

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

In the Matter of:

Petition of Legal & General America, Inc., for
Waiver of Section 64.1200(a)(4)(iv) of the
Commission’s Rules

CG Docket No. 02-278

CG Docket No. 05-338

**REPLY IN SUPPORT OF PETITION
FOR RETROACTIVE FAX OPT-OUT WAIVER
BY LEGAL & GENERAL AMERICA, INC.**

Petitioner Legal & General America, Inc., on behalf of itself and its subsidiaries (collectively “Legal & General America” or “Petitioner”), respectfully files this response to the Comment in opposition (“the Comment”) filed by JWD Automotive, Inc. and Russell M. Holstein, PhD, LLC (“Commenters”) to Petitioner’s request for retroactive waiver of the opt-out notice requirement in Section 64.1200(a)(4)(iv) (“the Rule”) for solicited faxes sent before April 30, 2015.

In its Petition filed March 31, 2016 (“the Petition”), Legal & General America set forth the reasons the Commission should grant a retroactive waiver of the opt-out notice requirement. The Commission determined in its October 30, 2014 Order (“the Fax Order”)¹, and confirmed in its subsequent Orders on August 28, 2015² and December 9, 2015³, that, in certain instances,

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014) (“2014 Fax Order”).

² See *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. Aug 28, 2015) (“August 28, 2015 Order”).

³ See *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) (“December 9, 2015 Order”).

good cause exists for a waiver of the Rule based on confusion created by prior guidance. The Commission invited parties “similarly situated” to those granted waivers in the Fax Order to file waiver petitions, and the Commission has subsequently granted many petitions. Petitioner Legal & General America is similarly situated to others that have received a retroactive waiver because its Petition relies on the confusion and uncertainty created by the Commission’s 2006 guidance and because it is facing two putative class action lawsuits alleging that its agents sent faxes that violate the Rule by failing to include a sufficient opt-out notice.⁴

In opposition, the named plaintiffs in the lawsuits against Legal & General America—JWD Automotive, Inc. and Russell M. Holstein, PhD, LLC, both represented by the law firm Anderson + Wanca—have filed a Comment in opposition. Their arguments in opposition have already been rejected by the Commission in granting prior petitions for waiver.⁵ These arguments should also be rejected here. First, the Commenters ask that the Commission deny the Petition as untimely filed. The Commission has previously rejected this argument in situations, like this one, where granting the petitions was not inconsistent with the intent of the Fax Order. Here, the Petition does not contradict the purpose of the initial Fax Order because the Petition merely seeks the same relief granted to other similarly situated parties, and because Legal & General America filed its Petition shortly after being sued. Second, the Commenters argue the Petition should be denied as “pointless” because Legal & General America allegedly did not have “prior express invitation or permission.” The Commission should disregard this argument, as it has when considering prior petitions, because consent is an issue to be determined in private

⁴ See LGA Petition.

⁵ In addition to the arguments addressed below, the Commenters also argue that the Commission “has no authority to ‘waive’ violations of the regulations.” See Comment at 3. This argument was already considered and rejected by the Commission in the August 28, 2015 Order.

litigation. Legal & General America denies the faxes were unsolicited, and the Commission has ruled in previous orders that the issue of whether a fax was solicited does not impact its consideration of a petition for waiver.⁶

Argument

1. The Petition Was Timely

The Fax Order states that parties should make “every effort” to pursue a retroactive waiver on or prior to April 30, 2015. Since that time, however, the Commission has consistently found that granting waiver requests filed after April 30, 2015 is consistent with the Fax Order as long as a petitioner is similarly situated to the initial waiver recipients. In two separate rulings, the Commission has granted waiver petitions filed after April 30, 2015. In its August 28, 2015 Order, the Commission stated that granting waivers of petitions filed after April 30, 2015 “does not contradict the purpose or intent of the initial waiver order.”⁷ More recently, in its December 9, 2015 Order, the Commission granted five petitions filed after April 30, 2015 and specifically declined to reject those petitions based on the filing dates. The Commission stated:

Finally, we decline to reject petitions solely on the basis that they were filed after April 30, 2015. We observe that all of the petitions resolved by this Order were filed after the six-month date (April 30, 2015) referenced in the 2014 Anda Commission Order. We examined these petitions, as we did each petition filed, independently. These 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 there. As such, 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.⁸

Here, Petitioner Legal & General America filed its Petition as soon as practicable after being served with two lawsuits, in December 2015 and January 2016, respectively. The Petition

⁶ See *infra* Part 2.

⁷ August 28, 2015 Order, ¶ 20.

⁸ Dec 9, 2015 Order, ¶ 18.

was filed after a reasonable period of investigation, and before Petitioner even responded to the Complaint in either lawsuit. Although the Comment refers repeatedly to April 30, 2015 as a presumptive deadline, the Commission’s prior orders have indicated that the Commission will not apply an arbitrary deadline to petitions for waiver filed by parties similarly situated to others who have received waivers. Instead, the Commission considers each petition individually and will not reject a petition as untimely where waiver “does not contradict the purpose or intent of the initial waiver order,” based on consideration of whether a petitioner is similarly situated to the initial waiver recipients.⁹ Because Petitioner Legal & General America is similarly situated to past waiver recipients (as set forth in the Petition), the Commission’s prior Orders compel that the Petition be considered on the substance.

2. Whether Faxes Were Solicited or Unsolicited Is An Issue for Private Litigation.

The Comment in Opposition also asks the FCC to consider as part of the Petition the underlying issue of whether the faxes were sent with the permission of the recipients. As the Commission has recognized in ruling on previous petitions, however, the issue of consent “remains a question for triers of fact in the private litigation” and does not factor into consideration of whether Petitioner is similarly situated to other parties that have received waivers.¹⁰ The Commission has expressly declined, on multiple occasions, to consider the consent issue in the context of a fax waiver petition.

[W]e decline to conduct a factual analysis to determine whether the petitioners actually obtained consent. We reiterate the Commission’s statement that the granting of a waiver does not confirm or deny that the petitioners had the prior

⁹ *Id.*

¹⁰ August 28, 2015 Order ¶ 17.

express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.¹¹

There is no reason for the Commission to deviate from its prior approach. In the underlying litigation here, the complaints allege that agents of Petitioner sent unsolicited fax solicitations to the plaintiffs and putative class members and did not include the precise opt-out notice required by the Rule, among other claims.¹² Each Complaint alleges these claims on behalf of a putative class of alleged recipients. As noted in the Petition, Petitioner disputes that the faxes were unsolicited and that any class treatment of these claims are proper.¹³

Similar to prior petitions that have been granted, Petitioner is not asking the Commission to resolve the factual and legal issues raised in the pending litigation, as those issues remain within the jurisdiction of the courts. Instead, Petitioner seeks the same retroactive waiver that the Commission granted to the petitioners in the Fax Order because the plaintiffs in the litigation allege that faxes sent with the express permission of the recipient(s) failed to include an opt-out notice that complied precisely with the Rule.

3. Conclusion

Petitioner Legal & General America is similarly situated to the entities that received a waiver from the Fax Order. For the reasons stated above and in the Petition, Petitioner respectfully requests that the Commission grant a limited retroactive waiver of Section

¹¹ December 9, 2015 Order ¶ 16. August 28, 2015 Order ¶ 17 (“[W]e decline to conduct a factual analysis to determine whether the petitioners actually obtained consent. . . We reiterate the Commission’s statement that the granting of a waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.”)

¹² Both of the faxes at issue in the litigation against Petitioner contained an opt-out notice, but the plaintiffs allege the opt-outs did not meet the requirements of the regulations.

¹³ By submitting this application for waiver, Petitioner does not waive any defenses it may assert in the private litigation.

64.1200(a)(4)(iv) for any solicited fax sent by Petitioner or on behalf of Petitioner (or any of its subsidiaries) prior to April 30, 2015.

May 20, 2016

Respectfully submitted,

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*On behalf of Legal & General America, Inc. and its
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