ORDER

Adopted: August 28, 2015
Released: August 28, 2015

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, the Consumer and Governmental Affairs Bureau (Bureau) follows the Commission’s 2014 fax opt-out notice order1 by addressing more than 100 waiver requests. 2


2 Petition of Allscripts-Misy’s Healthcare Solutions, Inc., et al. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (filed Sept. 30, 2014) (Allscripts Petition); Petition of Francotyp-Postalia, Inc. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (filed Oct. 14, 2014) (FP Petition); Petition of Howmedica Osteonics Corporation, et al. for Waiver, CG Docket Nos. 02-278, 05-338 (filed Nov. 7, 2014) (Howmedica Petition); Petition of Emery Wilson Corporation d/b/a Sterling Management Systems for Waiver, CG Docket Nos. 02-278, 05-338 (filed Nov. 10, 2014) (Emery Petition); Petition of ACT, Inc. for Waiver, CG Docket Nos. 02-278, 05-338 (filed Nov. 12, 2014) (ACT Petition); Petition of Amicus Mediation & Arbitration Group, Inc., and Hillary Earle for Waiver, CG Docket Nos. 02-278, 05-338 (filed Nov. 13, 2014) (Amicus Petition); Petition of Alma Lasers, Inc. for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 (filed Nov. 14, 2014) (Alma Petition); Petition of Den-Mat Holdings, LLC for Retroactive Waiver, CG Docket No. 05-338, (filed Nov. 20, 2014) (Den-Mat Petition); Petition for Retroactive Waiver by ASD Specialty Healthcare Inc., d/b/a Besse Medical, AmeriSourceBergen Specialty Group, Inc., and AmeriSourceBergen Corp., CG Docket No. 05-338 (filed Nov. 20, 2014) (ASD Petition); Petition of Apex Energetics, Inc. for Waiver, CG Docket Nos. 02-278, 05-338 (filed Nov. 21, 2014) (Apex Petition); Petition of McKesson Corporation for Waiver, CG Docket Nos. 02-278, 05-338 (filed Nov. 25, 2014) (McKesson Petition); Petition of American Association for Justice for Waiver of Section
Specifically, we grant waivers to parties similarly-situated to the initial waiver recipients granted relief by the Commission due to uncertainty whether the opt-out notice requirement applies to faxes sent with recipient consent. At the same time, we reiterate that the rule remains in full effect as an easy, cost-free means for fax recipients to avoid faxes they previously wanted but no longer wish to receive. In the 2014 Anda Commission Order we clarified the rule and explained the waiver granted therein would not apply to faxes sent more than six months from the release date of the order. We thus emphasize that the recipients of the waivers granted herein should already be in compliance having benefited from the Commission’s previous clarification.

2. We also deny several related requests for declaratory ruling insofar as they seek a ruling that the Commission lacked the statutory authority to require opt-out information on fax ads sent with a consumer’s prior express permission, or, alternatively, that section 227(b) of the Communications Act of 1934, as amended (the Act), was not the statutory basis of that requirement. The Commission has previously denied substantially similar requests. Finally, we deny the petition for declaratory ruling and/or waiver filed by Bijora, Inc., seeking a clarification that fax and text message ads sent with the prior express consent of the recipient do not require an opt-out notice.

II. BACKGROUND

A. Telephone Consumer Protection Act

3. In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA). In relevant part, the TCPA prohibits the use of any telephone facsimile (fax) machine, computer, or other device to send an “unsolicited advertisement” to a telephone fax machine. In 1992, the Commission adopted rules

(Continued from previous page)


3 The petitioners do not seek a waiver of a similar requirement that they include an opt-out notice on fax ads sent pursuant to an established business relationship as there is no confusion regarding the applicability of this requirement to such faxes. See 47 C.F.R. § 64.1200(a)(4)(iii). We also note that this waiver does not affect the prohibition against sending unsolicited fax ads, which has remained in effect since its original effective date. See 47 C.F.R. § 64.1200(a)(4).

4 See 2014 Anda Commission Order, 29 FCC Rcd at 14011, para. 29.

5 See Petition of Bijora, Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (filed Oct. 7, 2014) (Bijora Petition) at 1, 2, 6, 10; Allscripts Petition at 1, 2, 5, 7-9; FP Petition at 3-7; A-S Petition at 9-12; Zoetis Petition at 6-7; AIFS Petition at 4; Five-M Petition at 4; Reliant Petition at 2.


7 See Bijora Petition.

8 The TCPA is codified as section 227 of the Act, 47 U.S.C. § 227.

9 47 U.S.C. § 227(b)(1)(C). As the legislative history explained, because fax machines “are designed to accept, process, and print all messages which arrive over their dedicated lines,” fax advertising imposes burdens on unwilling recipients that are distinct from the burdens imposed by other types of advertising. See H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).
implementing the TCPA, including restrictions on the transmission of unsolicited fax ads by fax machines.\textsuperscript{10}

4. In 2005, Congress enacted the Junk Fax Prevention Act, which amended the fax advertising provisions of the TCPA.\textsuperscript{11} Among other things, the law: (1) codified an established business relationship (EBR) exemption to the prohibition on sending unsolicited fax ads;\textsuperscript{12} (2) provided a definition of EBR to be used in the context of unsolicited fax ads;\textsuperscript{13} (3) required the sender of an unsolicited fax ad to provide specified notice and contact information on the fax that allows recipients to “opt out” of any future fax transmissions from the sender;\textsuperscript{14} and (4) specified the circumstances under which a request to “opt out” complies with the Act.\textsuperscript{15} In 2006, the Commission adopted the Junk Fax Order amending the rules concerning fax transmissions as required by the Junk Fax Prevention Act and addressing certain issues raised in petitions for reconsideration concerning the Commission’s fax advertising rules.\textsuperscript{16} As part of that Order, the Commission adopted a rule that required 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.”\textsuperscript{17} A summary of the Junk Fax Order was published in the Federal Register on May 3, 2006.\textsuperscript{18}

B. The Anda Proceeding

5. In 2010, Anda, Inc. (Anda) sought a declaratory ruling on the opt-out rule as applied to fax ads sent with recipient consent. Specifically, Anda asked the Commission to find that: (1) it lacked any authority to adopt a rule requiring an opt-out notice on fax ads sent with the recipient consent; or (2) in the alternative, section 227(b) of the Act is not the statutory basis for the rule.\textsuperscript{19} In 2012, the Bureau dismissed Anda’s petition\textsuperscript{20} finding that the Commission had the authority to adopt the rule and section


\textsuperscript{12} See id. sec. 2(a).

\textsuperscript{13} See id. sec. 2(b).

\textsuperscript{14} See id. sec. 2(c).

\textsuperscript{15} See id. sec. 2(d).


\textsuperscript{17} 47 C.F.R. § 64.1200(a)(4)(iv); see also Junk Fax Order, 21 FCC Rcd at 3812, para. 48.

\textsuperscript{18} See 71 FR 25967 (May 3, 2006).


\textsuperscript{20} See id.
227(b) (part of the TCPA) was in fact part of that authority. The Bureau also found that the Commission had clearly set forth the rule’s requirement and found no controversy to terminate or uncertainty to remove.

6. Anda sought Commission review of the Bureau decision, reiterating its earlier arguments that the Commission lacked authority to adopt the rule or, alternatively, that the TCPA was not the basis for the rule. After Anda filed its Application for Review, a number of parties filed petitions seeking various forms of relief. In general, these petitioners contended that there is controversy and uncertainty over the scope of and statutory basis for the rule and that the Commission offered confusing and conflicting statements regarding the applicability of the rule to solicited faxes.

7. On October 30, 2014, the Commission denied Anda’s Application for Review, affirming that the Commission’s rules require opt-out notices to appear on all fax ads, and granting limited retroactive waivers to petitioners. Specifically, the Commission found that the record indicated that a footnote contained in the Junk Fax Order caused confusion regarding the applicability of the opt-out notice requirement to faxes sent to recipients who provided prior express permission. As a result, the Commission found that good cause existed to grant limited retroactive waivers to those petitioners who sent fax ads to recipients who had provided prior express consent to receive them. The Commission emphasized that full compliance with the rule would be required within six months from the release of the Order (i.e., April 30, 2015). The Commission stated that similarly situated parties could seek similar waivers.

C. Petitions for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)

8. Since the release of the 2014 Anda Commission Order, additional petitions have been filed seeking waiver of the rule. In general, these petitioners contend they are similarly situated to the

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21 See id. at 4914, para. 5.

22 See id.


25 See generally 2014 Anda Commission Order.

26 See id. at 14008-12, paras. 22-31.

27 See id. at 14010-12, paras. 26-28.

28 See id. at 14011, para. 29.

29 See id. at 14011-12, para. 30.

30 117 petitions for waiver were filed through June 23, 2015. Additional petitions raising similar issues have since been filed and will be addressed separately.

31 See supra n.2.
petitioners who received a waiver in the 2014 Anda Commission Order. Specifically, they assert that there was confusion caused by the seemingly contradictory statements contained in a footnote in the Junk Fax Order and the rule and, as a result, they sent faxes without compliant opt-out provisions to recipients who had previously provided permission or consent to receive them.

32 See Allscripts Reply Comments at 6-7; Howmedica Petition at 3; ACT Petition at 5; Alma Petition at 2, 4; Den-Mat Petition at 2, 7; ASD Petition at 5; Apex Petition at 3; McKesson Petition at 1, 4; AAJ Petition at 3; Sunwing Petition at 5-6; ZocDoc Petition at 3; JLBG Petition at 3; St. Luke Petition at 2, 7; CDI Petition at 2; Senco Petition at 2; EatStreet Petition at 3; Schein Petition at 3; PCH Petition at 5; SME Petition at 3-4; Dental Solutions Petition at 3, 6; A-S Petition at 5, 6; Surefire Petition at 2; Social UPS Petition at 4, 7; Medversant Petition at 1, 4; Lichtenstein Petition at 3, 5; Zoetics Petition at 2; RadNet Petition at 2, 4; Houghton Petition at 6; Grey Petition at 4; AIFS Petition at 4; EXP Petition at 4; Dongli Petition at 3; PHX Petition at 4; Creditsmarts Petition at 7; Water Cannon Petition at 7 National Pen Petition at 4, 6; Boehringer Petition at 1, 3; Healthways Petition at 2, 4; Park Surgical Petition at 5, 7; USI Petition at 2, 5; Esatoe Petition at 3; Dog Petition at 2; Prodigy Petition at 2; Solutions Petition at 1; Kirby Petition at 2, 5; Consumer Energy Petition at 3; Practice Recruiters Petition at 3; IPS Petition at 1, 6; American Health Petition at 4; Virtuex Petition at 6; FCS Petition at 5, 6; Nomax Petition at 1; Heska Petition at 3; Odyssey Petition at 1-2; GE Healthcare Petition at 3; AP&G Petition at 4; Competitive Health Petition at 2, 4; Geier Petition at 1, 4; Kaberline Petition at 1; Logistic Petition at 1; CCI Petition at 2; Saratoga Petition at 3, 10; Royal Canin Petition at 1, 5; Salix Petition at 3; Cephalon Petition at 7; Five-M Petition at 4; Valeant Petition at 5; Navinet Petition at 5; First Index Petition at 2, 5; IPM Petition at 2, 4; EPS Petition at 3; Truckers Petition at 3; Graduation Petition at 5; Homepatient Petition at 2, 4-5; Int’l Dental Petition at 4; EEI Petition at 2; Versa Petition at 3; Wells Fargo Petition at 3; ChappellRoberts Petition at 6; UBM Petition at 1, 5; Direct Energy Petition at 2, 4; Smith Petition at 2; Microwize Petition at 6; Ontario Petition at 2, 5; Greenway Petition at 4, 4; CVS Petition at 1; FCEA Petition at 2, 6; Sinopec Petition at 3; HSPS Petition at 3; Be-Thin Petition at 2; DHH Petition at 3, 7; Insight Petition at 3, 7; McAllister Petition at 3; DRS Petition at 3; MITC Petition at 3; Hoffman Petition at 3; ACG Petition at 3; Websolv Petition at 3; Trinity Petition at 3; C&T Petition at 3; Stryker Petition at 5; Zydus Petition at 5; Rehab Petition at 4, 5; BFS Petition at 1, 3; Key Petition at 3-4; Endo Petition at 5, 6; AEP Petition at 3, 5; Stationers Petition at 7, 8; Business (continued…)

33 See Allscripts Petition at 6-7; FP Petition at 2, 4; Howmedica Petition at 2-3; Emery Petition at 6; ACT Reply Comments at 6; Amicus Petition at 2, 5; Alma Petition at 4; Den-Mat Petition at 2, 6-7; ASD Petition at 5; Apex Petition at 3; McKesson Petition at 3-4, 8; AAJ Petition at 3; Sunwing Petition at 6; ZocDoc Petition at 3-4; JLBG Petition at 3; St. Luke Petition at 4, 7; CDI Petition at 3-4, 7; Senco Petition at 6-7; EatStreet Petition at 5, 6; Schein Petition at 3, 4; PCH Petition at 5; SME Petition at 4; Dental Solutions Petition at 2, 3-4; A-S Petition at 6, 8; Surefire Petition at 4; Social UPS Petition at 6, 7; Medversant Petition at 4; Lichtenstein Petition at 5, 7; Zoetics Petition at 4, 5; RadNet Petition at 5; Houghton Petition at 2; Grey Petition at 6, 8; EXP Petition at 3, 4; Dongli Petition at 3-4; PHX Petition at 3, 4; Creditsmarts Petition at 6; Water Cannon Petition at 6; National Pen Petition at 7; Boehringer Petition at 1, 3; Healthways Petition at 6; Park Surgical Petition at 6, 7; USI Petition at 5, 6; Esatoe Petition at 3-4; Dog Petition at 6, 7; Prodigy Petition at 3-4; Solutions Petition at 4; Kirby Petition at 5; Consumer Energy Petition at 3; Practice Recruiters Petition at 3; IPS Petition at 1, 6; American Health Petition at 4; Virtuex Petition at 6; FCS Petition at 5, 6; Nomax Petition at 1; Heska Petition at 3; Odyssey Petition at 1-2; GE Healthcare Petition at 3; AP&G Petition at 4; Competitive Health Petition at 2, 4; Geier Petition at 1, 4; Kaberline Petition at 1; Logistic Petition at 1; CCI Petition at 2; Saratoga Petition at 3, 10; Royal Canin Petition at 1, 5; Salix Petition at 3; Cephalon Petition at 7; Five-M Petition at 4; Valeant Petition at 5; Navinet Petition at 5; First Index Petition at 2, 5; IPM Petition at 2, 4; EPS Petition at 3; Truckers Petition at 3; Graduation Petition at 5; Homepatient Petition at 2, 4-5; Int’l Dental Petition at 4; EEI Petition at 2; Versa Petition at 3; Wells Fargo Petition at 3; ChappellRoberts Petition at 6; UBM Petition at 1, 5; Direct Energy Petition at 2, 4; Smith Petition at 2; Microwize Petition at 6; Ontario Petition at 2, 5; Greenway Petition at 4, 4; CVS Petition at 1; FCEA Petition at 2, 6; Sinopec Petition at 3; HSPS Petition at 3; Be-Thin Petition at 2; DHH Petition at 3, 7; Insight Petition at 3, 7; McAllister Petition at 3; DRS Petition at 3; MITC Petition at 3; Hoffman Petition at 3; ACG Petition at 3; Websolv Petition at 3; Trinity Petition at 3; C&T Petition at 3; Stryker Petition at 5; Zydus Petition at 5; Rehab Petition at 4, 5; BFS Petition at 1, 3; Key Petition at 3-4; Endo Petition at 5, 6; AEP Petition at 3, 5; Stationers Petition at 7, 8; Business (continued…)
9. The Commission sought comment on the petitions.\textsuperscript{35} Individual and corporate consumers filed comments opposing the petitions.\textsuperscript{36} Opponents of the petitions generally argue that the current (Continued from previous page) ———

Promotion Petition at 5-6; Meadowbrook Petition at 6-7; Northwood Petition at 6-7; Ryerson Petition at 4; Reliant Petition at 6, 7.

\textsuperscript{34} See Allscripts Petition at 2, 10; FP Petition at 1, 5, 8; Howmedica Petition at 1, 4; Emery Petition at 4, 5; ACT Petition at 4; Amicus Petition at 3-4, 5; Alma Petition at 3, 4; Den-Mat Petition at 2, 4; ASD Petition at 4, 5; McKesson Petition at 5; A&J Petition at 3; Sunwing Petition at 4, 5; ZocDoc Petition at 2, 3; JLBG Petition at 2, 3; St. Luke Petition at 4-7; CDI Petition at 2, 4-5; Senco Petition at 1, 4; EatStreet Petition at 6; Schein Petition at 1, 3, 4; PCH Petition at 2, 3, 5; SME Petition at 1, 4; Dental Solutions Petition at 2, 6; A-S Petition at 6; Surefire Petition at 1, 4; Social UPS Petition at 5, 7; Medversant Petition at 4; Zoetis Petition at 3, 5; RadNet Petition at 1; Houghton Petition at 1; Grey Petition at 2, 6, 7; AIFS Petition at 3; EXP Petition at 2-63; Dongli Petition at 3; PHX Petition at 2, 3; CreditSmarts Petition at 5, 6; Water Cannon Petition at 2, 5, 6; National Pen Petition at 6; Boehringer Petition at 1, 4; Healthways Petition at 4; Park Surgical Petition at 2, 6, 7; USI Petition at 6-7; Dog Petition at 1-2; Prodigy Petition at 1; Solutions Petition at 1, 2; Kirby Petition at 1, 5; Consumer Energy Petition at 3; Practice Recruiters Petition at 1; IPS Petition at 1, 5; American Health Petition at 1, 4, 5; Virtuox Petition at 5, 6; FCS Petition at 5, 6; Nomax Petition at 1; Heska Petition at 2; Odyssey Petition at 8; GE Healthcare Petition at 1, 4; A&R & G Petition at 2, 4; Competitive Health Petition at 1, 4; Geier Petition at 1, 4; Kaberline Petition at 1, 5; Logistic Petition at 1; CCI Petition at 1, 6; Saratoga Petition at 1, 2, 5; Royal Canin Petition at 6; Salix Petition at 1; Cephalon Petition at 1, 6; Five-M Petition at 3; Valeant Petition at 1; Navinet Petition at 1, 5; First Index Petition at 1, 2, 5; IPM Petition at 2, 5; EFS Petition at 2; Truckers Petition at 2; Graduation Petition at 6; Homepatient Petition at 2, 5; Int'l Dental Petition at 1, 2, 5; EEI Petition at 2, 3; Versa Petition at 1, 4; Wells Fargo Petition at 1; ChappellRoberts Petition at 1, 6; UBM Petition at 1, 2, 5; Direct Energy Petition at 1; Smith Petition at 1; Microwize Petition at 1, 5; MedTech Petition at 1, 4; Ontario Petition at 1; Greenway Petition at 1; CVS Petition at 1; FCEA Petition at 1; Sinopsec Petition at 4; HSPS Petition at 1; Be-Thin Petition at 1; DHI Petition at 1, 6; Insight Petition at 1, 5, 6; McAllister Petition at 1; DRS Petition at 4; MITC Petition at 4; Hoffman Petition at 4; ACG Petition at 4; Websov Petition at 4; Trinity Petition at 4; C&T Petition at 4; Stryker Petition at 1, 5; Zykus Petition at 4; 5; Rehab Petition at 1; FBS Petition at 1; Key Petition at 3, 4; Endo Petition at 2, 4; AEP Petition at 1, 4; Stationers Petition at 5, 9; Business Promotion Petition at 1, 2, 4; Meadowbrook Petition at 1; Northwood Petition at 1; Ryerson Petition at 1; Reliant Petition at 1.


\textsuperscript{36} A list of commenters can be found in Appendix A.
petitioners are not similarly situated to the initial waiver recipients because: (1) they have not and/or cannot establish that they received the prior express permission or consent of fax recipients prior to sending fax advertisements, and/or (2) they do not specifically assert that they were, in fact, confused or that the source of their purported confusion was the two factors outlined in the 2014 Retroactive Waiver Order – inconsistency between a footnote and the rule and lack of adequate notice. In addition, several commenters reiterate arguments raised prior to the release of the 2014 Anda Commission Order and argue that the Commission does not have authority to waive its regulations in a private right of action and that doing so violates the separation of powers. In response to these arguments, commenters reiterate the Commission’s holding that granting the waiver petitions does not imply that faxers received permission prior to sending the faxes; the issue of permission is best left to the trier of fact. Commenters supporting the petitions also argue that a showing of actual confusion is not required – a reference to the confusion is sufficient as the Commission already found that confusion in the marketplace did exist.

37 See PHI Comments at 13; Simon Feb. 13, 2015 Comments regarding Medversant Petition at 18; Simon Feb. 13, 2015 Comments regarding RadNet Petition at 20; Simon Apr. 10, 2015 Comments at 20; St. Louis Comments at 5; Craftwood II Comments at 19-20.

38 See Arwa Comments at 4; Degnen Comments at 4; Connector Comments at 3.


40 See TCPA Plaintiffs Dec. 12, 2014 Comments at 23, 30; TCPA Plaintiffs Jan. 13, 2015 Comments at 19, 40; Craftwood Comments at 10-13; PHI Comments on A-S Petition at 9; Simon Comments on Medversant Petition at 8, 10; Simon Comments on RadNet Petition at 8, 11; Hicklin Comments at 8; TCPA Plaintiffs Apr. 10, 2015 Comments at 10; P&S Comments at 4; TCPA Plaintiffs May 22, 2015 Comments at 5; Alco Comments at 4; TCPA Plaintiffs June 12, 2015 Comments at 9; Craftwood II Comments at 10, 12.

41 See Allscripts Reply Comments at 9; Senco Reply Comments at 7; Dental Solutions Reply Comments at 2; Medversant Reply Comments at 6; RadNet Reply Comments at 6-7; Healthways Reply Comments at 7; Navenet Reply Comments at 5; IPM Reply Comments at 5; Homepatient Reply Comments at 5; Intnl’l Dental Reply Comments at 5; UBM Reply Comments at 3; Ontario Reply Comments at 5; CVS Reply Comments at 5; AEP Reply Comments at 3-4.

42 See Allscripts Reply Comments at 4, 6; Howmedica Reply Comments at 6-7; ACT Reply Comments at 9; Alma Reply Comments at 4; Den-Mat Reply Comments at 3-4; ASD Reply Comments at 4; McKesson Reply Comments at 6-8; Sunwing Reply Comments at 4-5; ZocDoc Reply Comments at 74-8; Senco Reply Comments at 7, 11-12; PCH Reply Comments at 4-5; RadNet Reply Comments at 7; National Pen Reply Comments at 9-10; Healthways Reply Comments at 8; USI Reply Comments at 6-7; Kirby Reply Comments at 2-3; Nomax Reply Comments at 4; Royal Canin Reply Comments at 7-10; Navenet Reply Comments at 5-6; First Index Reply Comments at 5-6; IPM Reply Comments at 5-6; Homepatient Reply Comments at 5-6; Intnl’l Dental Reply Comments at 5-6; UBM Reply Comments at 4-5; Ontario Reply Comments at 5-6; CVS Reply Comments at 6-7; FCEA Reply Comments at 2-3; Endo Reply Comments at 5-7; AEP Reply Comments at 4; Reliant Reply Comments at 4-5.
D. Bijora, Inc. Petition for Declaratory Ruling and/or Waiver

10. On October 7, 2014, Bijora Inc. (Bijora) filed a petition seeking a declaratory ruling that Section 64.1200(a)(4)(iv) does not apply to fax or text message ads sent with the recipient’s consent or, alternatively, that the TCPA is not the statutory basis for the rule.\(^43\) Section 64.1200(a)(4)(iv) requires that fax advertisements sent with the recipient’s prior express consent must include an opt-out notice with the content specified by the Commission’s rule.\(^44\) Bijora states that it is a defendant in a class action lawsuit in which the plaintiff purportedly asserts that it violated the TCPA by sending text ads without an opt-out notice.\(^45\) Bijora also requests a retroactive waiver to the extent that the Commission declines to issue the declaratory ruling requested.\(^46\) The Commission sought comment on the petition.\(^47\) Two commenters oppose the petition arguing that there is no controversy or uncertainty to resolve as the rule at issue does not apply to text messages, and the lawsuit purportedly precipitating the petition does not allege a violation of section 64.1200(a)(4)(iv) of the Commission’s rules.\(^48\)

III. DISCUSSION

A. Requests for Waiver

11. In this Order, we grant 117 waivers to parties that have demonstrated they are similarly-situated to the faxers granted relief by the Commission in the 2014 Anda Commission Order. Specifically, we find good cause exists to grant individual retroactive waivers of section 64.1200(a)(4)(iv) of the Commission’s rules to the extent described below. We emphasize that these waivers provide relief through April 30, 2015. Any non-compliant faxes (i.e., faxes that do not include the required opt-out information) sent after that date are subject to Commission enforcement and TCPA liability. We also clarify the fax opt-out notification requirement does not apply to text messages.

12. We reiterate that the Commission’s previous conclusion that requests seeking a declaratory ruling that the Commission lacked the statutory authority to require opt-out information on fax ads sent with recipient consent, or, alternatively, that section 227 of the Act was not the statutory basis

\(^{43}\) See Bijora Petition at 1, 6.

\(^{44}\) See 47 C.F.R. § 64.1200(a)(4)(iv).

\(^{45}\) See id. at 5. The comments of Nicole Blow, plaintiff in the class action lawsuit, contest this assertion. Blow contends that the action pending Northern District of Illinois alleges violations of Section 64.1200(b)(1), not 64.1200(a)(4)(iv), and specifies that “there are no claims pending against Bijora for failure to include opt-out notices.” Blow Comments at 3 and Ex. A. Notwithstanding the commenters’ arguments, we see no reason to not address the issue presented in the Bijora petition.

\(^{46}\) See id. at 12.

\(^{47}\) See Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling and/or Waiver Filed by Bijora, Inc., CG Docket Nos. 02-278, 05-338, Public Notice, DA 14-1613 (rel. Nov. 7, 2014). A list of commenters can be found in Appendix B.

\(^{48}\) See generally Blow Comments; see also Shields Comments at 3; Shields Reply Comments at 1-2.
of that requirement, present no controversy to terminate or uncertainty to remove. 49 We also reiterate the Commission’s previous conclusion that it had authority to adopt the rule in question. 50

13. We find that good cause exists to grant a retroactive waiver to the petitioners. 51 For the reasons discussed below, we believe the public interest is better served by granting a limited retroactive waiver. At the outset, we dismiss arguments that by granting waivers while litigation is pending violates the separation of powers as several commenter have suggested. 52 As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. 53 Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations 54 does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply. 55

14. The Commission may waive any of its rules for good cause shown. 56 A waiver may be granted if: (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. 57 The Commission previously found that special circumstances warranted deviation from the general rule at issue. Specifically, the Commission found two reasons for confusion or misplaced confidence among affected parties that the opt-out notice rule did not apply to fax ads sent with recipient consent: (1) inconsistency between a Junk Fax Order footnote and the rule, and (2) the notice provided prior to the rule did not make explicit that

49 See 2014 Anda Commission Order, 29 FCC Rcd at 14006, para. 18
50 See id. at 14006, para. 19.
51 See supra n.2 (listing of petitions covered by this Order).
52 See TCPA Plaintiffs Dec. 12, 2014 Comments at 23, 30; TCPA Plaintiffs Jan. 13, 2015 Comments at 19, 40; Craftwood Comments at 10-13; PHI Comments on A-S Petition at 9; Simon Comments on Medversant Petition at 8, 10; Simon Comments on RadNet Petition at 8, 11; Hicklin Comments at 8; TCPA Plaintiffs Apr. 10, 2015 Comments at 10; P&S Comments at 4; TCPA Plaintiffs May 22, 2015 Comments at 5; Alco Comments at 4; TCPA Comments June 12, 2015 Comments at 9; Craftwood Comments at 10, 12.
53 See 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”); 47 C.F.R. § 1.2. See also, NCTA v. Brand X, 545 U.S. 967, 980 (2005) (“Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act, . . . and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act.”) (citations omitted); id. at 983-84 (“[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. . . . Instead, the agency may . . . choose a different construction [than the court], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”); 2014 Anda Commission Order, 29 FCC Rcd at 14008, para. 21.
55 See, e.g., 47 U.S.C. § 227(b)(2); Northeast Cellular v. FCC, 897 F.2d 1164 (D.C. Cir. 1990) (“The FCC has authority to waive its rules if there is ‘good cause’ to do so. 47 C.F.R. § 1.3. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”).
57 See Northeast Cellular, 897 F.2d at 1166.
the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.58 We find that the petitioners here have adequately demonstrated that they are similarly situated59 to the initial waiver recipients and are deserving of a limited retroactive waiver for those fax ads sent prior to April 30, 2015, with recipients’ prior express consent or permission.

15. As commenters observe,60 the Commission has established that petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence.61 We find that the 117 petitioners satisfy the 2014 Anda Commission Order’s test for waiver by referencing the confusing language in the Commission’s fax opt-out decision, and that no record evidence rebuts the resulting presumption of confusion or misplaced confidence.

16. All 117 petitions reference the contradictory language in the Commission’s fax opt-out decision, thus qualifying them for the presumption of confusion or misplaced confidence articulated by the Commission. Of these 117, 44 are not opposed by commenters. Of those remaining 73 petitions, oppositions generally argue that petitioners are not similarly-situated to the prior waiver recipients. More specifically, the oppositions fall into several categories: petitioners did not actually get consent;62 petitioners had actual knowledge of the requirement as evidenced, e.g., by the opt-out notices that did include on their faxes or lawsuits against them alleging violation of the rule;63 petitioners have not argued actual confusion;64 and, petitioners face insufficient liability for TCPA violations to qualify for a waiver.65 We address each argument in turn and find that none merit denying the requested waivers.

17. First, we decline to conduct a factual analysis to determine whether the petitioners actually obtained consent. Instead, our findings here is that – assuming that proper consent was obtained – petitioners qualify for limited retroactive waivers if they did not include the requisite opt-out notice. 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.66 That remains a question for triers of fact in the private litigation.


59 See e.g., supra. at n.35. In so doing, petitioners assert that there was industry-wide confusion resulting from the Junk Fax Order footnote and the rule. See supra at n. 36. In addition, petitioners allege that the faxes at issue were sent with the prior express consent or permission of the recipients. See supra at n. 37.

60 See, e.g., Endo Reply Comments at 5-6.


62 See e.g., PHI Comments at 13; Simon Feb. 13, 2015 Comments regarding Medversant Petition at 18; Simon Feb. 13, 2015 Comments regarding RadNet Petition at 20; Simon Apr. 10, 2015 Comments at 20; St. Louis Comments at 5; Craftwood II Comments at 19-20.

63 See e.g., TCPA Plaintiffs Dec. 12, 2014 Comments at 7, 32-33; Urban Comments at 39; City Select Comments at 5; Chapman Comments at 7.

64 See e.g., Arwa Comments at 4; Degnen Comments at 4; Connector Comments at 3.

65 See e.g., TCPA Plaintiffs Dec. 12, 2014 Comments at 35-36, 38; Urban Comments at 40; PHI Comments at 15-16; Simon Apr. 10, 2015 Comments at 24; TCPA Plaintiffs Apr. 10, 2015 Comments at 15, 17; TCPA Plaintiffs May 22 Comments at 9-10; TCPA Plaintiffs June 12, 2015 Comments at 14; Craftwood II Comments at 22.

18. Second, we reject arguments that petitioners who included limited opt-out notices on faxes and were sued for rule violations must have clearly understood the requirement and thus do not deserve the presumption of confusion or misplaced confidence. Commenters argue that the inclusion of an opt-out notice demonstrates the respective petitioner’s knowledge of the rule’s requirement. They allege that these petitioners were aware of the requirement (as demonstrated by the inclusion of opt-out language) and, therefore, they are not similarly situated to the waiver recipients who did not include opt-out language (because they were confused about the necessity of including opt-out notices in solicited fax advertisements). These commenters fail to acknowledge that businesses may well include basic opt-out information, including a phone or fax number, as a matter of good business practice rather than knowledge of the rule. Indeed, a business that understood the rule would have presumably included all elements of the required notice, not just a few. Likewise, we find that having been sued for non-compliance does not rebut the presumption unlike, e.g., a judicial finding.

19. Third, we reject arguments that the Commission made actual, specific claims of confusion a requirement to obtain the waiver. As described above, the Commission found that petitioners who referenced the confusing, contradictory language at issue are entitled to a presumption of confusion. The Commission did not require petitioners to plead specific, detailed grounds for individual confusion and we cannot impose those here. Finally, we reject arguments – somewhat in tension with the opposition argument addressed above – that petitioners who do not face significant potential liability for violations of the opt-out notice requirement do not qualify for a waiver. In the 2014 Anda Commission Order, the Commission did not require that faxers currently face lawsuits or potential liability to qualify for the waiver.

20. We observe that a few of the petitions resolved by this Order were filed in May and June of this year, after the six-month (April 30, 2015) date 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. As such, granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients.

21. We emphasize that full compliance with the requirement to provide an opt-out notice on fax ads sent with the prior express permission of the recipient is expected now that any potential for confusion on this point has been addressed and interested parties have been given additional notice of this requirement. We reiterate that the waiver granted herein applies only to the petitioners insofar as they

67 See TCPA Plaintiffs Dec. 12, 2014 Comments at 7, 32-33; Urban Comments at 39; City Select Comments at 5; Chapman Comments at 7.

68 See, e.g., First Index Reply Comments at 3–4, 5 (the business decision to include opt-out language in faxes does not demonstrate understanding of the requirement of its scope).


70 See 2014 Anda Commission Order, 29 FCC Red at 14011-12, para. 30 (“we expect parties making similar waiver requests to make every effort to file within six months of release of this Order”).
may have failed to comply with section 64.1200(a)(4)(iv) prior to April 30, 2015. As a result, the waiver granted herein shall not apply to such conduct occurring after April 30, 2015, nor shall it apply to any situation other than where the fax sender had obtained the prior express invitation or permission of the recipient to receive the fax advertisement. We also emphasize that this waiver does not affect the prohibition against sending unsolicited fax ads, which has remained in effect since its original effective date. Nor should the granting of such waivers 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.

B. Bijora, Inc. Petition for Declaratory Ruling and/or Waiver

22. We deny the request of Bijora, Inc. seeking a declaratory ruling clarifying that text messages do not require opt-out notices pursuant to section 64.1200(a)(4)(iv) on the grounds that there is no controversy or uncertainty in the rule with respect to text messages. We note that the plain language of that rule applies only to fax advertisements and makes no reference to text messages. As a result, we find no basis for any uncertainty on this point.

23. Consequently, we also deny the request of Bijora, Inc. seeking a retroactive waiver of section 64.1200(a)(4)(iv) with respect to any text message sent with the prior express consent of a recipient because that rule section is not applicable to text messages. In addition, the 2014 Anda Commission Order invited similarly situated parties to file petitions for waiver with the Commission. Insofar as it sent text messages and not solicited fax advertisements, Bijora, Inc. is not similarly situated to the petitioners identified in that order. As such, a waiver is not warranted in this instance.

IV. ORDERING CLAUSES


71 See 47 C.F.R. § 64.1200(a)(4).

72 The record indicates that whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties.
25. IT IS FURTHER ORDERED that the request for declaratory ruling and/or waiver filed by Bijora, Inc. IS DENIED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Alison Kutler
Acting Chief
Consumer and Governmental Affairs Bureau
APPENDIX A

List of Commenters

The following parties have filed comments in response to the various Public Notices issued in this matter (CG Docket Nos. 02-278; 05-338):

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*filing both comments and reply comments (bold – reply comments only)*
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*filing both comments and reply comments (bold – reply comments only)*