

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
Petition of Alma Lasers, Inc. for)	
Retroactive Waiver of)	
47 C.F.R. § 64.1200(a)(4)(iv))	CG Docket No. 05-338
)	
)	

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s *Order*, CG Docket No. 05-338, FCC 14-164 (rel. Oct. 30, 2014), Petitioner Alma Lasers, Inc. (“Alma”), by its attorneys, respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) of its rules.

I. THE COMMISSION’S OCTOBER 30, 2014 ORDER

On October 30, 2014, the Commission issued Order FCC 1-164 (“Order”) in this docket regarding the requirement that opt-out notices be provided on fax advertisements, conforming to the rules adopted by the Commission’s 2006 Junk Fax Order, 47 C.F.R. § 64.1200(a)(4)(iv) (“2006 Order”), regardless of whether a fax was solicited or sent with the recipient’s prior permission. In addition, the Commission granted retroactive waivers of the opt-out requirement to certain fax advertisement senders to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the Commission’s] rules.” (Order, ¶ 1)

The Commission found good cause to grant the retroactive waivers based on potential confusion in the interpretation of the 2006 Order:

The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the

applicability of this requirement to faxes sent to those recipients who provided prior express permission.

* * *

Further, some commenters question whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(4)(iv). Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice 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. (Order, ¶¶ 24-25 (citations omitted))

The Commission found that granting the requested retroactive waivers would serve the public interest, noting that the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.” (Order, ¶ 27) Because there may have been a mistaken belief by some parties that the opt-out notice requirement did not apply, the “confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement.” (*Id.* (citations omitted))

The Commission stated that “[o]ther, similarly situated parties may also seek waivers such as those granted in this Order”, although it is expected that within six months all fax senders are “to be aware of and in compliance with the requirement.” (Order, ¶ 30) The Commission directed that parties making similar waiver requests make every effort to file within six months of the release of the Order. (*Id.*)

II. ALMA IS SIMILARLY SITUATED AND RESPECTFULLY REQUESTS A RETROACTIVE WAIVER PURSUANT TO THE ORDER

A. The Allegations in the 2012 TCPA Lawsuit Against Alma

The Petitioner Alma is a defendant in a putative class action lawsuit alleging violations of the TCPA, which is currently pending in the United States District Court for the Northern District of Illinois, *Physicians Healthsource, Inc. v. Alma Lasers, Inc.*, Case No. 1:12-cv-04978

(the “Illinois Litigation”). The plaintiff in that case seeks to recover damages on behalf of itself and others similarly situated on the grounds that Alma sent faxes which did not display a proper opt-out notice. (Dkt. No. 77) The plaintiff has asserted that consent is not available as a defense to the allegation of a TCPA violation by any putative class member because the opt-out notice provided on the faxes at issue does not comply with the 2006 Order. (Dkt. 78, at 8-9) The faxes attached to the plaintiff’s complaint in the Illinois Litigation contain an opt-out notice which states, “To be removed from the fax list please call 1.800.783.1714 or fax this form back to 1.888.269.0559 and your fax will be removed immediately.” (Dkt. 78, Ex. I) Plaintiff asserts that this notice does not comply with 47 C.F.R. § 64.1200(a)(4)(iv). (Dkt. 78, at 7-8) Therefore, the plaintiff seeks to recover on behalf of all persons who received a fax that did not contain the compliant opt-out notice, regardless of whether the fax was solicited by the recipient or if Alma had express permission to send the fax.

Petitioner Alma receives numerous inquiries from customers and potential customers requesting information about the products (laser skin treatment equipment) that it sells in the United States and educational seminars it sponsors relating to laser skin treatments. Alma’s marketing director testified in the Illinois Litigation that, among other communications relating to consent, representatives obtained prior express permission from customer contacts prior to sending them faxes in response to specific information requests. (Dkt. 79, at 15 and Exhibit H (citing the testimony of Karen Wheeler (representatives would “call and personally invite [customer contacts] to the seminar, and then fax upon getting verbal permission to send that invitation.”))) This is consistent with the testimony of several Alma customers who averred that they consented to receiving faxes from Alma. (Dkt. 79, Exhibits 6 and 7)

B. Alma Is Similarly Situated to Parties Granted Waivers By the Order

Alma is similarly situated to the parties that were granted retroactive waivers by the Order, in that it sent certain faxes that were solicited or sent with express permission, and was not aware that the requirement for opt-out language in the form required by Section 64.1200(a)(4)(iii) and (iv) applied to those faxes. As with the parties that were granted waivers by the Order, Alma is potentially subject to substantial liability as well as the cost of litigation to the parties and the federal Court. Alma endeavors to maintain exemplary relations with its customers and provided notice of a right to opt-out to fax recipients who gave express permission to Alma to send faxes to them.

C. A Limited Retroactive Waiver is Appropriate

The Commission may grant a waiver where, as here, the underlying purpose of the rule(s) would not be served or the factual circumstances mandate a waiver to avoid application of the rule that would be inequitable, unduly burdensome or contrary to the public interest. 47 C.F.R. § 1.925(b)(3)(i)-(ii). *See also* 47 C.F.R. § 1.3 (the Commission may waive any provision of its rules for good cause shown when it concludes that a waiver would serve the public interest, considering all relevant factors). The stated purpose of Section 64.1200 is to allow consumers to stop unwanted faxes. That purpose would not be furthered by penalizing the consensual transmission of information where the recipient provides express consent to the sending of a fax, and where the fax contains opt-out language that may not strictly conform to the 2006 Order. The grant of a limited and retroactive waiver to Alma in this case would serve the public interest by avoiding an abuse of the private right of action created by the TCPA, through the exploitation of minor defects in the language of the opt-out notice for solicited faxes to maintain expensive and time-consuming litigation that threaten businesses like Alma with the potential of millions of

dollars in liability. In light of these circumstances, the factors that weighed in favor of the grant of retroactive waivers to the parties addressed by the Order are applicable here, and good cause exists for the grant of a retroactive waiver to Alma.

Alma therefore respectfully requests a retroactive waiver from liability under the TCPA for faxes that Alma sent to recipients from which it had obtained prior express invitation or permission and which did not contain an opt-out notice in strict compliance with Section 64.1200(a)(4)(iii) and (iv).

Alma understands the importance of compliance with Commission's rules, including the 2006 Order as clarified by the Order FCC 1-164, and has implemented procedures going forward to ensure compliance.

Date: November 14, 2014

Respectfully submitted,

ALMA LASERS, INC.

By: /s/ John F. Kloecker

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