PETITION OF ADVANCED CARE SCRIPTS, INC. FOR WAIVER

Pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s October 20, 2014 Order in CG Docket Nos. 02-278, 05-338 (the “Order”), Petitioner Advanced Care Scripts, Inc. (“ACS”) requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules, with respect to alleged advertising faxes sent by ACS with the recipients’ prior express invitation or permission covering the period before April 30, 2015.

In the Order, the Commission stated that the opt-out notice under the Telephone Consumer Protection Act (the “TCPA”), set forth in 47 U.S.C. §§ 227(b)(1)(C) and (2)(d) of the statute, and in the implementing regulation, 47 C.F.R. 64.1200(a)(4)(iv), applies to solicited fax advertisements. However, the Commission granted a retroactive waiver of Section 64.1200(a)(4)(iv) to a group of businesses that faced lawsuits alleging violations of the TCPA for failure to include specific opt-out language even if those faxes were sent with the recipient’s prior express invitation or permission. The Commission determined that, because of potential confusion before the Order regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public
interest. See Order ¶¶ 26-28. The Commission invited “similarly-situated parties” to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes. See id. ¶ 30.

ACS is similarly situated to the petitioners that have been granted retroactive waivers. Like those petitioners, ACS faces a lawsuit seeking to impose potentially substantial liability for alleged violations of the TCPA based on the failure to include the precise opt-out language required by the Commission’s rules even in solicited faxes. As a party similarly situated to those petitioners who have received the Commission’s waivers, ACS respectfully requests that the Commission grant its petition for waiver of 47 C.F.R. § 64.1200(a)(4)(iv) as applied to faxes sent with the recipients’ prior express consent or invitation. Consistent with the Commission’s prior rulings on other waiver petitions, ACS seeks only a waiver related as to such solicited faxes and only for the time period before April 30, 2015.

I. BACKGROUND

ACS is a specialty pharmacy services provider based in Orlando, Florida. ACS provides specialty medications—some of which are “limited-access” medications, i.e., medications that are available only through certain pharmacies—to approximately 29,000 patients on a monthly basis. The vast majority of medications dispensed by ACS are used to treat cancer and multiple sclerosis. ACS maintains close contacts with medical practices specializing in those and other areas that prescribe, or are likely to prescribe, the specialty pharmaceuticals ACS offers. It regularly interacts with them by telephone, at medical conferences, during in-person visits to medical offices, and through other means. When new medications become available through ACS’s pharmacy network, or when an existing medication is approved for a new treatment purpose, ACS notifies selected medical providers in certain practice areas, the majority of which have in the past, or are currently, referring patients to ACS.
While many other fields have moved away, often entirely, from fax communications, the medical field is an exception in this regard, and ACS, and the medical practices it interacts with, rely heavily on fax communications to make and fill prescriptions for the patients they both serve. Every day, medical providers and ACS rely on two-way fax transmissions to communicate about ACS prescriptions, medical diagnoses and treatment, and insurance and billing matters related to specific patients across the country. In fact, fax communications are frequently the medical providers’ preferred method for receiving information about newly available medications or new indications for existing medications, as well as making referrals related to the specialty medications ACS can dispense to the providers’ patients. Based on the petition signed by a number of ACS’s referring medical providers, ACS believes that many of the providers with whom it interacts see fax transmissions as more convenient, secure, and rapid than other means of communicating information about the availability of these medications. See Declaration of Scott M. Voelz, filed concurrently herewith (“Voelz Decl.”), Ex. D ¶ 1. And, given that their patients may suffer from serious or even life-threatening conditions, medical practices believe that it is critical that this information be disseminated immediately so that patients who could benefit from these treatments are informed about them as quickly as possible. Id. ACS accordingly uses fax transmissions to provide information about medications to numerous medical providers that have offered prior express invitation or permission through a variety of means. In its other communications with medical providers (including by phone, during in-person visits to offices, and during medical conferences that both ACS and medical providers attend), ACS regularly solicits and obtains such prior permission. Accompanying this submission is a petition in support of ACS signed by multiple medical providers explaining the
value to them of ACS’s fax transmissions, and agreeing with its practices in that regard. See Voelz Decl., Ex. D.

On April 29, 2015, ACS was sued in the United States District Court for the Eastern District of Louisiana in a putative class action. See Jefferson Radiation Oncology, L.L.C. v. Advanced Care Scripts, Inc., Case No. 2:15-cv-013-HGB-DEK. The named plaintiff, a radiation oncology practice located in Louisiana, alleges, inter alia, that ACS has violated the TCPA by sending faxes that do not comply with the opt-out notice requirements. See Voelz Decl., Ex. A ¶¶ 4, 10.) This is the first time ACS has been alleged to have violated the TCPA. The named plaintiff denies having provided prior permission, and ACS is not seeking to have the Commission resolve factual disputes about prior permission of particular providers; instead, ACS simply seeks a waiver applicable to those faxes that were sent with prior express invitation or permission as contemplated by the Order.

A. The TCPA and Junk Fax Prevention Act

The TCPA prohibits the use of a fax machine to send an “unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). The TCPA was amended in 2005 by the Junk Fax Prevention Act (“JFPA”). See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The JFPA codified an exception to the TCPA’s prohibition on unsolicited advertising faxes if three conditions are met. First, the sender must have an “established business relationship” with the recipient. 47 C.F.R. § 64.1200(b)(4)(i). Second, the sender must have acquired the recipient’s fax number either directly from the recipient or from a public source where the recipient made its number publicly available. Id. § 64.1200(b)(4)(ii). And third, the fax must include an opt-out notice with language and formatting that satisfies the FCC’s specific regulatory requirements. Id. § 64.1200(b)(iii).
The Commission amended its rules to incorporate the changes in the JFPA in 2006. See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (the “2006 Order”). Among other things, in the 2006 Order, the Commission adopted a rule that provided that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in [47 C.F.R. § 64.1200(a)(4)(iv)].” The 2006 Order, however, also stated in a footnote that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” 2006 Order, 21 FCC Rcd at 3810 n.154.

B. The October 30, 2014 Order

Years after issuing the 2006 Order, the Commission acknowledged that the “inconsistent footnote … caused confusion or misplaced confidence regarding the applicability of the [opt-out notice] requirement to faxes sent to those recipients who provided prior express permission.” Order ¶ 24. The Commission also acknowledged that the notice it provided “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient,” and that that lack of notice “may have contributed to confusion or misplaced confidence about the requirement.” Id. ¶ 25.

The Commission stated that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.” Id. ¶ 26. The Commission found that “granting a retroactive waiver would serve the public interest,” because it would be “unjust or inequitable” to subject parties to “potentially substantial damages,” given the confusion and misplaced confidence about the rule’s applicability. Id. ¶¶ 27, 28. Further, the Commission “grant[ed] retroactive waivers of [its] opt-out requirement to certain fax advertisement senders to
provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by [its] rules.” *Id.* ¶ 29. The Commission stated that “[o]ther, similarly situated parties may also seek waivers such as those granted” in the Order. *Id.* ¶ 30.

II. **ARGUMENT**

The Commission has the authority to grant a retroactive waiver of its rules “for good cause shown.” 47 C.F.R. § 1.3. Here, the Commission has already found that good cause exists for granting a retroactive waiver of Section 64.1200(a)(4)(iv) given confusion surrounding that applicability of the opt-out notice requirement. Because ACS is similarly situated to the petitioners that were granted a waiver in the Order, a waiver is warranted here.

A. **The Commission Has Found That Good Cause Exists to Grant a Retroactive Waiver Applicable to Faxes Sent Before April 30, 2015 With Prior Express Permission or Invitation**

The Commission has authority to waive its rules if there is “good cause” to do so. 47 C.F.R. § 1.3; *Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 631 (D.C. Cir. 1996). Good cause exists where “particular facts would make strict compliance inconsistent with the public interest.” *Omnipoint*, 78 F.3d at 631 (Commission properly waived comment requirement because the waiver was “necessary in order to reduce the harm resulting from delay”). As the Commission already found in the Order, both of these requirements are satisfied in the context of the rule applying the opt-out notice requirement to solicited faxes. *See, e.g.*, *Order* ¶ 15 (“[W]e find good cause exists to grant individual retroactive waivers of section 64.1200(a)(4)(iv)….”), ¶ 22 (“[W]e find good cause exists to grant a retroactive waiver to the petitioners.”), ¶ 26 (“We find that this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.”), ¶ 27 (“[W]e find that granting a retroactive waiver would serve the public interest.”). Thus, there is good cause to support ACS’s petition for waiver.
B. A Retroactive Waiver Is Warranted Because ACS Is Similarly Situated to the Parties That Were Granted Waiver in the Order

ACS is in the same position as the parties to whom the Commission already granted retroactive waivers. It faces a lawsuit that asserts the same claims that were discussed in the Commission’s Order granting retroactive waivers. ACS is alleged to have violated the TCPA by sending faxes that include inadequate opt-out notice language, see Voelz Decl., Ex. A ¶ 21. the overwhelming majority of which were sent prior to the FCC’s October 30, 2014 Order. Plaintiff alleges, specifically, that it received three such faxes in early 2015 but it denies having provided prior permission. Id. Plaintiff seeks to certify a class action of all fax recipients—without regard to whether the recipients gave prior express permission—and seeks damages in the minimum amount of $500 for each alleged violation of the TCPA by ACS since April 29, 2011. Id. ¶¶ 21, 25. Absent being granted a waiver, ACS faces potentially substantial liability based on the premise that even solicited faxes to recipients who granted ACS express permission to send them must contain the precise opt-out language of Section 64.1200(a)(4)(iv). Like the petitioners, then, ACS is a defendant in a putative class action lawsuit as a result of its alleged failure to comply with the opt-out provision of the TCPA, notwithstanding there being uncertainty in the law at the time the faxes were sent regarding any need to include opt-out language at all. Thus, for the same reasons found in the Order, good cause exists to grant ACS a waiver.

The Commission also should grant ACS a waiver because ACS sends faxes that serve the public interest by informing medical practitioners about new medications that have been approved for use and existing medications approved for new indications.1 See Voelz Decl., Ex. D ¶ 1. It is in the public interest for ACS to provide this information as swiftly and efficiently as

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1 ACS is not seeking a ruling from the Commission on any argument about substantial compliance as a complete defense. Rather, in analyzing a waiver application, the Commission “must consider all relevant factors when determining if good cause exists.” In the Matter of Rath Microtech Complaint Regarding Electronic Micro Systems, Inc., Emergency Telephones, 16 FCC Rcd 16710, 16714.
possible, particularly because ACS sends these documents to medical practices that treat serious and often life-threatening conditions.  *Id.*  Thus, the content and purpose of the faxes sent by ACS serve an important public health function. Moreover, even though ACS allegedly did not always use the precise opt-out language that the Commission clarified was required even for solicited faxes, ACS nonetheless provided a clear and conspicuous mechanism to “stop unwanted faxes.”2 See, e.g., Voelz Decl., Ex. A at Exs. 1-3 (“You may request removal from future faxes by calling 877-573-7105 or fax 877-679-7131 and include your fax number.”).3 For that reason, fax recipients understood that they were able to opt-out of receiving additional ACS faxes, but elected not to.  *See id.* ¶ 3. Thus, in addition to the reasons considered by the Commission in granting waivers to the petitioners, good cause exists for the Commission to grant ACS a waiver from strict compliance with Section 64.1200(a)(4)(iii) and (iv).

III. CONCLUSION

For these reasons, ACS respectfully requests that the Commission grant it a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) with respect to any fax sent prior to April 30, 2015 with the invitation or permission of the recipient.

Respectfully submitted,

ADVANCED CARE SCRIPTS, INC.

By Counsel

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2 *See* 2006 Order, 21 FCC Rcd. at 3812.
3 ACS’s purported non-compliance with the requirements of Section 64.1200(a)(4)(iii) was based on its reliance on a third-party service provider, Westfax, which directed ACS to include an opt-out provision on its faxes and provided the opt-out language to ACS. *See generally* Voelz Decl., Ex. C. Even if not itself a defense under the TCPA, this fact is relevant to ACS’s good faith for purposes of the Commission considering “all the circumstances” in granting a retroactive waiver for those faxes that were sent with prior express permission or invitation.
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