

**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	)	

**TCPA Plaintiffs' Comments on Petition for Retroactive Waiver filed by  
Buccaneers Limited Partnership**

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## Executive Summary

The Commission should deny the BLP waiver petition under its October 30, 2014 Order for four reasons. First, the Commission has no authority to “waive” Plaintiffs’ ability to sue BLP for violations of 47 C.F.R. § 64.1200(a)(4)(iv) in a private right of action under the TCPA, 47 U.S.C. § 227(b)(3).

Second, the petition is untimely. Although the October 30, 2014 Order allowed “similarly situated” persons to seek waivers, the Commission stressed that “we expect that parties will make every effort to file within six months of the release of this Order.” BLP filed its petition on April 28, 2016, two days short of one year after the deadline. BLP does not claim it made any “effort” to file by April 30, 2015, or explain why it could not file sooner. The underlying private TCPA litigation has been pending since 2013, and BLP (whose counsel also represent Anda, Inc.) had actual or constructive knowledge of the ability to seek a waiver since the October 30, 2014 Order was issued. BLP presumes its petition will be granted because the faxes at issue were “sent prior to the April 30, 2015 deadline,” but that is not the standard. The standard is whether BLP made “every effort” to file by the deadline, and it made *no* effort to do so.

Third, the October 30, 2014 Order ruled the “presumption of confusion” on which the waivers were based may be rebutted with evidence 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.” Here, BLP’s corporate representative testified that BLP understood in 2009–2010 that opt-out notice was a legal “necessity” for all fax advertisements, even if sent with prior express permission, but BLP simply failed to comply.

Fourth, read carefully, BLP’s petition does not actually *claim* that BLP obtained “prior express invitation or permission” from Plaintiff or any other class member. The October 30, 2014 Order ruled a petitioner need not *prove* prior express permission to obtain a waiver, but there should be a requirement that the petitioner at least *claim* permission. BLP cannot do that because it deliberately hired a third party to send faxes to persons who were *not* in its “existing contacts” and with whom BLP did not even have an established business relationship, let alone obtained prior express permission.

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Commenters, Cin-Q Automobiles, Inc. and Medical & Chiropractic Clinic, Inc. are the Plaintiffs in private TCPA litigation pending in the United States District Court for the Middle District of Florida against Petitioner Buccaneers Limited Partnership (“BLP”).<sup>1</sup> BLP seeks a “retroactive waiver” of 47 C.F.R. § 64.1200(a)(4)(iv), the rule requiring opt-out notice on fax advertisements sent with “prior express invitation or permission.”<sup>2</sup> The Consumer & Governmental Affairs Bureau sought comments on April 29, 2016.<sup>3</sup>

As argued below, the Commission should deny BLP’s petition because (1) the Commission has no authority to “waive” a defendant’s liability in statutory

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<sup>1</sup> *Cin-Q Automobiles, Inc. v. Buccaneers Ltd. P’Ship*, No. 13-cv-1592 (M.D. Fla.).

<sup>2</sup> *Petition of Buccaneers Limited Partnership for Retroactive Waiver*, CG Docket Nos. 02-278, 05-338 (filed Apr. 28, 2016) (“BLP Petition”).

<sup>3</sup> *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Apr. 29, 2016).

right of action for violation of the “regulations prescribed under” the TCPA, (2) BLP failed to “make every effort” to file by April 30, 2015, (3) unlike the petitioners granted waivers in the October 30, 2014 Order, BLP understood when it sent its faxes that opt-out notice was required on all fax advertisements, even those sent with prior express permission, and simply failed to comply, and (4) BLP does not even *claim* to have obtained prior express permission, given that it hired a third party to send the faxes to persons with whom BLP had no existing relationship and never even asked to see the list of target fax numbers.

### **Procedural History**

On October 30, 2014, the Commission issued its Order rejecting several challenges to the validity of § 64.1200(a)(4)(iv),<sup>4</sup> but granting the covered petitioners “retroactive waivers.”<sup>5</sup> 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

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<sup>4</sup> *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 Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, 29 FCC Rcd. 13998, 13998 (rel. Oct. 30, 2014) ¶¶ 19–20, 32 & n.70 (ruling that Commission issued regulation under its statutory authority to “implement” the TCPA by empowering consumers to “halt unwanted faxes” and regulation is enforceable through the TCPA’s private right of action) (“Opt-Out Order”).

<sup>5</sup> *Id.* ¶¶ 22–31.

of the release of this Order.”<sup>6</sup> 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.”<sup>7</sup> The same day, the Commission issued a public notice, which announced that “similarly situated parties” may seek waivers, but “emphasized that such parties should make every effort to file such requests prior to April 30, 2015,” and again repeated that the Commission “expect[s] these parties to make every effort to file such requests prior to April 30, 2015.”<sup>8</sup>

The Commission’s basis for the waivers was that the combination of a lack of advance public notice and a footnote in the 2006 Order promulgating the regulation created a “presumption” of confusion about whether opt-out notice was required on faxes sent with “prior express invitation or permission.”<sup>9</sup> The Commission ruled that the presumption of confusion had not been rebutted with respect to the petitioners before it because “we find nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.”<sup>10</sup>

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<sup>6</sup> *Id.* ¶ 2.

<sup>7</sup> *Id.* ¶ 30.

<sup>8</sup> *FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, 29 FCC Rcd. 13498, 13498 (Oct. 30, 2014).

<sup>9</sup> Opt-Out Order ¶ 26.

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

On August 28, 2015, the Bureau granted 117 follow-on waiver petitions, including seven petitions filed after April 30, 2015, where the petitioners were sued after (or in one case 10 days before) the deadline.<sup>11</sup> As with the October 30, 2014 Order, the Bureau found that “no record evidence rebuts” the “presumption of confusion or misplaced confidence.”<sup>12</sup>

On December 9, 2015, the Bureau granted an additional five petitions filed after the April 30, 2015 deadline, with the latest petition filed September 21, 2015, where each petitioner carefully explained why it could not file by the deadline.<sup>13</sup> The Bureau also for the first time denied several petitions.<sup>14</sup> One petition was denied because the petitioner argued “the faxes were sent to registered customers” and so “opt-out notice does not apply because the transmissions were not unsolicited.”<sup>15</sup> The Bureau ruled this assertion showed the petitioner “was ignorant of the law” and that “a waiver will not be extended to the requirement to include opt-out language on faxes pursuant to an existing business relationship,” which

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<sup>11</sup> *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”).

<sup>12</sup> *Id.* ¶ 15.

<sup>13</sup> *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 8543949 ¶¶ 20–21 (CGAB Dec. 9, 2015) (“December 9, 2015 Bureau Order”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* ¶ 21.

was “clear and without controversy.”<sup>16</sup> The other five petitions were denied because the petitioners admitted “simple ignorance” of the law.<sup>17</sup>

### **Factual Background**

#### **A. The BLP fax campaigns.**

BLP is one of the most prolific junk faxers yet to seek a “waiver” from the opt-out notice requirements from the Commission. In three waves of fax advertisements from July 2009 through June 2010, BLP sent a total of 343,122 advertisements to 131,011 unique fax numbers in the Tampa Bay area advertising tickets to Tampa Bay Buccaneers games.<sup>18</sup>

As BLP admits in its petition, BLP hired a fax broadcaster called FaxQom to conduct the fax campaigns. FaxQom in turn obtained the lists of target fax numbers in the Tampa area and transmitted the faxes through other third parties. BLP made no effort to obtain “prior express invitation or permission” from any recipient; BLP “never even saw the fax numbers.”<sup>19</sup> BLP had fax numbers for its

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Pls.’ Mot. Class Certification (without exhibits) at 3–9, attached to Declaration of Glenn L. Hara (“Hara Decl.”) as Ex. A.

<sup>19</sup> Deposition of BLP Corporate Representative Matthew Kaiser (“Kaiser Dep.”) at 132, attached to Hara Decl. as Ex. B.

own “existing contacts,” but it wanted to drum up “new business” by targeting people who were not “existing customers.”<sup>20</sup>

BLP exercised complete control over the faxing campaign: it solely created the content of the faxes, specified the area codes for transmission, and dictated the specific time of day the faxes were sent so its “sales department” would “be available when people receive these.”<sup>21</sup> BLP directed FaxQom to put BLP’s fax number on the target list so it could monitor the broadcasts in real time, and when they were late, it told FaxQom, “[w]e must keep schedule.”<sup>22</sup> BLP paid FaxQom \$15,336.80 for the first broadcasts in July 2009,<sup>23</sup> and when it determined the faxes “generated \$12,643 in Group Sales revenue,” it decided to send more in August 2009 and May–June 2010.<sup>24</sup>

BLP “was aware of the TCPA” and the Commission’s rules regarding fax advertising before it sent its faxes.<sup>25</sup> BLP’s corporate representative testified he believed that it was “a necessity” to have “‘opt-out’ language” on all fax advertisements, even if sent with prior express permission.<sup>26</sup> With respect to

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<sup>20</sup> *Id.* at 81.

<sup>21</sup> BLP000093, attached to Hara Decl. as Ex. C.

<sup>22</sup> *Id.*

<sup>23</sup> BLP000038.

<sup>24</sup> BLP00676.

<sup>25</sup> Kaiser Dep. at 72.

<sup>26</sup> *Id.* at 271.

whether the opt-out notice complied with the Commission’s regulations, however, BLP simply “trusted [FaxQom] that that was sufficient.”<sup>27</sup>

BLP used two forms of opt-out notice, neither of which comply with the Commission’s rules. The notice in the faxes sent in July–August 2009 states: “To immediately and permanently remove your fax number from our opt-in compiled database, please call 877-272-7614. [Removaltech@FaxQom.com](mailto:Removaltech@FaxQom.com).”<sup>28</sup> The opt-out notice on the faxes sent in May–June 2010 states: “If your office has decide to opt-out of further faxes please call 866-247-0920. Thank you.”<sup>29</sup> BLP told FaxQom to change the opt-out notice in the later faxes to “keep it simple and only related to opting out,” removing the reference to an “opt-in compiled database” from the previous two notices.<sup>30</sup>

To offset the risk of TCPA liability, BLP negotiated an indemnification agreement with FaxQom, stating FaxQom indemnifies BLP “from any and all complaints or litigation that may arise as a result of this campaign” and “FaxQom will agree to and abide by all laws associated with facimile [sic] marketing.”<sup>31</sup>

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<sup>27</sup> *Id.* at 270.

<sup>28</sup> BLP000040–42; BLP000029.

<sup>29</sup> RMI00221, attached to Hara Decl. as Ex. D.

<sup>30</sup> BLP00310.

<sup>31</sup> BLP000069.

BLP's General Counsel, Manuel Alvare, reviewed and approved the FaxQom indemnification agreement.<sup>32</sup>

Immediately after BLP began, consumers across the Tampa area began complaining to BLP about the unwanted fax advertisements. For example, on August 20, 2009, a Tampa area attorney named Phyllis J. Towzey sent a letter to BLP complaining of fax advertisements she received at her office on July 14, 2009, and August 17, 2009.<sup>33</sup> Towzey had no business relationship with BLP and did not give BLP permission to send fax advertisements.<sup>34</sup> Towzey warned BLP the TCPA prohibits fax advertisements without "prior express invitation or permission" and imposes \$500 damages per violation, which can be increased to \$1,500 for "willfully or knowingly" violating the statute, setting forth verbatim portions of the statute.<sup>35</sup> Towzey offered to settle for \$1,000 rather than sue BLP.<sup>36</sup>

Shortly thereafter, Towzey received a phone call from Alvare, BLP's General Counsel, who stated he received the August 20 letter.<sup>37</sup> Alvare told

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<sup>32</sup> BLP00136.

<sup>33</sup> Affidavit of Phyllis J. Towzey ¶¶ 1, 5, 6, attached to Hara Decl. as Ex. E.

<sup>34</sup> *Id.* ¶¶ 7, 8.

<sup>35</sup> *Id.* ¶ 11.

<sup>36</sup> *Id.*, Ex. A.

<sup>37</sup> *Id.* ¶ 15; Deposition of Manuel Alvare at 44, attached to Hara Decl. as Ex. F.

Towzey the faxes had been sent by FaxQom and that FaxQom was liable for any damages because it “sent” the fax, not BLP.<sup>38</sup>

Numerous consumers filed complaints with the Commission about BLP’s junk faxes. In response to Plaintiffs’ counsel’s FOIA request, the Commission produced several such consumer complaints, although it stated that additional complaints may not have been retained, since they were filed prior to 2011.<sup>39</sup> There were also numerous complaints to the FTC, which also produced such complaints to Plaintiffs’ counsel.<sup>40</sup> It does not appear the Commission or the FTC took any action against BLP based on these complaints.<sup>41</sup>

In May–June 2010, BLP send hundreds of thousands of additional fax advertisements. It did not stop sending fax advertisements until the Florida Attorney General sent BLP a cease-and-desist letter in June 2010.<sup>42</sup>

## **B. The BLP litigation.**

On June 18, 2013, Plaintiff Cin-Q filed a private TCPA action against BLP in the Middle District of Florida, with a Second Amended Complaint (“SAC”)

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<sup>38</sup> Towzey Aff. ¶¶ 16, 17; Alvare Dep. at 44–46.

<sup>39</sup> Commission FOIA Response (Mar. 20, 2014), attached to Hara Decl. as Ex. G.

<sup>40</sup> FTC FOIA Response (Jan. 9, 2013), attached to Hara Decl. as Ex. H.

<sup>41</sup> *Id.*

<sup>42</sup> See *Cin-Q Auto., Inc. v. Buccaneers Ltd. P'ship*, No. 8:13-CV-01592-AEP, 2014 WL 7224943, at \*2 (M.D. Fla. Dec. 17, 2014).

adding Medical & Chiropractic on January 3, 2014.<sup>43</sup> The SAC alleges the faxes are “unsolicited advertisements” in violation of the TCPA.<sup>44</sup> The SAC further alleges that BLP cannot claim “established business relationship” or “prior express invitation or permission” because the faxes lack compliant opt-out notice.<sup>45</sup> The SAC seeks to certify a class of “[a]ll persons from July 1, 2009, to present who were sent facsimile advertisements offering group tickets or individual game tickets for the Tampa Bay Buccaneers games and which did not display the opt out language required by 47 C.F.R. 64.1200.”<sup>46</sup>

On April 8, 2014, BLP filed an Amended Answer, denying the faxes attached to the SAC are “advertisements”<sup>47</sup> denying BLP “sent” the faxes,<sup>48</sup> and denying the faxes lack compliant opt-out notice.<sup>49</sup> BLP asserted affirmative defenses that “BLP is not vicariously liable” for the faxes (Third Aff. Defense), that “Plaintiff and potential class members had an established business relationship with BLP” (Eleventh Aff. Defense), and that “Plaintiff and potential class members

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<sup>43</sup> Second Amended Complaint (“SAC”), Doc. 70, attached to Hara Decl. as Ex. I.

<sup>44</sup> *Id.* ¶ 2.

<sup>45</sup> *Id.* ¶¶ 38–39.

<sup>46</sup> *Id.* ¶ 25.

<sup>47</sup> BLP Amended Answer, Doc. 119, ¶ 38, attached to Hara Decl. as Ex. J.

<sup>48</sup> *Id.* ¶¶ 14–15.

<sup>49</sup> *Id.* ¶ 24.

invited faxes by advertising or displaying their fax numbers publicly on business cards, advertisements, on the internet, etc.” (Twelfth Aff. Defense).<sup>50</sup>

On May 27, 2014, the parties filed cross-motions for summary judgment on Plaintiffs’ individual claims. In their motion for summary judgment, Plaintiffs argued there was no genuine issue of material fact that the faxes sent to Plaintiffs were “unsolicited” and that “[e]ven if BLP had some evidence of EBR or permission, the faxes do not contain compliant opt-out notice, meaning it cannot raise either defense.”<sup>51</sup>

BLP moved for summary judgment solely on its “vicarious liability” defense. Plaintiffs argued there is no such defense, since the Commission’s rules impose direct liability on the “sender,” defined as a “person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.”<sup>52</sup>

On October 30, 2014, while the motions for summary judgment were pending, the Commission released its Order granting “retroactive waivers” to 24 petitioners, and stating similarly situated parties may seek waivers, provided they

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<sup>50</sup> *Id.* at 6 & 8.

<sup>51</sup> Pls.’ Mot. Summ. J. (without exhibits) at 13 (citing *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013); *Nack v. Walburg*, 715 F.3d 680, 685-86 (8th Cir. 2013)), attached to Hara Decl. as Ex. K.

<sup>52</sup> 47 C.F.R. § 64.1200(f)(10).

“make every effort” to file by April 30, 2015.<sup>53</sup> The Commission issued a public notice announcing that similarly situated parties may seek waivers, provided they “make every effort to file such requests prior to April 30, 2015.”<sup>54</sup>

On December 17, 2014, the district court denied both parties summary judgment, finding a genuine issue as to whether the faxes were sent “on behalf of” BLP, and refusing to enforce the “or whose goods or services” prong of the sender definition on the basis that following its plain language “leads to absurd results which cannot possibly follow from a permissible construction of the TCPA or from an agency’s reasonable interpretation of its regulations.”<sup>55</sup> When Plaintiffs sought reconsideration or interlocutory review on the basis that the district court had effectively determined the “validity of” a final Commission order in violation of the Hobbs Act, the Court ruled it was merely “interpreting” the regulation.<sup>56</sup>

On March 25, 2016, following the close of discovery, Plaintiffs filed their motion for class certification, arguing that the evidence demonstrated that BLP used FaxQom to send 343,122 fax advertisements to 131,011 unique fax numbers

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<sup>53</sup> Opt-Out Order ¶¶ 2, 30.

<sup>54</sup> *FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, 29 FCC Rcd. 13498, 13498 (Oct. 30, 2014).

<sup>55</sup> *Cin-Q Auto., Inc. v. Buccaneers Ltd. P'ship*, No. 8:13-CV-01592-AEP, 2014 WL 7224943, at \*6 (M.D. Fla. Dec. 17, 2014).

<sup>56</sup> *Cin-Q Auto., Inc. v. Buccaneers Ltd. P'ship*, No. 8:13-CV-1592-T-AEP, 2015 WL 2092810, at \*3 & nn.1, 3 (M.D. Fla. May 5, 2015).

in the Tampa area from July 2009 to June 2010.<sup>57</sup> Plaintiff sought to certify three classes, corresponding to the dates in which the three waves of faxes were sent and the non-compliant opt-out notice.<sup>58</sup> Plaintiffs proposed four common issues for classwide resolution: (1) whether the faxes are “advertisements” as defined by 47 C.F.R. § 64.1200(a)(1); (2) whether BLP is the “sender,” as defined by § 64.1200(f)(10); (3) whether the opt-out notice violates § 64.1200(a)(4)(iii), precluding BLP from asserting EBR or prior express permission as to any class member; and (4) whether the violations were “willful or knowing” and the appropriate remedies.<sup>59</sup>

On April 20, 2016, BLP requested and was granted an extension of time to respond to the motion for class certification to June 13, 2016.

On April 28, 2016, BLP filed its petition with the Commission. BLP acknowledges its petition was filed nearly one year after the “deadline” of April 30, 2015, but states the Commission merely “encouraged” parties to file by that date.<sup>60</sup> BLP does not claim it made any effort to file by April 30, 2015, or explain why it waited until a year later.<sup>61</sup> BLP asserts instead that “the date was not fixed

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<sup>57</sup> Pls.’ Mot. Class Certification at 2.

<sup>58</sup> *Id.* at 1–2.

<sup>59</sup> *Id.* at 20–21.

<sup>60</sup> BLP Pet. at 3.

<sup>61</sup> *Id.*

and allowed for waivers to be granted after that date,” citing the December 9, 2015 Bureau Order, and so assumes BLP is entitled to a waiver as well.<sup>62</sup>

BLP’s petition does not repeat the claim in its Affirmative Defenses before the district court that Plaintiffs and the other class members gave “prior express invitation or permission” within the meaning of 47 U.S.C. § 227(a)(5) “by advertising or displaying their fax numbers publicly on business cards, advertisements, on the internet, etc.”<sup>63</sup> BLP’s petition does not claim BLP actually obtained prior express permission from *anyone* to send its fax advertisements.<sup>64</sup>

### Argument

#### **I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action.**

Numerous commenters in these proceedings, including undersigned counsel, have argued that the TCPA creates a private right of action to sue for “a violation of this subsection or the regulations prescribed under this subsection”<sup>65</sup> and gives the Commission no power to “waive” that right. Plaintiffs will not repeat those arguments here, but incorporate them by reference.<sup>66</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1–9.

<sup>64</sup> *Id.*

<sup>65</sup> 47 U.S.C. § 227(b)(3).

<sup>66</sup> *See* TCPA Pls.’ Comments on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338 at 20–23 (Feb. 14, 2014); TCPA Pls.’ Reply Comments at 3–6 (Feb. 21, 2014); TCPA Pls.’ Comments on Stericycle, Inc. Petition at 6–7 (July 11, 2014); TCPA Pls.’ Comments on American Caresource Petition at 1–3

## **II. BLP failed to “make every effort” to file a petition by April 30, 2015.**

The Commission has not yet denied a waiver request for failure to “make every effort” to file by April 30, 2015. BLP’s petition is a perfect place to start because BLP fails to offer any explanation for why it did not file by the deadline, merely assuming its petition will be granted. Moreover, BLP had constructive, if not actual, knowledge of the opportunity to seek a waiver since October 30, 2014.

### **A. BLP offers no reason for its failure to file a petition by April 30, 2015, which justifies denial of the petition in itself.**

In general, where a petitioner seeking relief from the Commission has had “ample time” to comply with a deadline and “offers no reason for its failure to do so,” the Commission will deny the relief.<sup>67</sup> BLP had ample time to file a petition

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(Aug. 8, 2014); TCPA Pls.’ Comments on Unique Vacations, Inc. Petition at 6–8 (Sept. 12, 2014); Beck Simmons LLC’s Comments on Francotyp-Postalia Petition at 2, n.6 (Nov. 18, 2014); Physicians Healthsource, Inc.’s Comments on Allscripts Petition at 2, n.6 (Nov. 18, 2014); TCPA Pls.’ Comments on Petitions by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. at 23–31 (Dec. 12, 2014); TCPA Pls.’ Comments on Petitions by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke’s Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. at 19–22 (Jan. 13, 2015); Physicians Healthsource, Inc.’s Comments on A-S Medication Solutions LLC’s Petition at 9–13 (Feb. 13, 2015); Christopher Lowe Hicklin, DC, PLC’s Comments on National Pen Petition at 7–11 (Mar. 13, 2015); TCPA Pls.’ Comments on Petitions by Boehringer Pharmaceuticals and Esaote North America at 10–14 (Apr. 10, 2015); TCPA Pls.’ Comments on Thirty-One Petitions Filed on or Before April 30, 2015 at 5–8 (May 22, 2015); TCPA Pls.’ Comments on Endo Pharms. Petition at 9–13 (June 12, 2015); TCPA Pls.’ Comments on Petitions by athenahealth, Inc. & Ohio Nat’l Mut., Inc. at 5–9 (Sept. 11, 2015); Wilder Chiropractic, Inc.’s Comments on Scrip Inc. Petition at 4–7 (Oct. 9, 2015); Shaun Fauley’s Comments on Petitions by Virbac Corp. and Petplan at 4–8 (Dec. 18, 2015).

<sup>67</sup> *In re Atlanta Channel, Inc.*, 27 FCC Rcd. 14541, 14545-46, ¶ 9 (rel. Nov. 9, 2012) (denying request to waive filing deadline).

by April 30, 2015, and it offers no reason for its failure to do so.<sup>68</sup> BLP does not, for example, claim it tried to file by that date but was somehow forced to wait until April 28, 2016.<sup>69</sup> Nor can BLP argue it had no reason to seek a waiver because it was not sued until after the deadline, as several petitioners have, since it has been vigorously defending the opt-out-notice allegations in the underlying TCPA action since 2013, as detailed in the factual background, above.

Instead, BLP argues that the Commission merely “encouraged” parties to file waiver requests by the “deadline” of April 30, 2015, and that this “deadline” was not “not fixed.”<sup>70</sup> Contrary to BLP’s interpretation, the October 30, 2014 Order did not state parties were “encouraged” to file by April 30, 2015; it stated they were “expected” to do so.<sup>71</sup> Although the Commission did not say petitions filed after the deadline would automatically be denied, it should be incumbent on a petitioner filing after the deadline to at least explain why it could not file by April 30, 2015. There should be a particularly good reason when the delay is not a matter

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<sup>68</sup> BLP Pet. at 1–9.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 3.

<sup>71</sup> Opt-Out Order ¶ 2; *id.* ¶ 30 (“We expect parties making similar waiver requests to make every effort to file within six months of the release of this Order.”); Public Notice, 29 FCC Rcd. 13498 (Oct. 30, 2014) (noting Commission “emphasized that such parties should make every effort to file such requests prior to April 30, 2015,” and Commission “expect[s] these parties to make every effort to file such requests prior to April 30, 2015”).

of days, but a full year. BLP chose not to provide any such explanation in its petition, and the Commission should deny BLP's petition for that reason alone.<sup>72</sup>

BLP is correct that the Bureau granted waivers to some petitioners who filed after April 30, 2015 in its order of August 28, 2015, but every one of those seven petitioners explained in its petition that it was either sued after April 30, 2015,<sup>73</sup> or just days before the deadline.<sup>74</sup> This justification is not available to BLP because Plaintiffs sued it for opt-out-notice violations in 2013.

BLP is correct that the Bureau granted post-April 30, 2015 waiver petitions in the December 9, 2015 Order, but of the 11 petitioners covered by that Order, nine were served with the complaint after April 30, 2015.<sup>75</sup> One petitioner, Costco

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<sup>72</sup> *In re Atlanta Channel*, 27 FCC Rcd. at 14545-46, ¶ 9 (“Deadlines often have harsh consequences for those who fail to meet them.”).

<sup>73</sup> *Petition of AEP Energy, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 4 (filed May 7, 2015) (complaint filed May 1, 2015); *Petition of United Stationers Inc., et al. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 5 & 7 (filed May 18, 2015) (complaint filed May 1, 2015); *Petition of Business Promotion LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 2 (filed May 20, 2015) (petitioner served with complaint May 13, 2015); *Petition of Northwood, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 1 (filed June 2, 2015) (petitioner served with “demand letter on or about May 27, 2015”); *Petition of Joseph T. Ryerson & Son, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 2 (filed June 4, 2015) (petitioner served with complaint May 14, 2015); *Petition of Reliant Services Group, LLC d/b/a Reliant Funding for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 4 (filed June 16, 2015) (petitioner served with complaint May 22, 2015).

<sup>74</sup> *Petition of Meadowbrook Ins. Group, Inc. & Meadowbrook, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338, at 2 (filed May 29, 2015) (petitioner served with complaint April 20, 2015).

<sup>75</sup> *Petition of Megadent, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 at 2 (June 24, 2015) (petitioner “served with the lawsuit at issue on May 13, 2015”); *Petition of Dental Fix Rx LLC for Retroactive Waiver of 47 C.F.R. §*

Wholesale Corp., was served in two lawsuits, one on April 10, 2015, and one on May 15, 2015, and did not file a petition until July 22, 2015.<sup>76</sup> But Costco offered a reason for its late filing, arguing “[t]he timing of the filing of these lawsuits was such that it was not feasible for Costco to have filed the present Petition for Waiver by April 30, 2015,” since it first had to “conduct[] an initial investigation to determine the facts” surrounding the allegations of the complaint.<sup>77</sup> BLP offers no such explanation.<sup>78</sup>

Similarly, the final petitioner covered by the December 9, 2015 Bureau Order, SourceMedia LLC, was sued October 23, 2014, but did not file a petition

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*64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at Ex. B, Complaint (Sep. 11, 2015) (complaint filed July 1, 2015); *Petition of Scrip Holding Co. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 8 (Sep. 17, 2015) (complaint “was not filed until June 30, 2015, and was not served on Petitioner until July 9, 2015”); *Petition of Ivoclar Vivadent, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 1 (June 24, 2015) (complaint filed “May 29, 2015”); *Petition of Renaissance Sys. & Servs., LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 1 (June 25, 2015) (complaint filed “on June 17, 2015”); *Petition of Zimmer Dental, Inc. & Amy Beth Gerzog for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 3 (July 16, 2015) (petitioners “served with the lawsuit in issue on June 17, 2015”); *Petition of athenahealth, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338 (Aug. 6, 2015) (acknowledging petition was “a bit beyond the April deadline,” but complaint was not filed until “July 10, 2015”); *Petition of Ohio Nat’l Mut., Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 5 (Aug. 21, 2015) (complaint filed “August 5, 2015”); *Petition of Prevention Pharms., Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 1 (Aug. 26, 2015) (complaint filed “June 11, 2015”).

<sup>76</sup> *Petition of Costco Wholesale Corp. for Retroactive Waiver or in the Alternative for Declaratory Ruling*, CG Docket Nos. 02-278, 05-338 at 3, n.9 (filed July 22, 2015).

<sup>77</sup> *Id.*

<sup>78</sup> BLP Pet. at 1–9.

until September 21, 2015.<sup>79</sup> However, SourceMedia gave a reason for its late filing, explaining in its petition that its motion to dismiss the TCPA claim in the underlying case was not denied until September 11, 2015, and it promptly filed its petition 10 days later.<sup>80</sup> In addition, no comments were filed arguing the SourceMedia petition was untimely before the Bureau granted the petition. Again, BLP gives no such explanation, and Plaintiffs object to the petition on the basis that it is untimely.

Thus, BLP is unlike every petitioner that has so far been granted a waiver in that it has not (1) filed a petition by the April 30, 2015 deadline or (2) offered some justification for its failure to do so. The failure to provide any explanation for the late filing alone should warrant denial of the BLP petition.

**B. BLP had actual or constructive knowledge of the opportunity to seek a waiver as of October 30, 2014, and failed to act.**

BLP is represented in the underlying TCPA litigation by Latham & Watkins LLP, one of the most profitable and prestigious law firms in the world, with vast experience in TCPA litigation, including the proceedings leading up to the October 30, 2014 Order. Latham & Watkins represents Anda, Inc., the party whose petition led to the October 30, 2014 Order. Latham & Watkins filed the Anda Petition in

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<sup>79</sup> *Petition of SourceMedia LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (filed Sep. 21, 2015).

<sup>80</sup> *Id.* at 3.

2010, and conducted countless ex parte meetings with Commission staff regarding its petition and application for review from the Bureau’s denial. It continues as counsel for Anda in the appeals from the October 30, 2014 Order currently pending in the D.C. Circuit. It is inconceivable that BLP’s counsel (and thus BLP through imputation) were unaware of the opportunity to seek a waiver prior to the filing of the BLP petition in April 2016.

Even assuming against all odds that the individual attorneys representing BLP (who are from Latham’s Chicago office, rather than Washington, D.C.) were unaware of the waiver petitions *prior to* the October 30, 2014 Order, no lawyer practicing in this area could credibly claim to be unaware of the opportunity to seek a waiver *after* that Order. In addition to the Order itself and the accompanying public notice—which in and of themselves put every attorney practicing in this area on notice<sup>81</sup>—the six-month period was widely discussed by industry observers and legal commentators, who commonly referred to it as a “deadline.”<sup>82</sup> The

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<sup>81</sup> Opt-Out Order ¶ 2; *id.* ¶ 30 (“We expect parties making similar waiver requests to make every effort to file within six months of the release of this Order.”); Public Notice, 29 FCC Rcd. 13498 (parties must “make every effort to file such requests prior to April 30, 2015”).

<sup>82</sup> *E.g.*, Alan S. Kaplinsky, Daniel J.T. McKenna, Mark J. Furletti, Matthew A. Morr, *FCC Gave Entities Six Months to Comply with Order Requiring Opt-Out Notices for Faxed Ads Sent with Prior Consent Under TCPA*, 68 Consumer Fin. L.Q. Rep. 417 (2014) (Commission “instructed that such requests should be filed by April 30, 2015”); Allison Grande, *FCC Junk Fax Ruling Signals Agency’s Flexibility on TCPA*, <http://www.law360.com/articles/594579/fcc-junk-fax-ruling-signals-agency-s-flexibility-on-tcpa> (Nov. 7, 2014) (Commission granted “retroactive waiver of the rule to more than two dozen companies and extend[ed] an invitation for others to apply for the waiver within the next six months”); Yaron Dori & Michael Beder, *Waivers of FCC Opt Out Notice Rule Available to Senders of Solicited Faxes During Limited Window*,

Commission directed the Bureau “to conduct outreach to inform senders of the opt-out notice requirement.”<sup>83</sup> On November 17, 2014, Commissioner O’Rielly personally informed members of the U.S. Chamber of Commerce of the waiver opportunity, stating “[t]he Commission also envisions granting relief to additional, similarly situated parties that file waivers in the near-term.”<sup>84</sup>

In the weeks leading up to April 30, 2015, many sources warned the deadline was approaching and advised fax advertisers to file their petitions, which over 100 advertisers did.<sup>85</sup> BLP must have become aware (if it was not already

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[https://www.cov.com/~media/files/corporate/publications/2014/12/waivers\\_of\\_fcc\\_opt\\_out\\_notice\\_rule\\_available\\_to\\_senders\\_of\\_solicited\\_faxes\\_during\\_limited\\_window.pdf](https://www.cov.com/~media/files/corporate/publications/2014/12/waivers_of_fcc_opt_out_notice_rule_available_to_senders_of_solicited_faxes_during_limited_window.pdf) (Dec. 3, 2014) (“Other similarly-situated senders of solicited fax advertisements may request their own waivers from the FCC, but the FCC’s order stated that such other parties should ‘make every effort’ to file their requests by **April 30, 2015.**”); Judith L. Harris, Lisa B. Kim, Christine Nielsen Czuprynski, *FCC Confirms that Even Solicited Fax Ads Must Contain Opt-Out Language, and Sets Six-Month Deadline for Companies to Seek a Retroactive Waiver*, <https://www.technologylawdispatch.com/2014/11/privacy-data-protection/fcc-confirms-that-even-solicited-fax-ads-must-contain-optout-language-and-sets-sixmonth-deadline-for-companies-to-seek-a-retroactive-waiver> (Nov. 6, 2014) (“All businesses sending out fax advertisements should reach out to experienced counsel to review their marketing practices and, if necessary, petition the FCC for a retroactive waiver regarding the inclusion of opt-out language and an opt-out mechanism in their solicited fax ads. All requests for waivers are to be submitted by April 30, 2015.”).

<sup>83</sup> Opt-Out Order ¶ 2; *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.”).

<sup>84</sup> Remarks of FCC Commissioner Michael O’Rielly, U.S. Chamber of Commerce Telecom. & E-Commerce Committee Meeting, Nov. 17, 2014 (as prepared for delivery).

<sup>85</sup> *E.g.*, Lawren A. Zann, *Opt-Out Notices Seem to be in With the FCC*, <http://www.law360.com/articles/646563/tpa-opt-out-notices-seem-to-be-in-with-the-fcc> (Apr. 27, 2015) (“[I]t is incumbent on every individual and entity that sends fax advertisement to confer with counsel and make every effort to file a petition for retroactive waiver by April 30, 2015, or risk an unnecessary uncertainty. Failure to do so is not only counterintuitive, but also may prove to be

aware) that the Commission was accepting waiver requests between October 30, 2014, and April 30, 2015. Given BLP's decision not to explain why it did not file sooner, the Commission can only conclude on this record that BLP knew about the deadline but decided not to file a waiver petition. It should be held to that choice.

BLP appears to assume that it is entitled to a waiver because its faxes were sent prior to April 30, 2015.<sup>86</sup> Although that is a *necessary* condition for a waiver under the Opt-Out Order,<sup>87</sup> it is not a *sufficient* condition. If all that is required for a waiver is that the subject faxes be sent prior to April 30, 2015, then the Commission's expectation that petitioners "make every effort" to file by that date would be superfluous. Plus, if BLP is right, the Commission will be entertaining opt-out waiver requests for many years, even past April 30, 2019, when the four-

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quite costly."); Dentons, *Deadline for Waiver from FCC "Blast Fax" Rules Approaching—April 30, 2015*, <http://www.dentons.com/en/insights/alerts/2015/march/9/deadline-for-waiver-rules-approaching> (Mar. 9, 2015) ("The FCC will allow any other companies, who mistakenly failed to provide an opt-out notice or sent incomplete opt-out notices to consenting recipients, to petition the FCC for similar waivers by April 30, 2015. Companies that did not provide adequate opt-out notices should immediately request waivers."); K&L Gates, *Last Week to File for Retroactive Waiver of FCC Rule Requiring Opt-Out Notice on All Fax Advertisements*, <http://www.jdsupra.com/legalnews/last-week-to-file-for-retroactive-waiver-13984> (Apr. 28, 2015) (stating "[a]ny company that communicates by fax should strongly consider whether to request a retroactive waiver," and "[o]n April 30, 2015, the period for requesting such waivers will come to a close"); McDermott, Will & Emory, *Junk Fax Act Compliance: One Week Left to Request a Waiver for Non-Compliance*, <http://www.natlawreview.com/article/junk-fax-act-compliance-one-week-left-to-request-waiver-non-compliance> (Apr. 23, 2015) ("Thursday, April 30, 2015, marks the last day a business can request a retroactive waiver for failing to comply with certain fax advertising requirements promulgated by the Federal Communications Commission (FCC).").

<sup>86</sup> BLP Pet. at 6.

<sup>87</sup> Opt-Out Order ¶ 36 (waiver limited to faxes sent "prior to **April 30, 2015**").

year statute of limitations on private TCPA claims runs out on faxes sent prior to April 30, 2015, given that the limitations period is often tolled (*e.g.*, by the pendency of a related class action).<sup>88</sup>

Finally, it is possible BLP changed its mind about seeking a waiver after Plaintiffs filed their motion for class certification on March 25, 2016, laying out the evidence of at least 343,122 fax advertisements sent without compliant opt-out notice during the class period, resulting in at least \$171.5 million in statutory damages.<sup>89</sup> On the other hand, BLP is worth approximately \$1.5 billion, with annual revenue of \$313 million and \$55.2 million in operating income.<sup>90</sup> BLP generated substantial revenue from the fax advertisements giving rise to this action, and it should not be permitted to avoid the consequences.

In sum, it is unknown why BLP waited to file a waiver petition until a year after the deadline, and BLP has declined to explain the delay in its petition. On this record, however, the Commission should deny the BLP petition for failure to “make every effort” to file within six months of the October 30, 2014 Order. That will dispose of the BLP petition, and the Commission need go no further.

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<sup>88</sup> See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983); *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 562 (7th Cir. 2011) (TCPA fax class action tolled by prior pending class action).

<sup>89</sup> Pl.’s Mot. Class Certification at 34.

<sup>90</sup> Forbes.com, *The Business of Football*, <http://www.forbes.com/teams/tampa-bay-buccaneers/> (last visited Mar. 24, 2016).

**III. BLP understood that opt-out notice was required on all fax advertisements, even those sent with prior express invitation or permission, and simply failed to comply.**

The October 30, 2014 Order ruled that a combination of the lack of public notice and footnote 154 of the 2006 Order created a “presumption” of confusion that may be rebutted with evidence that a petitioner “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.”<sup>91</sup> Neither the Commission nor the Bureau has yet denied a petition on the basis that the presumption of confusion has been rebutted, and the BLP petition should be the first.

BLP “was aware of the TCPA” and the Commission’s rules before it sent its faxes,<sup>92</sup> and it understood that it was “a necessity” to have “‘opt-out’ language” on all fax advertisements, even if sent with prior express permission.<sup>93</sup> The opt-out notice BLP used is non-compliant, but BLP knew it was legally required. BLP’s petition does not state BLP was unaware that opt-out notice was required on faxes sent with prior express permission, sticking with vague references to general “confusion or misplaced confidence” or passively stating that “confusion remained” as to unknown persons. The Commission should rule that the

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<sup>91</sup> *Id.*

<sup>92</sup> Kaiser Dep. at 72.

<sup>93</sup> Kaiser Dep. at 271.

“presumption of confusion” is rebutted as to BLP because it understood perfectly well that opt-out notice was required on all fax advertisements, even those sent with prior express permission, in 2009 and 2010, and simply failed to comply.

**IV. BLP does not claim it obtained “prior express invitation or permission” from Plaintiffs or any other class members.**

BLP’s petition does not claim BLP actually obtained “prior express invitation or permission” from Plaintiffs or any other putative class members.<sup>94</sup>

BLP claims only that “FaxQom *represented* that it had prior express permission” to send the faxes.<sup>95</sup> That does not constitute “prior express invitation or permission” *in fact*<sup>96</sup> and BLP does not claim that it does.

Nor does BLP’s petition repeat the claim it made in its affirmative defenses before the district court in the underlying litigation that Plaintiffs and the other class members gave “prior express invitation or permission” within the meaning of 47 U.S.C. § 227(a)(5) “by advertising or displaying their fax numbers publicly on business cards, advertisements, on the internet, etc.”<sup>97</sup> The Commission ruled more

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<sup>94</sup> BLP Pet. at 1–9.

<sup>95</sup> *Id.* at 4 (emphasis added).

<sup>96</sup> *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd 3787, 3812 ¶ 45 (Apr. 6, 2006) (express permission is “a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements *from that company or organization*”) (emphasis added); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 484, 497 (W.D. Mich. 2014) (permission was at best “indirect,” and not *express*, where plaintiff gave fax number to American Medical Association, which then sold lists of numbers to third parties).

<sup>97</sup> BLP Pet. at 1–9.

than 20 years ago that the TCPA does not “equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive . . . advertisements.”<sup>98</sup> Publishing a fax number in the manner BLP claims would, at best, constitute one of the three elements of an EBR defense.<sup>99</sup> BLP could not in good faith raise this argument before the Commission.

The October 30, 2014 Order noted that “whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties” and emphasized the waivers should not be “construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.”<sup>100</sup> But those petitioners could at least bring themselves to *claim* that they had prior express permission, even if they were not required to *prove* it to obtain a waiver. That is why the issue was a “source of dispute between the parties.” The Bureau took note of the same “dispute” with respect to the petitioners covered by

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<sup>98</sup> *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12408–09 (Aug. 7, 1995).

<sup>99</sup> 47 C.F.R. § 64.1200(a)(4)(ii).

<sup>100</sup> Opt-Out Order ¶ 31 n.104.

the August 28 Bureau Order<sup>101</sup> and the petitioners covered by the December 9, 2015 Bureau Order.<sup>102</sup>

There is no such “dispute” here because no one is claiming BLP actually obtained prior express permission. Plaintiffs do not allege it in their Complaint, and BLP does not claim it in its waiver petition. Even if a petitioner need not *prove* prior express permission to obtain a waiver, there is no reason to grant a waiver where the petitioner does not even claim to have obtained prior express permission, and the BLP petition should be denied on this independent basis.

### **Conclusion**

For the foregoing reasons, the Commission should deny BLP’s petition for retroactive waiver.

Dated: May 13, 2016

Respectfully submitted,

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<sup>101</sup> August 28, 2015 Bureau Order ¶ 8 (noting all 117 petitioners “assert that . . . they sent faxes without compliant opt-out provisions to recipients who had previously provided permission or consent to receive them”); *id.* ¶ 21 n.72 (noting “whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties”)

<sup>102</sup> December 9, 2015 Bureau Order ¶ 8 (noting all 11 petitioners “assert that they sent faxes without compliant opt-out provisions to recipients who had previously provided permission or consent to receive them”); *id.* ¶ 19 (noting “the question of whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties”).