

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

In the Matter of:

Petition of LKN Communications, Inc. d/b/a  
ACN, Inc. For Waiver of Section  
64.1200(a)(4)(iv) of the Commission's Rules

**REPLY PETITION OF LKN COMMUNICATIONS, INC. d/b/a ACN, INC.  
FOR RETROACTIVE WAIVER**

Petitioner LKN Communications, Inc., d/b/a ACN, Inc., on behalf of itself and its subsidiaries (“ACN” or “Petitioner”) by and through its undersigned counsel, and pursuant to the Public Notice issued by the Federal Communications Commission (the “Commission”) on March 25, 2016 in Docket Nos. 02-278 and 05-338,<sup>1</sup> and Section 1.3 of the Commission’s Rules,<sup>2</sup> respectfully files this Reply in response to the lone comment<sup>3</sup> (an opposition posted on April 8, 2016 (the “Comment”) by Dr. David L. Brouillette, D.C., S.C. (“Brouillette”)) filed by his counsel Edelman, Combs, Lattuner & Goodwin, LLC in response to ACN’s request (the “Petition”) that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the “Regulation”) of its Rules<sup>4</sup> with regard to the opt-out notice requirement for solicited facsimiles sent by or on behalf of Petitioner.

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<sup>1</sup> *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 16-317 (rel. Mar. 25, 2016).

<sup>2</sup> 47 C.F.R. § 1.3.

<sup>3</sup> Comment of Dr. David L. Brouillette, D.C., S.C. to Petition of LKN Communications, Inc., CG Docket Nos. 02-278, 05-338 (posted Apr. 8, 2016) (hereinafter “Comment”).

<sup>4</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

## Argument

In its Petition, ACN demonstrated why the Commission should grant a retroactive waiver of the Regulation: The Commission already determined in the *2014 Anda Commission Order*<sup>5</sup> that good cause exists for a waiver of the Regulation; the Commission expressly invited parties “similarly situated” to the parties granted retroactive waivers in the *2014 Anda Commission Order* to file their own waiver requests; and ACN is a similarly situated party and equally entitled to a waiver because (i) “no record evidence demonstrates that [it] 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” and (ii) ACN “referenced the confusion between the footnote and the rule.”<sup>6</sup>

Brouillette, who is the plaintiff in a TCPA putative class action against ACN, opposes the Petition, arguing that the petition should be denied because (i) Brouillette “denies giving consent to the sender of the faxes,” (ii) “[t]here is nothing in the Petition to indicate that ACN read or relied on the Junk Fax Prevention Act” (iii) ACN’s petition is purportedly “untimely,” and (iv) “[i]t is unlikely that any judgment entered against ACN in this case would drain its resources.”<sup>7</sup> As set forth below, none of these arguments has any merit—the Consumer and Governmental Affairs Bureau (the “Bureau”) has previously expressly rejected each and every one of them.

First, regarding Brouillette’s principal argument that the Petition should be denied because Brouillette claims he did not consent to the fax he received, the Bureau addressed and

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<sup>5</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd. 13998 (2014) (the “*2014 Anda Commission Order*”).

<sup>6</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 ¶ 14, 30 FCC Rcd. 14057, 14063 (rel. Dec. 9, 2015) (hereinafter “*December 9 Order*”) (citing *2014 Anda Commission Order* ¶¶ 24-26, 29 FCC Rcd. at 14009-10); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-976 ¶ 15, 30 FCC Rcd. 8598, 8610 (rel. Aug. 28, 2015) (hereinafter “*August 28 Order*”); Petition at 2-5.

<sup>7</sup> Comment at 1, 3, 4, 5.

rejected this argument in its *August 28 Order*. In that Order, the Bureau noted that “Opponents of the petitions generally argue that the current petitioners are not similarly situated to the initial waiver recipients because . . . they have not and/or cannot establish that they received the prior express permission or consent of fax recipients prior to sending fax advertisements . . . .”<sup>8</sup> In rejecting this argument, the Bureau “decline[d] to conduct a factual analysis to determine whether the petitioners actually obtained consent,” because that “remains a question for triers of fact in the private litigation.”<sup>9</sup> Rather, the Bureau explained that “assuming that proper consent was obtained[,] petitioners qualify for limited retroactive waivers if they did not include the requisite opt-out notice.”<sup>10</sup> Brouillette’s assertions on this point—such as that the Commission and courts have placed the burden of proving a fax was solicited on the sender—are simply irrelevant.<sup>11</sup>

Second, Brouillette’s argument that there is no purported evidence<sup>12</sup> of ACN’s reliance on the Commission’s contradictory statements simply rehashes the same meritless argument the Bureau repeatedly has rejected that “the Commission made actual, specific claims of confusion a requirement to obtain the waiver.”<sup>13</sup> Rather, as the Bureau stated in its *December 9 Order*, the

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<sup>8</sup> *August 28 Order* ¶ 9, 30 FCC Rcd. at 8606-07.

<sup>9</sup> *Id.* ¶ 17, at 8610.

<sup>10</sup> *Id.*

<sup>11</sup> Comment at 2.

<sup>12</sup> Brouillette’s argument that the lack of a limited opt-out notice on the fax at issue is evidence that a petitioner was ignorant of the law and does not merit a waiver is an attempt to create a heads-I-win, tails-you-lose rule: the Bureau previously rejected the argument that “petitioners who *included* limited opt-out notices on faxes and were sued for rule violations must have clearly understood the requirement” and therefore did not merit waivers. *August 28 Order*, ¶ 18, 30 FCC Rcd. at 8611 (emphasis added). As the Bureau reasoned, “a business that understood the rule would have presumably included all elements of the required notice, not just a few.” *Id.* Thus, just as nothing in the *2014 Anda Commission Order* suggested that the *inclusion* of a partial opt-out notice undermines a waiver petition, nothing in the *2014 Anda Commission Order* suggested that the *lack* of a partial opt-out notice undermines a waiver petition.

<sup>13</sup> *Id.* (“The Commission did not require petitioners to plead specific, detailed grounds for individual confusion and we cannot impose those here.”); *December 9 Order* ¶ 15, 30 FCC Rcd. at 14063-64 (rejecting the argument that petitioners were required to “argue[] actual confusion” to obtain a waiver).

standard for granting a waiver is “where no record evidence demonstrates that [petitioners] understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so and where the petitioners referenced the confusion between the footnote and the rule.”<sup>14</sup> That is the case here—Brouillette offers no evidence in his Comment that ACN 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, and ACN referenced the confusion between the footnote and the rule in its Petition.<sup>15</sup>

Third, regarding Brouillette’s argument that ACN’s Petition is untimely, the Bureau rejected this same argument in its *December 9 Order*. In that Order, the Bureau noted that opponents of the petitions addressed in that order argued that certain “petitions were untimely filed” because they were filed after April 30, 2015.<sup>16</sup> In rejecting this argument, and “declin[ing] to reject petitions solely on the basis that they were filed after April 30, 2015”<sup>17</sup> the Bureau noted that the petitions “sought waiver for faxes sent *prior* to the April 30, 2015 deadline,” which was the same relief afforded to the original petitioners, making the later filed petitioners still “similarly situated” to the initial waiver recipients.<sup>18</sup> The same is true here and the result should be no different—ACN seeks a waiver of the Regulations for faxes sent prior to April 30, 2015.<sup>19</sup>

Fourth, Brouillette’s argument that the scope of ACN’s potential liability is unknown and would purportedly not “drain” ACN’s resources simply rehashes the same meritless argument

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<sup>14</sup> *December 9 Order* ¶ 14, 30 FCC Rcd. at 14063.

<sup>15</sup> See Petition at 2-3.

<sup>16</sup> *December 9 Order*, ¶ 15, 30 FCC Rcd. at 14063-64 .

<sup>17</sup> *Id.* ¶ 18, at 14064.

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> See Petition at 5.

the Bureau has rejected that “petitioners who do not face significant potential liability for violations of the opt-out notice requirement do not qualify for a waiver.”<sup>20</sup> As the Bureau reasoned, “[i]n the 2014 *Anda Commission Order*, the Commission did not require that faxers currently face lawsuits or potential liability to qualify for the waiver.”<sup>21</sup> Brouillette’s same arguments must be rejected here, too.<sup>22</sup>

## CONCLUSION

For the reasons set forth above, ACN respectfully requests that the Commission grant this Waiver Petition and the request for a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) for solicited fax advertisements purportedly transmitted by or on behalf of LKN Communications, Inc., d/b/a ACN, Inc. or any of its subsidiaries prior to April 30, 2015.

April 15, 2016

Respectfully submitted,

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<sup>20</sup> *August 28 Order* ¶ 19, 30 FCC Rcd. at 8611.

<sup>21</sup> *Id.*

<sup>22</sup> Brouillette’s argument here again attempts to create a heads-I-win, tails-you-lose rule: since the Commission and the Bureau both previously ruled that the threat of significant liability for violations of the Regulation from a pending lawsuit does not implicate the doctrine of separation of powers and deprive petitioners of a right to seek a waiver (*December 9 Order* ¶ 12, 30 FCC Rcd. at 14062-63), Brouillette now urges the Bureau to adopt a rule where the purported *lack* of a threat of significant liability deprives a petitioner of the right to seek a waiver.

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