads Ohio National’s Petition as asserting that Ohio National was “unaware” of the TCPA’s opt-out requirements for solicited faxes, Ohio National is entitled to a waiver of the rule since it is plainly “similarly situated” to the original petitioners, since there was and is “nothing in the record here demonstrating that [Ohio National and its subsidiaries] understood that they did, in fact, have to comply with the opt-out notice requirements for fax ads sent with prior express permission but nonetheless failed to do so.”²⁷ Ohio National therefore asks the Bureau to reconsider its determination that Ohio National was and is not “similarly situated” to the original petitioners (the basis upon which the Bureau denied Ohio National’s petition), and grant its Petition.

B. Ohio National’s Petition Was Not Intended To Be Read, And Should Not Be Read, As Seeking A Waiver Based On “Simple Ignorance” Of The Law.

In its Petition, Ohio National stated that “[p]rior to learning of the instant lawsuit regarding facsimiles sent over two years ago and retaining counsel, Petitioners did not have any understanding that opt-out notices were required on solicited faxes.”²⁸ The Bureau read this language as “admit[ting] a lack of awareness of the TCPA and/or Commission rules requiring

²⁵ Petition of Versa Cardio, LLC at 3 (filed Apr. 29, 2015) (emphasis added).

²⁶ August 28 Order ¶ 18 (emphasis added).

²⁷ 2014 Anda Commission Order ¶ 26.

²⁸ Ohio National Petition at 6.

them to include opt-out notices on faxes sent to recipients who provided prior express permission or consent,” which according to the Bureau, meant that Ohio National was not “similarly situated to the initial waiver recipients.”²⁹ For the reasons set forth in Section A, Ohio National does not believe that the Bureau consistently applied the standard announced by the Commission in its *2014 Anda Commission Order* and applied by the Bureau itself to petitions it granted in its *August 28 Order*.

However, to the extent that the Bureau created and applied a new standard for granting petitions, Ohio National met that standard because it nowhere asserted a lack of “awareness” of the TCPA or the Commission’s Orders. Rather, Ohio National purposefully used the very term repeatedly used by the Commission and the Bureau: “understanding.” A comparison of the language used by the Bureau and that used by Ohio National is provided below:

December 9 Order ¶ 14

Stating petitioners must “assert their general lack of *understanding* that the rules applied to solicited faxes” to be similarly situated. (emphasis added).

Ohio National Petition at 6

Stating “Petitioners did not have any *understanding* that opt-out notices were required on solicited faxes.” (emphasis added).

Given that the Commission and the Bureau used the term “understanding” to characterize the standard under which they would find that a petitioner was *not* “asserting simple ignorance of the TCPA or the Commission’s attendant regulations” as grounds for waiver, Ohio National could not reasonably have expected the Bureau to read Ohio National’s use of that same term in precisely the opposite fashion. Indeed, the lone commenter to oppose the Petition certainly did not read Ohio National’s petition in this manner or he would have raised this argument.³⁰

²⁹ *December 9 Order* ¶ 20.

³⁰ See TCPA Plaintiffs’ Comments on Petitions for Retroactive Waiver filed by athenahealth, Inc. and Ohio National Mutual, Inc., CG Docket Nos. 02-278, 05-338 (filed Sept. 11, 2015).

Ohio National did not intend for the use of the term “understanding” to be read as “asserting simple ignorance of the TCPA or the Commission’s attendant regulations” as the grounds for waiver, and was not seeking a waiver on that basis. Ohio National therefore asks the Bureau to reconsider its *December 9 Order* insofar as it denied Ohio National’s request for a waiver on that basis. Rather, Ohio National sought and was entitled to a waiver on the basis that it referenced the confusion between the footnote and the rule in the 2006 Junk Fax Order and no record evidence demonstrated that Ohio National understood that it 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.

C. The Bureau Has Not Previously Read The Language Used By Ohio National As Seeking A Waiver Based On “Simple Ignorance” Of The Law And Had No Basis To Deviate With Respect To Ohio National’s Petition.

On August 28, 2015, the Bureau granted 117 petitions seeking a waiver of the Regulation with regard to the opt-out notice requirement for solicited facsimiles sent prior to April 30, 2015.³¹ Many of those petitions used the exact same language as did the Ohio National Petition.

For example:

- Consumer Energy Solutions, Inc. sought and was granted a waiver based on the fact that “Petitioner did not *understand* the opt-out requirement to apply to such expressly-solicited faxes.”³²
- J.L. Barnes Insurance Agency, Inc. d/b/a/ JLBG Health sought and was granted a waiver based on the fact that “JLBG did not *understand* that it had to comply with the opt-out notice requirement for facsimile advertisements sent with prior express permission.”³³

³¹ See *August 28 Order*.

³² Petition of Consumer Energy Solutions, Inc. at 3 (filed Mar. 26, 2015) (emphasis added).

³³ Petition of J.L. Barnes Insurance Agency, Inc. d/b/a/ JLBG Health at 3 (filed Dec. 5, 2014) (emphasis added).

- Logistic Innovations, LLC sought and was granted a waiver based on the fact that it “certainly did not *understand* that it did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission.”³⁴
- Medversant Technologies, LLC sought and was granted a waiver based on the fact that it “certainly did not *understand* that it 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.”³⁵
- Royal Canin U.S.A., Inc. sought and was granted a waiver based on the fact that it “did not *understand* that the opt-out requirements applied to solicited facsimiles.”³⁶
- Sunwing Airlines Inc., Vacation Express USA Corp, and Sunwing Vacations Inc. sought and were granted waivers based on the fact that they “did not *understand* the opt-out requirement to apply to solicited faxes.”³⁷
- United Stationers Inc., United Stationers Supply Co., and Lagasse LLC sought and were granted waivers based on the fact that they “did not *understand* the opt-out requirement to apply to solicited faxes.”³⁸
- Zoetis, Inc., Zoetis LLC, and Zoetis Products, LLC sought and were granted a waiver based on the fact that they “did not *understand* that they needed to comply with the opt-out notice requirement for faxed webinar invitations sent to its customers who had provided prior express invitation or permission (i.e., faxes that were ‘solicited’”).³⁹
- Endo Pharmaceuticals Inc., Endo Pharmaceutical Solutions Inc., Endo Pharmaceuticals Valera Inc., Endo Health Solutions Inc., Endo Pharma LLC and Endo Pharma Delaware Inc. sought and were granted a waiver based on the fact

³⁴ Petition of Logistic Innovations, LLC at 4 (filed Apr. 24, 2015) (alternations and internal quotations omitted) (emphasis added).

³⁵ Petition of Medversant Technologies, LLC at 4 (filed Jan. 7, 2015) (alternations and internal quotations omitted) (emphasis added).

³⁶ Petition of Royal Canin U.S.A., Inc. at 6 (filed Apr. 27, 2015) (emphasis added).

³⁷ Petition of Sunwing Airlines Inc., Vacation Express USA Corp, and Sunwing Vacations Inc. at 5 (filed Nov. 26, 2014) (emphasis added).

³⁸ Petition of United Stationers Inc., United Stationers Supply Co., and Lagasse LLC at 7 (filed May 18, 2015) (emphasis added).

³⁹ Petition of Zoetis, Inc., formerly known as Pfizer Animal Health, Zoetis LLC, and Zoetis Products, LLC at 5 (filed Jan. 16, 2015) (emphasis added).

that they “did not *understand* the opt-out requirement to apply to solicited faxes.”⁴⁰

- Dongili Investment Group, Inc. and Label Tape Systems, Inc. sought and were granted a waiver based on the fact that they “contend[ed] that faxes were sent with the prior express permission of the recipients and . . . did not *understand* the opt-out requirement to apply to solicited faxes.”⁴¹

Other petitions used similar language. For example, another one of the initial petitioners granted a waiver by the *2014 Anda Commission Order*—Douglas Paul Walburg—stated that the faxes he sent “did not contain an opt-out notice because Mr. Walburg did not *believe* that such a notice was necessary if he had obtained the prior express consent of the recipient.”⁴² Consequently, the Bureau granted dozens of petitions using the same language.⁴³

⁴⁰ Petition of Endo Pharmaceuticals Inc., Endo Pharmaceutical Solutions Inc., Endo Pharmaceuticals Valera Inc., Endo Health Solutions Inc., Endo Pharma LLC and Endo Pharma Delaware Inc. at 5 (filed Apr. 27, 2015) (emphasis added).

⁴¹ Petition of Dongili Investment Group, Inc. and Label Tape Systems, Inc. at 3 (filed Jan. 23, 2015) (emphasis added).

⁴² Petition of Douglas Paul Walburg and Richie Enterprises, LLC, at 5 n.13 (filed Aug. 19, 2013) (emphasis added).

⁴³ See, e.g., Petition of McKesson Corporation at 2 (filed Nov. 25, 2014) (“McKesson and its wholly owned subsidiaries did not *believe* that these solicited facsimiles required opt-out notices.” (emphasis added)); Petition of American Power & Gas LLC, AP&G Holdings LLC, and Tom Cummins at 3 (filed Apr. 17, 2015) (“AP&G did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Amicus Mediation & Arbitration Group, Inc. and Hillary Earle at 2 (filed Nov. 13, 2014) (“Amicus did not *believe* that it was legally required to include an opt-out notice in faxes sent to recipients who gave prior express permission.” (emphasis added)); Petition of Electronic Funds Source LLC Petition at 2 (filed Apr. 28, 2015) (“EFS did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Greenway Health, LLC at 2 (filed Apr. 29, 2015) (“Greenway, and its predecessor, Sage, did not *believe* that these solicited fax transmissions required opt-out notices.” (emphasis added)); Petition of Henry Schein, Inc. at 3 (filed Dec. 17, 2014) (“Henry Schein did not *believe* that the opt-out notice requirements of 47 CFR 64.1200(a)(4)(iii) were applicable to those faxes sent with the prior express invitation or permission of the recipients.” (emphasis added)); Petition of Heska Corporation at 2 (filed Apr. 14, 2015) (“Heska did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Jay Geier’s Scheduling Institute at 4 (filed Apr. 20, 2015) (“Scheduling Institute did not *believe* that the TCPA required an opt-out notice to be included on fax advertisements sent with prior express permission.” (emphasis added)).

This is why Ohio National used similar language, asserting “Ohio National had no cause to file such a petition for retroactive waiver pursuant to the order until it was recently sued . . . Prior to that time, Ohio National had no basis upon which to *believe* there was any question regarding the legality of any solicited fax messages purportedly sent on behalf of Ohio National.” Ohio National Petition at 4 (emphasis added). Indeed, this language closely tracks the language used by Petitioner Joseph T. Ryerson & Son, Inc. (whose petition was granted in the *August 28 Order*), asserting that “Ryerson was not aware of any claims against it for violations of the TCPA until May 14, 2015 — two weeks after the expiration of the six-month period set forth in the October 30 Order. Ryerson therefore had no reason to file a petition within the original six-month period because it did not *believe* that there was any question

Based on the Commission and the Bureau granting the waiver requests in these petitions using the same words, Ohio National had no reasonable basis to believe that the wording in its Petition would be construed as asserting “simple ignorance of the TCPA or the Commission’s attendant regulations”⁴⁴ as the basis for its waiver request. Indeed, since the order granting these petitions was issued the same day as the Public Notice seeking comment on Ohio National’s petition,⁴⁵ Ohio National also had no basis to clarify in its Reply Comment that it was affirmatively *not* asserting “simple ignorance of the TCPA or the Commission’s attendant regulations” as the grounds for its Petition. Ohio National is now able to clarify that it was not asserting “simple ignorance” of the law as a basis for granting it a waiver of the Regulation as applied to solicited faxes, and seeks reconsideration of the Bureau’s determination of that point as applied to Ohio National’s Petition in the *December 9 Order* on that basis.⁴⁶

D. The Bureau Granted Petitions In The *December 9 Order* That Made The Same Assertions As Made In The Ohio National Petition.

In the *December 9 Order*, the Bureau granted five petitions on the basis that those petitioners were “similarly situated to the waiver recipients previously granted relief by the Commission,” meaning that the Bureau did *not* read their petitions as seeking a waiver by “admit[ting] a lack of awareness of the TCPA and/or Commission rules requiring them to

about the legality of the faxes that it may have sent to its customers” Petition of Joseph T. Ryerson & Son, Inc. at 3 (filed June 4, 2015) (emphasis added).

⁴⁴ *December 9 Order* ¶ 2.

⁴⁵ *Consumer and Governmental Affairs Bureau Seeks Comments on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, FCC 15-972 (rel. August 28, 2015).

⁴⁶ To the extent the Bureau reads this portion of Ohio National’s Petition for Reconsideration as “rel[ying] on facts or arguments which have not previously been presented to the Commission, the facts or arguments “relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission” and were “unknown to [Ohio National] until after [its] last opportunity to present them to the Commission, and [Ohio National] could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity” because prior to the *December 9 Order*, the Bureau had not read similar language in the manner it did in the *December 9 Order*. Thus, Ohio National did not have any prior opportunity to explain that its language should not be read in such a manner.

include opt-out notices on faxes sent to recipients who provided prior express permission or consent.”⁴⁷ The Ohio National Petition, however, did not make assertions different from those made in the petitions that were granted.

For example, Scrip Inc. sought and was granted a waiver based on the fact that “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.”⁴⁸ Likewise, Dental Fix Rx LLC sought and was granted a waiver based on the fact that “Dental Fix did not *understand* that it needed to comply with the opt-out notice requirement for solicited faxed advertisements.”⁴⁹ Since the Bureau did not read these petitions as seeking a waiver by “admit[ting] 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,” the Bureau should reconsider its reading of Ohio National’s Petition as doing so.⁵⁰

[text continues on following page]

⁴⁷ *December 9 Order* ¶ 20.

⁴⁸ Petition of Scrip Inc. at 5 (filed Sept. 17, 2015) (emphasis added).

⁴⁹ Petition of Dental Fix Rx LLC at 4 (filed Sept. 11, 2015) (emphasis added).

⁵⁰ Indeed, one of the petitions that was *granted* in the *December 9 Order* expressly asserted that the petitioner “was *not aware* of the need to seek a waiver from compliance with the Regulation.” Petition of Costco Wholesale Corporation at 3 (filed July 10, 2015) (emphasis added).

Conclusion

Ohio National respectfully requests that the Bureau reconsider its determinations in the *December 9 Order* as applied to its Petition and grant this petition for reconsideration as well as the underlying Waiver Petition and the request for a retroactive waiver from liability under 47 C.F.R. § 64.1200(a)(4)(iv).

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