

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
Junk Fax Prevention Act of 2005
Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission
CG Docket No. 02-278
CG Docket No. 05-338

ORDER

Adopted: December 9, 2015

Released: December 9, 2015

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, the Consumer and Governmental Affairs Bureau (Bureau) addresses 11 waiver requests<sup>1</sup> that seek relief similar to that granted in the Commission’s 2014 fax opt-out notice

1 See Petition of Megadent, Inc. d/b/a Megadent Labs, Inc. d/b/a Megadent d/b/a Megadent Laboratories and Kim Martinez for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, CG Docket Nos. 02-278, 05-338 (filed June 24, 2015) (Megadent Petition); 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 (filed June 24, 2015) (Ivoclar Petition); Petition of Renaissance Systems and Services, LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 (filed June 25, 2015) (Renaissance Petition); Petition of Zimmer Dental, Inc. d/b/a Zimmer Dental and Amy Beth Gerzog for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 (filed July 16, 2015) (Zimmer Petition); Petition of Costco Wholesale Corporation for Retroactive Waiver or in the Alternative for Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed July 22, 2015) (Costco Petition); 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 (filed Aug. 6, 2015) (Athena Petition); Petition of Ohio National Mutual, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 (filed Aug. 21, 2015) (Ohio Petition); Petition of Prevention Pharmaceuticals, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 (filed Aug. 26, 2015) (Prevention Petition); Petition of Dental Fix Rx LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278, 05-338 (filed Sep. 11, 2015) (Dental Petition); 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 (filed Sep. 17, 2015) (Scrip Petition); 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) (SourceMedia (continued...))

order.<sup>2</sup> Specifically, we grant waivers to five petitioners<sup>3</sup> that are similarly situated to the waiver recipients previously granted relief by the Commission due to uncertainty about whether the opt-out notice requirement applies to fax advertisements sent with recipient consent.<sup>4</sup> 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*, the Commission clarified the rule and explained the waivers granted therein would not apply to faxes sent more than six months from the release date of the order, *i.e.*, by April 30, 2015.<sup>5</sup> We thus emphasize that the recipients of the waivers granted herein should already be in compliance after having benefited from the Commission's previous clarification.

2. We deny five of the requests<sup>6</sup> for waiver insofar as the petitioners admit to being unaware of the opt-out notice requirement and, therefore, not similarly situated to the initial waiver recipients, consistent with the Commission's statement that "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."<sup>7</sup> We also deny one request for waiver insofar as the petitioner alleges that because the faxes at issue were sent to those parties with whom it had an existing business relationship, they were solicited and a waiver is appropriate.<sup>8</sup> Finally, we deny one related request for declaratory ruling<sup>9</sup> insofar as it seeks 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.<sup>10</sup>

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Petition) (collectively Petitioners). One additional petition was filed and subsequently withdrawn; therefore, we will not address it here. *See Petition McVey Associates, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Aug. 31, 2015) (McVey Petition); *Withdrawal of Petition of McVey Associates, Inc. for Retroactive Waiver*, CG Docket Nos. 02-278, 05-338 (filed Oct. 15, 2015).

<sup>2</sup> *See Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (*2014 Anda Commission Order*).

<sup>3</sup> *See* Megadent Petition; Costco Petition; Dental Petition; Scrip Petition; SourceMedia Petition.

<sup>4</sup> 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 the waivers do 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).

<sup>5</sup> *See 2014 Anda Commission Order*, 29 FCC Rcd at 14011, para. 29.

<sup>6</sup> *See* Ivoclar Petition; Renaissance Petition; Athena Petition; Ohio Petition; Prevention Petition.

<sup>7</sup> *2014 Anda Commission Order*, 29 FCC Rcd at 14010, para. 26.

<sup>8</sup> *See* Zimmer Petition.

<sup>9</sup> *See* Costco Petition.

<sup>10</sup> *See 2014 Anda Commission Order*, 29 FCC Rcd at 14004, para. 14.

## II. BACKGROUND

### A. Telephone Consumer Protection Act

3. In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA).<sup>11</sup> 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.<sup>12</sup> In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited fax ads to fax machines.<sup>13</sup>

4. In 2005, Congress enacted the Junk Fax Prevention Act, which amended the fax advertising provisions of the TCPA.<sup>14</sup> Among other things, the law: (1) codified an established business relationship (EBR) exception to the prohibition on sending unsolicited fax ads;<sup>15</sup> (2) provided a definition of EBR to be used in the context of unsolicited fax ads;<sup>16</sup> (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;<sup>17</sup> and (4) specified the circumstances under which a request to “opt out” complies with the Act.<sup>18</sup> 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.<sup>19</sup> As part of that Order, the Commission adopted a rule 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.”<sup>20</sup> A summary of the *Junk Fax Order* was published in the Federal Register on May 3, 2006.<sup>21</sup>

### 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

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<sup>11</sup> The TCPA is codified as section 227 of the Act, 47 U.S.C. § 227.

<sup>12</sup> See 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., 1<sup>st</sup> Sess. 11 (1991).

<sup>13</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); see also 47 C.F.R. § 64.1200(a)(4).

<sup>14</sup> See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act).

<sup>15</sup> See *id.* sec. 2(a).

<sup>16</sup> See *id.* sec. 2(b).

<sup>17</sup> See *id.* sec. 2(c).

<sup>18</sup> See *id.* sec. 2(d).

<sup>19</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (*Junk Fax Order*).

<sup>20</sup> 47 C.F.R. § 64.1200(a)(4)(iv); see also *Junk Fax Order*, 21 FCC Rcd at 3812, para. 48.

<sup>21</sup> See 71 FR 25967 (May 3, 2006).

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.<sup>22</sup> In 2012, the Bureau dismissed Anda's petition<sup>23</sup> finding that the Commission had the authority to adopt the rule and that section 227(b) (part of the TCPA) was in fact a basis of that authority.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> 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 was 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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> The Commission also found that the associated Notice of Proposed Rulemaking did not explicitly indicate that the Commission was contemplating an opt-out requirement on faxes sent with the recipient's prior express permission.<sup>30</sup> 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.<sup>31</sup> The Commission emphasized that full compliance with the rule would be required within six months from the release of the order (*i.e.*, by April 30, 2015).<sup>32</sup> The Commission stated that similarly situated parties could seek similar waivers.<sup>33</sup>

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<sup>22</sup> See generally *Junk Fax Prevention Act of 2005, Petition for Declaratory Ruling to Clarify that 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rules Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, CG Docket No. 05-338, Order, 27 FCC Rcd 4912 (CGB 2012) (*2012 Anda Order*).

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 4914, para. 5.

<sup>25</sup> See *id.*

<sup>26</sup> See *Anda, Inc. Application for Review*, CG Docket No. 05-338, at 10-13 (filed May 14, 2012).

<sup>27</sup> See *2014 Anda Commission Order*, 29 FCC Rcd at 14002, para. 10.

<sup>28</sup> See generally *2014 Anda Commission Order*.

<sup>29</sup> See *id.* at 14008-12, paras. 22-31.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 14010-12, paras. 26-28.

<sup>32</sup> See *id.* at 14011, para. 29.

<sup>33</sup> See *id.* at 14011-12, para. 30.

### 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* and the Bureau's subsequent August 2015 order,<sup>34</sup> there are 11 additional pending petitions seeking waiver of the rule.<sup>35</sup> In general, the petitioners contend they are similarly situated to the petitioners who received a waiver in the *2014 Anda Commission Order*.<sup>36</sup> Specifically, they assert that they sent faxes without compliant opt-out provisions to recipients who had previously provided permission or consent to receive them<sup>37</sup> and that such faxes should not be subject to TCPA liability because there was industry-wide confusion caused by the seemingly contradictory statements contained in a footnote in the *Junk Fax Order* and the rule.<sup>38</sup>

9. The Commission sought comment on the petitions.<sup>39</sup> Individual and corporate consumers filed comments opposing the petitions.<sup>40</sup> Opponents of the petitions generally argue that the current petitioners are not similarly situated to the initial waiver recipients because: (1) they have not established and/or cannot establish that they received the prior express permission or consent of fax recipients prior to sending fax advertisements;<sup>41</sup> and/or (2) they do not specifically assert that they were, in fact, confused.<sup>42</sup> 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 private litigation and that doing so violates the separation of powers.<sup>43</sup> In response to these arguments,

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<sup>34</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Prevention Act of 2005; Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, DA 15-976 (CGB rel. Aug. 28, 2015).

<sup>35</sup> See *supra* n.2. As noted above, one of the 12 filed petitions was subsequently withdrawn. We therefore address here only the 11 remaining petitions.

<sup>36</sup> See Megadent Petition at 2; Ivoclar Petition at 5; Renaissance Petition at 5; Zimmer Petition at 3; Costco Petition at 1, 6; Ohio Petition at 5, 6; Prevention Petition at 3, 5; Dental Petition at 2, 4-5; Scrip Petition at 1, 5; SourceMedia Petition at 4.

<sup>37</sup> See Megadent Petition at 1; Ivoclar Petition at 1; Renaissance Petition at 1; Zimmer Petition at 1; Costco Petition at 2-3; Athena Petition at 1; Ohio Petition at 1, 5; Prevention Petition at 1, 6; Dental Petition at 1; Scrip Petition at 1, 5; SourceMedia Petition at 1, 3.

<sup>38</sup> See Megadent Petition at 6; Ivoclar Petition at 4-5; Renaissance Petition at 4; Zimmer Petition at 2; Costco Petition at 5; Athena Petition at 2, 5; Ohio Petition at 3; Prevention Petition at 3-4; Dental Petition at 4; Scrip Petition at 7; SourceMedia Petition at 4.

<sup>39</sup> See *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, DA 15-876 (rel. July 31, 2015); *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, DA 15-972 (rel. Aug. 28, 2015); *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, DA 15-1077 (rel. Sep. 25, 2015).

<sup>40</sup> A list of commenters can be found in Appendix A.

<sup>41</sup> See ABC Comments on Costco Petition at 2.

<sup>42</sup> See Degnen Comments on Megadent Petition at 3; Degnen Comments on Zimmer Petition at 3.

<sup>43</sup> See Degnen Comments on Zimmer Petition at 5-6; St. Louis Comments on Athena and Ohio Petitions at 5; Degnen Comments on Dental Petition at 2; Wilder Comments on Scrip Petition at 4.

petitioners assert that they should not be held to a higher standard than initial waiver recipients; evidence of actual, subjective confusion is not required.<sup>44</sup>

### III. DISCUSSION

#### A. Requests for Waiver

10. In this Order, we grant waivers to Megadent, Inc. d/b/a Megadent Labs, Inc. d/b/a Megadent d/b/a Megadent Laboratories and Kim Martinez, Costco Wholesale Corporation, Dental Fix Rx LLC, Scrip Holding Co., and SourceMedia LLC as they have demonstrated that 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.

11. We reiterate the Commission's previous rejection of 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 of that requirement. The Commission concluded that such requests present no controversy to terminate or uncertainty to remove.<sup>45</sup> We also reiterate the Commission's previous conclusion that it had authority to adopt the rule in question.<sup>46</sup>

12. We find that good cause exists to grant a retroactive waiver to five of the eleven petitioners.<sup>47</sup> For the reasons discussed below, we find that the public interest is better served by granting limited retroactive waivers. At the outset, we dismiss arguments that by granting waivers while litigation is pending violates the separation of powers, as three commenters have suggested.<sup>48</sup> 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.<sup>49</sup> Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations<sup>50</sup> does

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<sup>44</sup> See Megadent Reply Comments at 2; Ohio Reply Comments at 6; Scrip Reply Comments at 8.

<sup>45</sup> See *2014 Anda Commission Order*, 29 FCC Rcd at 14006, para. 18.

<sup>46</sup> See *id.* at 14006, para. 19.

<sup>47</sup> See Megadent Petition; Costco Petition; Dental Petition; Scrip Petition; SourceMedia Petition.

<sup>48</sup> See Degnen Comments on Zimmer Petition at 5-6; St. Louis Comments on Athena and Ohio Petitions at 5; Degnen Comments on Dental Petition at 2; Wilder Comments on Scrip Petition at 4.

<sup>49</sup> 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.

<sup>50</sup> See 47 U.S.C. § 227(b)(3).

not undercut the Commission's authority, as the expert agency, to define the scope of when and how its rules apply.<sup>51</sup>

13. The Commission may waive its rules for good cause shown.<sup>52</sup> 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.<sup>53</sup> 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 the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.<sup>54</sup> We find that the five petitioners here have adequately demonstrated that they are similarly situated<sup>55</sup> to the initial waiver recipients, and are deserving of a limited retroactive waiver for fax ads sent with recipients' prior express consent or permission prior to April 30, 2015.

14. As commenters observe,<sup>56</sup> the Commission granted waivers to petitioners where no record evidence demonstrates that they 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 and where the petitioners referenced the confusion between the footnote and the rule.<sup>57</sup> We find that the five petitioners are similarly situated and thus qualify for waivers. The faxes at issue were sent prior to the Commission's clarification in the *2014 Anda Commission Order*, petitioners assert their general lack of understanding that the rules applied to solicited faxes and/or refer to the confusion caused by the inconsistency between the text of the *Junk Fax Order* and the erroneous footnote,<sup>58</sup> and no record evidence rebuts the presumption of confusion or misplaced confidence.

15. All five 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 five petitions, one is not opposed by commenters. Of the remaining four petitions, opponents argue that petitioners are not similarly situated to the prior waiver recipients. More specifically, opponents assert the following: petitioners did not actually get consent;<sup>59</sup> petitioners have

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<sup>51</sup> See, e.g., 47 U.S.C. § 227(b)(2); *Northeast Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*) ("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.").

<sup>52</sup> See 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

<sup>53</sup> See *Northeast Cellular*, 897 F.2d at 1166.

<sup>54</sup> See *2014 Anda Commission Order*, 29 FCC Rcd at 14009-10, paras. 24-26.

<sup>55</sup> See e.g., *supra*. at n.36. 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. 38. 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.

<sup>56</sup> See, e.g., Megadent Reply Comments at 2; Ohio Reply Comments at 6; Scrip Reply Comments at 8.

<sup>57</sup> See *2014 Anda Commission Order*, 29 FCC Rcd at 14009-10, paras. 24-26.

<sup>58</sup> See Megadent Petition at 2; Costco Petition at 5, 6; Dental Fix Petition at 4; Scrip Petition at 7; SourceMedia Petition at 4.

<sup>59</sup> See e.g., ABC Comments on Costco Petition at 2.

not argued actual confusion;<sup>60</sup> and petitions were untimely filed.<sup>61</sup> We address each argument in turn and find that none merit denying the requested waivers.

16. First, we 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 express permission of the recipients to send the faxes.<sup>62</sup> That remains a question for triers of fact in the private litigation.

17. Second, we reject arguments that the Commission made actual, specific claims of confusion a requirement to obtain a waiver. The Commission did not require petitioners to plead specific, detailed grounds for individual confusion, and we therefore cannot impose that requirement now. The petitioners asserted their general confusion regarding the opt-out notice requirement for solicited faxes and there is no evidence in the record demonstrating that petitioners understood they were required to comply but failed to do so.

18. 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.

19. 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 waivers granted herein apply only to the petitioners insofar as they may have failed to comply with section 64.1200(a)(4)(iv) prior to April 30, 2015. As a result, the waivers granted herein shall not apply to conduct occurring after April 30, 2015, nor shall they 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 these waivers do not affect the prohibition against sending unsolicited fax ads, which has remained in effect since its original effective date.<sup>63</sup> Nor should the granting of such waivers be construed in any way to confirm or deny that these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private litigation.<sup>64</sup>

20. In this Order, we also deny Ivoclar Vivadent, Inc., Renaissance Systems and Services, LLC, athenahealth, Inc., Ohio National Mutual, Inc., and Prevention Pharmaceuticals, Inc.'s petitions for waiver on the grounds that petitioners are not similarly situated to the initial waiver recipients. In each of the five petitions, petitioners admit a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express permission or

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<sup>60</sup> See e.g., Degnen Comments on Megadent Petition at 3.

<sup>61</sup> See e.g., *id.* at 2, 4; Degnen Comments on Dental Petition at 6-7; Wilder Comments on Scrip Petition at 3.

<sup>62</sup> See *2014 Anda Commission Order*, 29 FCC Rcd at 14012, para. 31.

<sup>63</sup> See 47 C.F.R. § 64.1200(a)(4).

<sup>64</sup> The record indicates that the question of whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties. See, e.g., ABC Comments on Costco Petition at 2.



consent.<sup>65</sup> The *2014 Anda Commission Order* made clear that ignorance of the law would not constitute grounds for a waiver.<sup>66</sup> Because these five parties admit their ignorance of the law, their petitions must be denied.

21. In addition, we deny Zimmer Dental, Inc. d/b/a/ Zimmer Dental, Amy Beth Gerzog and John Does 1-10's petition on the ground that a waiver is not appropriate for the failure to include the opt-out notice on faxes sent pursuant to an existing business relationship. In its petition, Zimmer asserts that because the faxes were sent to registered customers it "reasonably believed that they were within the provision of the Junk Fax Protection Act stating that the opt-out notice does not apply because the transmissions were not unsolicited."<sup>67</sup> Not only does this assertion establish that the petitioner was ignorant of the law<sup>68</sup> – which provides independent grounds to deny the petition – but the *2014 Anda Commission Order* was clear in stating that a waiver will not be extended to the requirement to include opt-out language on faxes pursuant to an existing business relationship, which it said was clear and without controversy.<sup>69</sup>

#### IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 227, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and the authority delegated in sections 0.141 and 0.361 of the rules, 47 C.F.R. §§ 0.141, 0.361, that the petitions for retroactive waiver of section 64.1200(b)(1) of the Commission's rules, 47 C.F.R. § 64.1200(b)(1), filed by Megadent, Inc. d/b/a Megadent Labs, Inc. d/b/a Megadent d/b/a Megadent Laboratories and Kim Martinez, Costco Wholesale Corporation, Dental Fix Rx LLC, Scrip Holding Co., and SourceMedia LLC, in CG Docket Nos. 02-278 ARE GRANTED insofar as they may have failed to comply with the opt-out notice requirement for fax advertisements sent with the prior express invitation or permission of the recipient prior to **April 30, 2015**. Full compliance with this rule is required by these parties from that date forward.

23. IT IS FURTHER ORDERED, that the request for declaratory ruling filed by Costco Wholesale Corporation in CG Docket Nos. 02-278 and 05-338 IS DENIED to the extent discussed herein.

24. IT IS FURTHER ORDERED THAT the petitions for retroactive waiver of the Commission's rule 47 C.F.R. § 64.1200(a)(4)(iv) filed by Ivoclar Vivadent, Inc., Renaissance Systems and Services, LLC, Zimmer Dental, Inc. d/b/a/ Zimmer Dental, Amy Beth Gerzog and John Does 1-10,

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<sup>65</sup> See Ivoclar Petition at 2 (sales representative not aware of the opt-out requirement); Renaissance Petition at 2 (not aware of the Commission's October 30, 2014 Order); Athena Petition at 6 (was not monitoring FCC's Orders; not prepared to be fully compliant until August 2015); Ohio Petition at 6 (prior to being sued, petitioner had no understanding that opt-out notices were required); Prevention Petition at 2 (sales representative was not aware of the opt-out requirement).

<sup>66</sup> See *2014 Anda Commission Order*, 29 FCC Rcd at 14010, para. 26 ("simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver").

<sup>67</sup> *Id.* at 3.

<sup>68</sup> See 47 C.F.R. § 64.1200(a)(4)(iii) which requires faxes sent to parties pursuant to an existing business relationship to include an opt-out notice.

<sup>69</sup> See *2014 Anda Commission Order*, 29 FCC Rcd at 14011 n.99 ("there is no confusion regarding the applicability of this requirement to such faxes").

Athena Health, Inc., Ohio National Mutual, Inc., and Prevention Pharmaceuticals, Inc. ARE 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):

<u>Commenter</u>	<u>Petition(s)</u>	<u>Abbreviation</u>
ABC Business Forms, Inc. and The Backer Law Firm, LLC	Costco Petition	ABC
Suzanne Degnen, D.M.D., P.C.	Megadent Petition; Zimmer Petition; Dental Petition	Degnen
<b>Megadent, Inc. d/b/a Megadent Labs, Inc. d/b/a Megadent d/b/a Megadent Laboratories and Kim Martinez</b>	<b>Megadent Petition</b>	<b>Megadent</b>
Florence Mussat M.D., S.C.	McVey Petition	Mussat
<b>Ohio National Mutual, Inc.</b>	<b>Ohio Petition</b>	<b>Ohio</b>
<b>Scrip Holding Company, a/k/a Scrip, Inc.</b>	<b>Scrip Petition</b>	<b>Scrip</b>
St. Louis Heart Center, Inc. and JT's Frames, Inc.	Athena Petition; Ohio Petition	St. Louis
Wilder Chiropractic, Inc.	Scrip Petition	Wilder

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