

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

In the Matter of)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
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)	

APPLICATION FOR REVIEW

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Requirement for Faxes Sent with the Recipient's)	
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APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules, Wilder Chiropractic, Inc. seeks review by the full Commission of the Order adopted by the Consumer & Governmental Affairs Bureau on December 9, 2015, purporting to grant "retroactive waivers" from 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring "opt-out notice" on faxes sent with "prior express invitation or permission," to five petitioners, including Scrip Holding Co. ("Scrip"). The Commission should vacate the Scrip waiver because Scrip failed to "make every effort" to file a waiver petition before April 30, 2015, as required by the Commission's October 30, 2014 Order. The Commission should rule all five waivers invalid for the reasons articulated in Wilder Chiropractic's pending application for review from the Bureau's August 28, 2015 Order granting 117 waivers.

Questions Presented

Pursuant to Section 1.115(b), Wilder Chiropractic identifies two questions for review:

(1) Whether the Bureau erred in finding the Scrip Petition timely where it was not filed until September 17, 2015, nearly five months after April 30, 2015, the date by which the Commission expected parties to “make every effort” to file a waiver petition, where Scrip was served with the Complaint in the underlying TCPA action July 9, 2015, Scrip’s attorneys filed a waiver petition on behalf of another party on April 30, 2015, and Scrip admits it deliberately waited 68 days to file its petition.

(2) Whether all five waivers granted in the Bureau’s December 9, 2015 Order are invalid for the same legal reasons articulated in Wilder Chiropractic’s pending application for review from the Bureau’s August 28, 2015 Order.

Factual and Procedural Background

On August 5, 2013, Wilder Chiropractic received a fax from “Scrip” advertising a “Fall Pre-Sale” on Scrip’s “Biofreeze” product, stating recipients can “Save up to 23%” if they “Buy 20 Get 4 Free” or “Buy 38 Get 10 Free.”¹ The fax is addressed to “our customers.”² The fax contains no opt-out notice.³

On October 30, 2014, the Commission issued the “Opt-Out Order,” denying 24 petitions challenging the validity of 47 C.F.R. § 64.1200(a)(4)(iv),⁴ but granting retroactive

¹ *Wilder Chiropractic, Inc. v. Scrip, Inc.*, No. 15-cv-5778, Doc. 1 ¶¶ 11, 20 & Ex. A.

² *Id.*

³ *Id.*

⁴ *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking*

“waivers” purporting to relieve the covered petitioners from liability for violations of that regulation in private lawsuits filed under the TCPA’s private right of action, 47 U.S.C.

§ 227(b)(3).⁵ The Commission allowed “similarly situated” parties to petition for waivers, but stressed that “in light of our confirmation here that a fax ad sent with the recipient’s prior express permission must include an opt-out notice, we expect that parties will make every effort to file within six months of the release of this Order.”⁶ The Commission directed the Bureau “to conduct outreach to inform senders of the opt-out notice requirement.”⁷ The Commission repeated, “[w]e expect parties making similar waiver requests to make every effort to file within six months of the release of this Order.”⁸

Between October 30, 2014, and April 30, 2015, over 100 parties filed waiver petitions.⁹ One such petitioner was Stryker Lubricant Distributors, Inc., which filed on April 30, 2015, through its counsel, Rock Fusco & Connelly LLC, the same law firm representing Scrip.¹⁰ Not all petitioners were current TCPA defendants. For example, Truckers B2B, LLC, filed a petition April 28 explaining that, although it had not been sued, it sought a waiver because it was “concerned that it could one day face significant liability” for opt-out-

Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014), ¶¶ 19–20, 32 & n.70.

⁵ *Id.* ¶¶ 22–31.

⁶ *Id.* ¶ 2.

⁷ *Id.*; see also Statement of Comm’r O’Rielly Concurring in Part and Dissenting in Part at 25 (“At my request, staff has committed to engage in significant outreach to ensure that fax senders, including those that might not normally follow FCC proceedings, will be aware of the opt-out requirement.”).

⁸ *Id.* ¶ 30.

⁹ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 5120879, at *1 (CGAB Aug. 28, 2015) (“August 28, 2015 Bureau Order”).

¹⁰ *Petition for Retroactive Waiver by Stryker Lubricant Distributors, Inc.*, CG Docket Nos. 02-278, 05-338, at 6 (filed Apr. 30, 2015).

notice violations.¹¹ Wells Fargo filed a petition April 29 explaining it was not currently being sued for opt-out notice violations but was seeking a waiver “as a prophylactic measure.”¹²

On June 30, 2015, Wilder Chiropractic filed a private TCPA action alleging opt-out notice violations against Scrip in the United States District Court for the Northern District of Illinois.¹³ Scrip was served with the Complaint on July 9, 2015.¹⁴

On July 30, 2015, Scrip answered the Complaint through its counsel, Rock Fusco & Connelly LLC.¹⁵ Scrip’s alleged as an affirmative defense that “Plaintiff’s claims are barred because it provided, upon information and belief, express consent, invitation, and/or permission to receive information from Defendants.”¹⁶ Scrip denied that the fax “did not display a proper opt-out notice as required by 47 C.[F].R. § 64.1200.”¹⁷

On August 28, 2015, the Bureau issued an order granting all 117 follow-on waiver petitions, including the Stryker Lubricant petition.¹⁸ It also granted the Truckers B2B and Wells Fargo petitions, finding there was no requirement “that faxers currently face lawsuits or potential liability to qualify for the waiver.”¹⁹ Numerous parties, including Wilder

¹¹ *Petition for Waiver by Truckers B2B, LLC*, CG Docket Nos. 02-278, 05-338, at 2 (filed Apr. 28, 2015).

¹² *Petition of Wells Fargo & Co. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338, at 5 (filed Apr. 29, 2015).

¹³ *Wilder Chiropractic, Inc. v. Scrip, Inc.*, No. 15-cv-5778, Doc. 1 ¶¶ 11, 20.

¹⁴ *Id.*, Doc. 10.

¹⁵ *Id.*, Answer, Doc. 11.

¹⁶ *Id.* at 16 (Eighth Aff. Defense).

¹⁷ *Id.* ¶ 18.

¹⁸ August 28, 2015 Bureau Order ¶ 24.

¹⁹ *Id.* ¶ 19.

Chiropractic, filed applications for review of the August 28, 2015 Bureau Order, which are pending before the Commission.²⁰

On September 17, 2015, Scrip filed its waiver petition.²¹ Scrip acknowledged the Opt-Out Order states, “[w]e expect that parties will make every effort to file within six months of the release of this order.”²² Scrip argued its “late filing” should be excused because it “had no reason to seek a waiver prior to April 30, 2015, as it was unaware of any potential claim against it as of that date.”²³ Scrip’s Petition did not explain why it did not file its waiver petition immediately after it was served with the Complaint on July 9, 2015, or after it answered the Complaint on July 30, 2015.²⁴

On October 9, 2015, Wilder Chiropractic filed comments opposing the Scrip Petition, raising the same legal objections currently pending before the Commission regarding the August 28, 2015 Order.²⁵ With respect to the Scrip Petition in particular, Wilder Chiropractic argued the Petition was untimely.²⁶ Wilder Chiropractic argued the

²⁰ *E.g.*, Application for Review filed by Beck Simmons, LLC; Physicians Healthsource, Inc.; Radha Geismann, M.D., P.C.; Sandusky Wellness, LLC; Alan L. Laub, DDS, Inc.; North Branch Pizza & Burger Co.; True Health Chiropractic, Inc.; Alan Presswood, D.C., P.C.; Carradine Chiropractic Center, Inc.; Christopher Lowe Hicklin, DC, PLC; J. Barrett Company, Central Alarm Signal, Inc.; St. Louis Heart Center, Inc.; Eric B. Fromer Chiropractic, Inc.; Arnold Chapman; Shaun Fauley; Keith Bunch Associates, LCC; Michael C. Zimmer, D.C., P.C.; Wilder Chiropractic, Inc.; Law Office of Stuart R. Berkowitz; Proex Janitorial, Inc.; Italia Foods, Inc., CG Docket Nos. 02-278, 05-338 (Sept. 28, 2015).

²¹ Scrip Pet. at 1.

²² *Id.* at 8 (citing Opt-Out Order ¶ 2).

²³ *Id.*

²⁴ *Id.* at 1–9.

²⁵ Wilder Chiropractic, Inc.’s Comments on Scrip Inc.’s Petition for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 (Oct. 9, 2015).

²⁶ *Id.* at 7–9.

Commission gave ample public notice that all petitions should be filed by April 30, 2015, and that Scrip's failure to comply was unjustified where it was served in the underlying TCPA action on July 9, 2015, where it answered the Complaint July 30, 2015, and where its attorneys filed a waiver petition on behalf of another party on April 30, 2015.²⁷

On October 15, 2015, Scrip filed reply comments explaining it made a conscious decision not to file its waiver petition immediately after being served with the Complaint or after filing its answer.²⁸ Scrip explained it decided to wait and see how the Bureau ruled on other petitions filed after April 30, rather than incur the "financial cost to Scrip, in the form of its attorneys' fees," in filing a petition.²⁹ Scrip argued that "without a clear indication that the Commission would consider and accept such petitions," the "only responsible option" was for it to wait for the August 28 order so it could be "sure" its petition would be granted if filed.³⁰

On December 9, 2015, the Bureau granted the Scrip Petition and four other petitions.³¹ The Bureau rejected the argument that the Scrip Petition was untimely, stating "we decline to reject petitions solely on the basis that they were filed after April 30, 2015."³² The Bureau reasoned the petitions "sought waiver for faxes sent prior to the April 30, 2015 deadline imposed by the 2014 *Anda Commission Order* for compliance by the waiver recipients

²⁷ *Id.*

²⁸ Scrip's Reply in Support of Petition for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 (Oct. 15, 2015) at 6–7.

²⁹ *Id.*

³⁰ *Id.*

³¹ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 8543949, at *1 (CGAB Dec. 9, 2015) ("December 9, 2015 Bureau Order").

³² *Id.* ¶ 18.

there,” and so “granting waivers to the five parties here does not contradict the purpose or intent of the initial waiver order because these parties are similarly situated to the initial waiver recipients.”³³

Argument

I. The Bureau erred in finding the Scrip Petition timely.

Scrip did not “make every effort” to file a waiver petition by April 30, 2015, as required by the Opt-Out Order. It made *no* effort to do so. Scrip did not dispute that proposition before the Bureau or provide any reason it was unable to file a timely petition.

Instead, Scrip argued it “had no reason to seek a waiver prior to April 30, 2015, as it was unaware of any potential claim against it as of that date,” given that it was not served with the Complaint until July 9, 2015.³⁴ But the Commission did not impose the April 30 deadline based on when any party was sued. It imposed that deadline “in light of our confirmation” of the opt-out-notice requirements on October 30, 2014, and determined that requiring petitions “within six months of the release of this Order” was ample time for parties to comply.³⁵ Scrip had an excellent reason to seek a waiver by April 30, 2015: the Commission issued a final order stating it was “expect[ed]” to do so.

The Commission also issued a public notice on October 30, 2014, announcing that “similarly situated parties may seek waiver requests,” “emphasiz[ing] that such parties should make every effort to file such requests prior to April 30, 2015,” and repeating that the Commission “expect[s] these parties to make every effort to file such requests prior to April

³³ *Id.*

³⁴ Scrip Pet. at 8.

³⁵ *Id.* ¶ 2.

30, 2015.”³⁶ Neither the Opt-Out Order nor the public notice make any reference to when a party is sued, and that factor is irrelevant. Other petitioners who had not yet been sued, including Truckers B2B and Wells Fargo, complied with the deadline.

The Bureau stated it would not deny the Scrip Petition “solely on the basis that [it was] filed after April 30, 2015.”³⁷ But Wilder Chiropractic did not argue the petition was untimely “solely” because it was filed after April 30. Wilder Chiropractic also argued the petition was untimely because Scrip “did not file its petition immediately after being served with the Complaint on July 9, 2015,” or after answering the Complaint July 30, when its attorneys had filed a waiver petition on behalf of another TCPA defendant three months earlier, on April 30.³⁸

Scrip’s Petition contained no explanation for this 68-day delay.³⁹ In its reply comments, however, Scrip explained it deliberately waited to file its petition until after the Bureau issued the August 28, 2015 Order, reasoning as follows:

Had Scrip filed its petition after the deadline but before the 2015 Order, such a filing would have been a financial cost to Scrip, in the form of its attorneys’ fees, and done without a clear indication that the Commission would consider and accept such petitions. Thus, it was both prudent and expedient for Scrip to wait for the Commission’s 2015 Order and its indication that the Commission would consider late petitions. Contrary to Wilder’s argument, it would be inequitable and against public interest to strictly enforce the deadline against Scrip. Without knowing whether any of the petitions filed, let alone petitions filed after April 30, would be successful, Scrip chose the only responsible option – wait and monitor the Commission’s rulings until Scrip could be sure that it had the legal and administrative authority to support its

³⁶ *FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, 29 FCC Rcd. 13498, 13498 (Oct. 30, 2014).

³⁷ December 9, 2015 Bureau Order ¶ 18.

³⁸ Wilder Chiropractic Comments at 9.

³⁹ Scrip Pet. at 1–9.

petition. Put another way, to making arguments without legal support is a dangerous tactic. As such, Scrip and its counsel found it prudent to wait until after the 2015 Order was published to submit its petition.⁴⁰

Thus, Scrip admits it waited over two months to file its petition because it was not willing to incur the “financial cost” of paying an attorney until it felt confident the petition would be granted. That is not a “responsible option,” contrary to Scrip’s argument. Scrip contradicted the Commission’s clear expectation that waiver applicants would act as promptly as possible in seeking waivers, and it was not entitled to sit on its hands and see how other post-April 30 petitioners fared before filing its petition. The Commission should vacate the Scrip waiver on this basis alone.

II. The Commission should rule all five waivers invalid for the reasons in Wilder Chiropractic’s pending application for review of the August 28, 2015 Bureau Order.

On September 28, 2015, Wilder Chiropractic and two dozen other applicants filed an Application for Review of the Bureau’s August 28, 2015 order granting 117 waiver petitions.⁴¹ Wilder Chiropractic adopts and incorporates the same arguments in this application for review, including that (1) the Commission has no authority to “waive” liability in a private TCPA right of action pending in a court of law and (2) the contemporaneous evidence shows the “industry” immediately understood opt-out notice

⁴⁰ Scrip Reply Comments at 6–7.

⁴¹ Application for Review filed by Beck Simmons, LLC; Physicians Healthsource, Inc.; Radha Geismann, M.D., P.C.; Sandusky Wellness, LLC; Alan L. Laub, DDS, Inc.; North Branch Pizza & Burger Co.; True Health Chiropractic, Inc.; Alan Presswood, D.C., P.C.; Carradine Chiropractic Center, Inc.; Christopher Lowe Hicklin, DC, PLC; J. Barrett Company, Central Alarm Signal, Inc.; St. Louis Heart Center, Inc.; Eric B. Fromer Chiropractic, Inc.; Arnold Chapman; Shaun Fauley; Keith Bunch Associates, LCC; Michael C. Zimmer, D.C., P.C.; Wilder Chiropractic, Inc.; Law Office of Stuart R. Berkowitz; Proex Janitorial, Inc.; Italia Foods, Inc., CG Docket Nos. 02-278, 05-338 (Sept. 28, 2015).

was required on faxes sent with prior express permission, and there is no evidence to support a “presumption of confusion.” The Bureau’s legal justifications for the December 9 Order are the same as its justifications for its August 28, 2015 Order, and both orders should be reversed for the same reasons.

Conclusion

The Commission should vacate the Scrip waiver because Scrip’s petition was untimely. The Commission should vacate all five waivers granted in the December 9, 2015 Bureau Order for the same reasons it should grant Wilder Chiropractic’s application for review of the August 28, 2015 Bureau Order.

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