BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	CG Docket No. 02-278 CG Docket No. 05-338
Consumer Energy Solutions, Inc.'s Petition for Retroactive Waiver of 47 C.F.R. §64.1200(a)(4)(iv)	

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 Nos. 02-278, 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (October 30, 2014), Petitioner Consumer Energy Solutions, Inc. respectfully requests the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) of its Rules.

I. THE COMMISSION'S OCTOBER 30, 2014 ORDER CLARIFYING THE JUNK FAX ORDER.

On October 30, 2014, the Commission issued Order FCC 14-164 (the "Order") regarding the requirement that opt-out notices be provided on fax advertisements, confirming the rules adopted by the Commission's 2006 Order, 47 C.F.R. § 64.1200(a)(4)(iv) (the "Junk Fax Order"), regardless of whether a fax was *in fact* solicited, that is, where the recipient had actually requested or consented to receive it. In its Order, the Commission granted retroactive waivers of the opt-out requirement to the petitioners 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 Junk Fax 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.
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> 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 [the Telephone Consumer Protection Act'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 business 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 expected that within six months all fax senders were "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. PETITIONER IS SIMILARLY SITUATED AND RESPECTFULLY REQUESTS RETROACTIVE WAIVER PURSUANT TO THE ORDER.

A. The Allegations in the Florida Litigation Against Petitioner.

Petitioner has been a defendant in a putative class action lawsuit alleging violations of the TCPA, brought before the United States District Court for the Middle District of Florida, titled *Laub, et al., v. Consumer Energy Services, Inc., et al.*, Case No. 8:15-cv-00073-VMC-AEP (the "Florida Litigation"). The first-named plaintiff in the Florida Litigation sought to recover damages on behalf of himself and others purportedly similarly situated on the grounds that Petitioner allegedly sent faxes in violation of the TCPA and in particular, alleged that the faxes did not contain an opt-out notice that complied with the TCPA. Plaintiffs sought to recover on behalf of all persons who received faxes that did not contain an opt-out notice, regardless of whether the recipients had provided prior express permission to receive such faxes.

Petitioner intended to assert in the Florida Litigation that they are not liable under the TCPA because, among other reasons, the plaintiff and/or members of the putative class *actually solicited* the alleged faxes. The parties have since amicably resolved the matter. Nonetheless, Petitioner remains in jeopardy of a copycat claim.

B. Petitioner Is Similarly Situated to Parties Granted Retroactive Waiver by the Order.

Petitioner is similarly situated to the parties that were granted retroactive waivers by the Order. In the Florida Litigation, Petitioner is alleged to have sent faxes that did not contain proper opt-out notices. Petitioner contends the faxes were sent with the prior express permission of the recipients (in fact at the recipients' request), and Petitioner did not understand the opt-out requirement to apply to such expressly-solicited faxes. In short, as with the parties that were granted waivers by the Order, Petitioner finds itself potentially subject to liability, as well as the costs of litigation, based on the application of a provision of the Junk Fax Order over which the Commission has acknowledged reasonable confusion.

C. A Retroactive Waiver Is Appropriate.

The Commission may grant a waiver where, as here, the underlying purpose of the rule would not be served and/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. This purpose would not be furthered by subjecting Petitioner to jeopardy for faxes that did not contain proper opt-out notices where the recipients had provided prior express permission to receive (or invited) such faxes, and there was reasonable confusion over the rules relating to such faxes. Accordingly, the grant of a limited and retroactive waiver to Petitioner would serve the public interest in that the factors that weighed in favor of the grant of retroactive waiver to the parties addressed by the Order are similarly applicable here, and good cause exists for the grant of a retroactive waiver to Petitioner.

III. CONCLUSION.

Petitioner does understand the importance of compliance with the Commission's rules, including the Junk Fax Order, as confirmed and clarified by the Order, and has implemented procedures to ensure compliance. In light of the matters set forth above, Petitioner respectfully requests retroactive waiver from liability under the TCPA and the FCC's regulations and orders relating to faxes sent to recipients who had provided prior express invitation or permission to receive such faxes but where such faxes did not contain opt-out notices in compliance with Section 64.1200(a)(4)(iii) and (iv).

Dated this March 26, 2015.

Respectfully submitted,

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