Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition of Grey House Publishing, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules	CG Docket No. 02-278 CG Docket No. 05-338

PETITION OF GREY HOUSE PUBLISHING INC. FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules Grey House Publishing, Inc. ("Grey House Publsihing") respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by Grey House Publishing with the prior express consent or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation. The Commission recently granted a number of such waivers and invited similarly situated parties, such as Grey House Publishing, to file requests for the same relief.

I. INTRODUCTION.

Founded in 1980, Grey House Publishing is one of the major publishers and distributors of reference and directory works, in both print and electronic forms, in the United States and Canada. In addition to publishing over twenty business/industry directories, annually, that are the authoritative databases for those "Verticals", it is also the publisher of many of the most important reference titles found in Public and University libraries. Among these are the **"Books In Print"** product line as well as the **"Readers Guide to Periodical Literature"**. Grey House also publishes award winning, one and two Encyclopedic works, in its Grey House, Salem Press, and HW Wilson product lines. It is

the largest publisher of reference works in Canada, including **"The Canadian Almanac",** now in its 167th year of publication.

Grey House Publishing is a privately owned company. It has no history of any FCC complaints, TCPA lawsuits or any notices or complaints from any recipient of a facsimile other than Drug Reform Coordination Network, Inc. a TCPA class action plaintiff in multiple lawsuits.

Grey House Publishing is currently a defendant in one of the TCPA class action lawsuits filed by this plaintiff and its TCPA attorneys. The plaintiff's Complaint alleges plaintiff (an existing listee in a directory Grey House Publishing publishes) and an unknown putative class of recipients received facsimile advertisements from the defendant without a compliant opt-out notice and seeks potentially substantial monetary damages for alleged violations of the opt-out notice requirement for faxes allegedly sent at the request of the recipients. Grey House Publishing denied the facsimile plaintiff received was an advertisement and stated it simply contained a request to update the listee's information currently in the directory and further stated plaintiff and any other recipients consented to receive the facsimile. The basis for the lawsuit is the TCPA. The plaintiff and Grey House Publishing dispute whether the fax at issue in the lawsuit is an advertisement and was solicited (i.e. sent with prior express invitation or permission).[1]

Grey House Publishing communicates with its existing listees in its Directories, including by sending facsimiles, to obtain information about the listees for the Directories. Grey House Publishing uses facsimiles to gather information from existing listees and not

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1 *See* Drug Reform Coordination Network, Inc. v. Grey House Publishing, Inc., Civil Action No. 1:14-cv-00701-APM, U. S. District Court for the District of Columbia (filed April 23, 2014).

for advertising or marketing purposes. Grey House Publishing markets and advertises its services separately and not with facsimiles.

Since the adoption of Section 64.1200(a)(4)(iv), plaintiffs and their attorneys have seized on the controversy and uncertainty of the Regulation and Commission rule created in part by confusing and conflicting statements regarding the scope and applicability of such rule to Solicited Faxes to bring numerous class action lawsuits for TCPA violations. Such lawsuits have been brought against legitimate companies for engaging in consensual communications where the fax recipients had provided consent to receive faxes. Many of these class action lawsuits seek millions of dollars in damages based on the Commission's conflicting statements pertaining to the Regulation.

However, it is not necessary for the Commission to consider that dispute in acting on this Petition, and the dispute does not impact the sole issue raised in this Petition. The Commission expressly noted that granting a waiver should not "be construed in any way to confirm or deny whether the petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.[2]

On October 30, 2014, the Commission released FCC Order 14-164 (the "Fax Order").[3] Prior to the release various petitioners had challenged the Commission's authority to issue the Regulation and alternatively sought retroactive waivers of its opt-out notice requirement for Solicited Faxes. In response to the admitted uncertainty about whether the opt-out notice applied to Solicited Faxes, the Commission granted retroactive waivers to

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2 *See* Fax Order, para. 31.

3 *See* Petitions 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, FCC 14-164 (rel October 30, 2014).

certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. The waivers granted in the Fax Order apply only to the identified petitioners, and the Commission made clear that other similarly situated parties, like Grey House Publishing, may also seek such waivers.

There is no public interest in strict enforcement of the Regulation against businesses that were confused by the Regulation and therefore did not include compliant opt-out notices to fax recipients who had provided "prior express invitation or permission" to be sent faxes. In contrast public interest would be harmed by requiring parties like Grey House Publishing to divert substantial capital, time and human resources from its lawful business to engage in unnecessary (and possibly business ending) litigation because of past confusion over the Commission's Regulation. A waiver is thus appropriate here.

II. BACKGROUND

A. The Current Statutory and Regulatory Framework.

The TCPA, as codified in 47 U.S.C. Section 227 *et seq*., and amended by the Junk Fax Prevention Act of 2005 ("JFPA"),[4] prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."[5] An "unsolicited advertisement" is any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior express invitation or permission."[6]

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4 *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

5 47 U.S.C. Sections 227(a)(5) and (b)(1)(C).

6 *Id*., Section (a)(5).

As relevant to this Petition, the Regulation states a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice."[7] In addition to the Regulation, the Commission also adopted rules implementing the JFPA.[8] As explained in the Fax Order, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice requirement to Solicited Faxes.[9] The Commission clarified this important issue in the Fax Order.

Pursuant to the Fax Order, the Commission "confirmed that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders."[10] Due to the confusion,[11] however, the Commission decided to grant retroactive waivers to parties affected by the

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7 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration, 21 FCC Rcd at 3812, para. 48 (2006) (the "Junk Fax Order"); *see* 47 C.F.R. Section 64.1200(a)(4)(iv).

8 *See generally* Junk Fax Order.

9 Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n. 154 ("We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.") (emphasis added).

10 Fax Order, para. 1.

11 The Commission detailed the reasons for such confusion in the Fax Order: "Specifically, there are two grounds that we find led to confusion among affected parties that the opt-out notice did not apply to fax ads sent with the prior express permission of the recipient, the combination of which presents us with special circumstances warranting deviation from the rule. The record indicates that inconsistency between a footnote contained in the Junk Fax Order (only unsolicited advertisements) and the rule (all advertisements) caused confusion regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Further, the notice of intent to adopt the Regulation did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with prior express permission of the recipient." Fax Order, para. 24-25 (emphasis in original).

confusion. Affected parties are those, like Grey House Publishing, who have sent faxes with the recipient's prior express permission and may reasonably have been uncertain about the opt-out notice requirements for such faxes. The Commission stated:

> "We recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirements for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide those parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.
>
> "We believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule."

Fax Order, para. 1.

The Commission stated that other affected parties similarly situated as the petitioners, like Grey House Publishing, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver.[12] Thus, Grey House Publishing's Petition is timely.

III. DISCUSSION

A. <u>The Commission Should Grant Grey House Publishing A Waiver</u>.

Grey House Publishing respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Facsimiles sent by Grey House Publishing (or on its behalf) after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown. Generally, the Commission may grant a waiver of its rules in a particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest. Further, a waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule. As shown, both

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12 Junk Fax Order, para. 48.

rationales apply and Grey House Publishing is entitled to a waiver under this standard for the same reasons the parties granted waivers in the Fax Order received them.

B. **Waiver Would Not Undermine the TCPA Policy Objective**.

Granting a waiver to Grey House Publishing would not undermine the TCPA's policy objective "to allow consumers to stop unwanted faxes."[13] Grey House Publishing does not send fax advertisements to market and advertise its goods and services. This policy is not undermined where, as here, Grey House Publishing sent Solicited Faxes to existing listees with a request for them to update their existing information in the Directories prior to the next publication who also consented to receive such faxes.

C. **Special Circumstances Warrant Deviation from the General Rule**.

The Commission explained in the Fax Order that special circumstances counsel in favor of deviation from the general rule rather than strict adherence. The Fax Order found there was "industry-wide confusion" as to whether Solicited Faxes must include an opt-out notice, based in part on the special circumstance of the confusing footnote in the Junk Fax Order. Grey House Publishing, like many other companies, was reasonably confused as to whether Solicited Faxes must include an opt-out notice. Grey House Publishing is not relying on simple ignorance of the TCPA or the FCC's attendant regulations as grounds for this waiver. For Grey House Publishing, a waiver is particularly in the public interest because denial of a waiver would subject Grey House Publishing to potentially millions of dollars in monetary damages and force it out of business. In the Fax Order the Commission made it clear that the public interest favors not subjecting businesses that understandably were confused by the Regulation and inadvertently may not have fully complied with the Regulation and are now the subject of TCPA class action

13 Fax Order, para. 27.

lawsuits seeking millions of dollars in monetary damages. In the Fax Order, the Commission stated:

> "The record in this proceeding demonstrates that a failure to comply with the rule - which as noted above could be the result of reasonable confusion or misplaced confidence – could subject parties to potentially substantial damages …. This 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. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed upon them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward."

Fax Order, para. 27.

To summarize, Grey House Publishing sent Solicited Faxes to its existing listees requesting updated information and who also consented to receive such fax ads and was reasonably uncertain about whether the opt-out notices were required on such faxes. Therefore, Grey House Publishing is similarly situated to the petitioners who were granted waivers in the Fax Order and equally entitled to the same limited retroactive waiver. Due to the nature and extent of Grey House Publishing's Solicited Faxes, the waiver will not undermine the TCPA policy objective and the public interest will be better served by the Commission granting the waiver instead of subjecting Grey House Publishing to a further diversion of time, capital and other resources defending its TCPA lawsuit and potentially millions of dollars in monetary damages that would put it out of business.

D. **Other Matters**.

Grey House Publishing supports and agrees with the Commission's finding in the Fax Order that good cause exists due to the special circumstances (i.e. the footnote, the explicitness of the notice, enforcing the rule would be unjust or inequitable, etc.), that the

public interest is better served (i.e. the confusion subjects the parties to potentially substantial damages for inadvertent violations and by balancing the legitimate business and consumer interests) by the granting of an individual limited retroactive waiver of this rule for any prior conduct, and that confusion was created in the Junk Fax Order adopting this requirement, so that several parties face liability exposure in private rights of action. Grey House Publishing is a part of this industry-wide confusion for businesses that mistakenly believed the opt-out notice did not apply to Solicited Faxes. The confusion or misplaced confidence does warrant some relief from its potentially substantial consequences; and the rule is not waived indefinitely, so consumers will not be deprived of the rule's value.

This request for a waiver is not an acknowledgement or admission by Grey House Publishing that it sent any facsimile advertisements, or any facsimile advertisements in violation of the TCPA, including any facsimile advertisements that failed to comply with the Regulation's opt-out notice requirement. The granting of the waiver should not be construed in any way to confirm or deny whether Grey House Publishing, in fact, had the prior express permission of any recipients to be sent faxes, including the faxes at issue in the private right of action currently pending against it (*see* Footnote 1, *supra*).

This Petition does not contest the protections afforded by the opt-out notice requirement going forward, the statutory authority to require opt-out information on fax ads (or, alternatively, that Section 227(b) of the Act was not the statutory basis of that requirement), or seek a repeal of the rule or a finding of substantial compliance. Grey House Publishing does not believe the Commission has violated the separation of powers vis-a-vis the judiciary and is interpreting the TCPA as the expert agency. Grey House Publishing now fully understands how the two rules – one requiring the fax sender to include opt-out information and the other requiring the recipient to use that information

when making an opt-out request are intended to work in concert and will include an opt-out notice on any fax ads it may send in accordance with the TCPA and its Regulation and rule.

IV. **CONCLUSION**.

Grey House Publishing is similarly situated to those parties who were granted waivers in the Fax Order and is seeking the same retroactive waiver of the Regulation in order to provide Grey House Publishing with the same temporary relief other petitioners were granted. For these reasons, Grey House Publishing respectfully requests that the Commission grant it a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any Solicited Faxes sent by Grey House Publishing (or on its behalf) after the effective date of the Regulation.

Respectfully submitted,

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