In the Matter of:

Petition of CCI Investments, LLC, d/b/a CareWorks Consultants, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)  

CG Docket No. 02-278  
CG Docket No. 05-338

PETITION FOR RETROACTIVE WAIVER

Pursuant to 47 C.F.R. § 1.3 and Paragraph 30 of the Commission’s Order in CG Docket Nos. 02-278, 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (Oct. 30, 2014) (the “Waiver Order”), Petitioner CCI Investments, LLC, d/b/a CareWorks Consultants, Inc. (“Petitioner” or “CCI”), hereby requests that the Commission grant Petitioner a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules with respect to any advertising faxes sent with the recipients’ prior express invitation or permission.

In the Waiver Order, the Commission clarified that the opt-out notice requirement under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the “TCPA”), which is set forth in 47 U.S.C. §§ 227(b)(1)(C) and 227(b)(2)(D), and in the implementing regulation, 47 C.F.R. § 64.1200(a)(4)(iv), applies to solicited fax advertisements (i.e., fax advertisements sent with the recipients’ prior express invitation or permission). The Commission also granted a retroactive waiver of Section 64.1200(a)(4)(iv) to a number of petitioners that were facing lawsuits alleging that the petitioners had violated Section 64.1200(a)(4)(iv) by failing to include the “opt-out” language in advertising faxes. The Commission determined that, because of potential confusion 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 Waiver 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.

As CCI demonstrates below, it is similarly situated to the petitioners that were granted retroactive waivers in the Waiver Order. CCI respectfully requests that the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) for the same reasons that supported the Commission’s retroactive waivers in the Waiver Order.

I. PETITIONER’S BACKGROUND

Petitioner CCI is an Ohio business that provides claims administration services as a third-party administrator (“TPA”) to employers insured through the Ohio Workers’ Compensation State Fund (“State Fund”). Thousands of Ohio employers on the State Fund are enrolled in “group rating” plans, which are sponsored by third-party organizations approved by the Ohio Bureau of Worker’s Compensation (“BWC”). These plans permit employers with better-than-average workers’ compensation claim histories to join the group and receive workers’ compensation premium discounts. CCI offers group rating plans in cooperation with sponsoring organizations approved by the BWC.

Under BWC rules, before offering an opportunity to participate in a group rating plan, TPAs such as CCI are required to obtain an employer’s authorization. The authorization allows the TPA to obtain access to BWC information concerning the employer’s payroll, workers’ compensation claim history, and other data necessary to develop a projected group rating plan premium discount offer. When it contacts employers that are potential candidates for a group rating plan, CCI asks employers whether they would be interested in authorizing it to develop a projected premium discount offer. If an employer states it is not interested in a group rating plan, that ends the inquiry and no further contact is made with the employer. If the employer is
interested, CCI confirms contact information and determines which method of communication
the employer prefers for receiving enrollment information and necessary forms. CCI sends
information by fax only with the employer’s prior authorization to use fax transmission as a
means of communication, and its fax communications contain CCI’s contact information. CCI
does not send unsolicited fax advertisements to its customers or potential customers, and it does
not send fax advertisements to the general public.

**II. TCPA “JUNK FAX” REQUIREMENTS.**

The TCPA prohibits the use of any telephone facsimile machine, computer, or other
device to send an “unsolicited advertisement” to a fax machine. 47 U.S.C. § 227(b)(1)(C). The
prohibition on unsolicited advertising faxes for companies that send fax advertisements to those
with whom they have an established business relationship. See 47 U.S.C. § 227(b)(1)(C)(i). The
JFPA also amended the TCPA to require the sender of an “unsolicited advertisement” to provide
a specific notice on the fax communication that allows recipients to “opt out” of any future fax
transmissions from the sender. See id. §§ 227(b)(1)(C)(iii) and 227(b)(2)(D). The Commission
amended its rules to incorporate the changes in the JFPA. 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 “Junk Fax Order”). Among other things, in the Junk Fax 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.” 47
C.F.R. § 64.1200(a)(4)(iv). The Junk Fax Order, however, also stated in a footnote that “the opt-
out notice requirement only applies to communications that constitute *unsolicited* advertisements.” Junk Fax Order, 21 FCC Rcd at 3810 n.154 (emphasis added).

**III. CCI IS A SIMILARLY SITUATED PARTY TO THE PETITIONERS THAT WERE GRANTED RELIEF IN THE WAIVER ORDER, AND SHOULD BE GRANTED A RETROACTIVE WAIVER OF 47 C.F.R. § 64.1200(a)(4)(iv)**

Good cause exists to grant CCI a retroactive waiver of the opt-out language requirement in section 64.1200(a)(4)(iii)-(iv). The Commission has the authority to waive any rule for good cause shown. See 47 C.F.R. § 1.3. The Waiver Order was issued in response to numerous parties that filed petitions challenging the Commission’s rule applying the opt-out notice requirement to advertising faxes that are solicited and, thus, sent with permission of the recipient. The Commission resolved those petitions in the Waiver Order, in which it acknowledged that the “inconsistent footnote” in the Junk Fax Order, which stated that the opt-out notice requirement applied only to *unsolicited* advertisements, “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.” Waiver Order ¶ 24. The Commission also recognized that “the lack of explicit notice” in the notice of proposed rulemaking that the Commission contemplated requiring opt-out notices on solicited fax advertisements “may have contributed to confusion or misplaced confidence.” Id. ¶ 25.

The Commission stated that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.” Waiver Order ¶ 26. The Commission found that “granting a retroactive waiver would serve the public interest,” id. ¶ 27, because it would be “unjust or inequitable” to subject parties to “potentially substantial damages,” given the confusion about the rule’s applicability. Id. ¶ 28. The Commission granted retroactive waivers of its opt-out requirement to certain senders of fax advertisement to provide these parties with
relief from any past obligation to provide the opt-out notice. Waiver Order ¶ 29. The Commission stated that “[o]ther, similarly situated parties may also seek waivers such as those Granted in this Order” if they apply within six months of the date of the Order. Id. ¶ 30. The Commission then added that, “[h]aving confirmed the Commission’s requirement to provide opt-out notices on fax ads sent with the recipient’s prior express permission, however, we expect all fax senders to be aware of and in compliance with this requirement.” Id.

CCI respectfully requests that the Commission grant it the same waiver the Commission granted to the parties in the Waiver Order. As the Commission has explained, it may grant a waiver where “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.” Waiver Order ¶ 23. CCI should be granted a waiver under this standard, for the same reasons waiver was granted to the parties in the Waiver Order:

First, there are “special circumstances” that “warrant deviation from the general rule” here, in that there are “grounds that … led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient)” Id. ¶ 24. Specifically, the Commission has noted that the Junk Fax Order stated that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements” and that the notice of proposed rulemaking issued in advance of that regulation “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” Id. ¶ 24 (quoting Junk Fax Order, 21 FCC Rcd at 3810 n.154). Those same circumstances are present with respect to CCI.
Second, granting CCI “a retroactive waiver would serve the public interest.” Id. ¶ 27. In
the Waiver Order, the Commission found this requirement satisfied because “a failure to comply
with the rule – which … could be the result of reasonable confusion or misplaced confidence –
could subject parties to potentially substantial damages.” Id. The same is true here. Without a
waiver, CCI could potentially face putative class litigation in which plaintiffs seek substantial
statutory penalties based on older fax communications sent with opt-out notices that may not
have been in compliance with the Commission’s position as recently clarified in the Waiver
Order. Its circumstances are similar to those of the many other companies that have already
received retroactive waivers. See id. ¶ 22 & n.4 & n.81.

Moreover, the underlying purpose of the TCPA would not be served by a refusal to grant
a retroactive waiver to CCI. A purpose of Section 64.1200 is to allow consumers to stop
unwanted faxes. See 47 CFR 64.1200(a)(4). This purpose would not be furthered by subjecting
CCI to potentially significant liability for facsimile transmissions that did not contain specifically
compliant opt-out notices, given that the recipients had provided prior express permission to
receive such faxes and there was confusion regarding whether the opt-out requirement applied to
such faxes. CCI understands the importance of compliance with the Commission’s rules, and,
indeed, has already taken steps to ensure compliance with the Commission’s current
interpretation of its rules as clarified by the Waiver Order. Granting a waiver to CCI would not
undermine the TCPA’s policy objective to allow consumers to stop unwanted faxes.

For these reasons, CCI respectfully requests that the Commission grant it a retroactive
waiver of rule 47 C.F.R. § 64.1200(a)(4)(iv) insofar as it may have sent fax advertisements
before April 30, 2015, without the specific compliant opt-out notices required by that rule to
recipients that had provided prior express invitation or permission.
Dated April 27, 2015

Respectfully submitted,

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