

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	CG Docket No. 02-278
)	
Petition for Waiver)	CG Docket No. 05-338
of American Power & Gas LLC, AP&G)	
Holdings LLC, and Tom Cummins)	

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or the "Commission") regulations, 47 C.F.R. § 1.3, American Power and Gas LLC, AP&G Holdings LLC and Tom Cummins (hereinafter collectively referred to as "AP&G") respectfully requests that the Commission grant AP&G a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission's regulations, 47 C.F.R. § 64.1200(a)(4)(iv) (the "Opt Out Rule") with respect to any facsimiles that have been transmitted by or on behalf of AP&G prior to April 30, 2015.

This request for waiver is being submitted pursuant to the Commission's recent Order granting a retroactive waiver of the Opt-Rule and inviting "similarly situated parties" to seek similar waivers.¹ As the Commission has already determined that good cause exists for such retroactive waiver requests and grant of the waiver would serve the public interest, AP&G respectfully requests that the Commission expeditiously grant its petition for waiver.²

¹ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; 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 No. 02-278, 05-338, Order, FCC 14-164, ¶30 (rel. Oct. 30, 2014) ("Fax Order").

² See Fax Order at ¶ 22.

I. BACKGROUND

AP&G owns and operates an Energy Service Company (“ESCO”) with its principal place of business being 411 Cleveland Street, Suite 299, Clearwater, FL 33755. AP&G is licensed to provide energy service to customers in New York State and Pennsylvania. AP&G has been in business since 2010. Tom Cummins is the CEO of AP&G.

AP&G conducts direct marketing by obtaining a “scrubbed”³ list of prospective customers and their respective telephone numbers. AP&G does not obtain a list of any prospective customers’ fax numbers. AP&G’s customer service representatives (the “CSRs”) initiate phone calls with prospective customers to provide information regarding APG’s services and potential savings on their energy bill. The CSRs follow a script that was prepared and reviewed by attorneys to ensure that it is in compliance with federal, state, and local laws and regulations.

The CSRs do not send out any faxes unless the prospective customer expressly requests a fax. If a prospective customer requests a fax writing, then the CSR inputs the fax number into the computer system, and the fax is sent out to that number. Faxes are not sent to any prospective customer unless the CSR inputs the number and clicks the send button. AP&G does not send out any faxes unless it is expressly requested by a prospective customer.

The Telephone Consumer Protection Act (“TCPA”), enacted in 1991, prohibits the use of a fax machine to send an “unsolicited advertisement.”⁴ In 2005, Congress

³ A scrubbed customer list is the industry term for a customer list customarily purchased from a company who certifies that all the customers and their respective telephone numbers have been confirmed not to be on the “National Do Not Call Registry.”

⁴ Pub. L. No. 10243, 105 Stat. 2394 (codified at 47 U.S.C. § 227).

enacted the Junk Fax Prevention Act to "require the sender of an *unsolicited* fax advertisement to provide specified notice and contact information on the fax that allows recipients to 'opt out' of any future fax transmissions from the sender."⁵ Therefore, AP&G did not believe that any of its solicited facsimiles required opt-out notices. However, as a consequence of this regulatory uncertainty, AP&G, like many other companies, now finds itself a defendant in a putative class action lawsuit filed in federal court which alleges, *inter alia*, violations of the TCPA.⁶

The named plaintiff in that case, along with the putative class, seeks damages for alleged violations of the TCPA on the grounds that, *inter alia*, AP&G allegedly sent facsimile transmissions to the named plaintiff and the putative class which did not bear the opt-out notice required by the Opt-Out Rule. This petition for waiver does not ask the Commission to resolve the factual and legal questions raised in the pending litigation; these issues properly remain within the jurisdiction of the district court. By this filing, AP&G seeks only to obtain the same retroactive waiver of the Opt-Out Rule that the Commission granted to multiple petitioners in the Fax Order.

II. GRANT OF THE AP&G RETROACTIVE WAIVER REQUEST IS IN THE PUBLIC INTEREST.

As the Commission concluded in the Fax Order, good cause exists for a retroactive waiver of the Opt-Out Rule insofar as it relates to the failure to comply with

⁵ 47 C.F.R. § 64.1200(a)(4)(iv)(emphasis added); *see also* 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 Red 3787, fn. 154 ("Junk Fax Order") (2006) (stating that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements" (emphasis added)).

⁶ *Nicholas Fitzgerald, on behalf of himself and all others similarly situated v. American Power & Gas LLC, AP&G Holdings LLC and Tom Cummins*, Case No.: 2:14-CV-02112 (D.N.J.).

the Opt-Out Rule's opt-out notice requirements for facsimile transmissions sent with the prior express invitation or permission of recipients.⁷

The Commission recognized that this good cause is based, first, on the "inconsistency" between a footnote to the Junk Fax Order and the Opt-Out Rule; the Commission stated that this inconsistency has "caused confusion or misplaced confidence" regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission.⁸ This acknowledged inconsistency has contributed to substantial uncertainty surrounding the opt-out notice requirements for solicited fax advertisements. Like the petitioners granted retroactive waivers in the Fax Order, there is "nothing in the record here demonstrating that the petitioners 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."⁹ As a "similarly situated party" - *i.e.*, a defendant in a pending TCPA lawsuit - good cause exists to resolve this inconsistency by granting AP&G's request for a retroactive waiver.

Grant of the retroactive waiver request would also be in the public interest. AP&G notes that the Commission has already decided that such retroactive waivers will serve the public interest because the "confusion or misplaced confidence ... left some businesses potentially subject to significant damage awards" and that "on balance .. it serves the public interest. .. 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."¹⁰ Based on this finding, the FCC granted

⁷ *Fax Order* at ¶ 22.

⁸ *Junk Fax Order* at fn. 154; *see also Fax Order* at ¶ 24.

⁹ *Fax Order* at ¶ 26.

¹⁰ *Id.* at ¶ 27.

a retroactive waiver to all of the petitioners explicitly referenced in the Order and further invited other "similarly situated parties" to seek retroactive waivers as well.¹¹

III. CONCLUSION

For the foregoing reasons, AP&G respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) effective through April 30, 2015.

Respectfully Submitted,

April 17, 2015

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¹¹ *Id.* at ¶30.