

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

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| In the Matter of |) | |
| |) | |
| Petition of Electrical Enlightenment, Inc and |) | CG Docket No. 05-338 |
| The Enlightenment Companies for Retroactive |) | |
| Waiver of 47 C.F.R. 64.1200(a)(4)(iv) |) | |

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communication Commission’s rules and Paragraph 30 of the Commission’s October 30, 2014 order, Petitioners, Electrical Enlightenment, Inc. and the Enlightenment Companies, by and through their attorneys, Morse, Bolduc & Dinos LLC respectfully request that the Commission grant a retroactive waiver of the opt-out requirements contained in Section 64.1200(a)(4)(iv).

A. Federal Communication Commission’s October 30, 2014 Order allowing for the retroactive waiver of TCPA “opt-out” provision requirements

On October 30, 2014, the FCC issued Order 1-164 which addressed the requirements pertaining to opt out notices that must be included on facsimile advertisements. This order was in conformity with the rules adopted by the FCC’s 2006 Junk Fax Order. One consequence of this order was the determination that all faxes, whether or not those fax were unsolicited, must contain opt-out notices in compliance with the FCC rules.

Recognizing the issues raised by this Order, the FCC also provided that petitioners could obtain retroactive waivers of the opt-out requirements with respect to faxes that were not unsolicited. The stated reason for this decision was to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by the Rules.” The Commission found that good cause existed to grant the retroactive waivers because of potential confusion with the 2006 Junk Fax Order. The FCC stated as follows:

“The record indicates that consistency 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 at 24-25

Furthermore, the FCC found that granting the retroactive waivers requested would serve the public interest by noting that the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.” Order at 27. Since there may have been a mistaken belief by some fax senders that opt-out requirements did not apply to consensual faxes, the “confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA’s private right of action .”

The FCC stated that “other, similarly situated parties may also seek waivers such as those granted in the Order.” The FCC directed that parties “make every effort to file within six months of the release of this Order.”

B. Petitioners are similarly situated and seek a waiver such as that granted in the Order

Petitioner, Electrical Enlightenment, Inc. is the defendant in a putative class action lawsuit pending in the Northern District of Illinois under cause number 14-cv-9503. The Plaintiff, J. Barrett Co, seeks to recover damages on behalf of itself and other class members based on the allegation that Petitioner allegedly sent unsolicited fax advertisements in violation of the TCPA. The Plaintiff alleges specifically that Petitioner’s fax does not contain an opt-out that complies with the TCPA. Plaintiff seeks to recover on behalf of all persons who received faxes that did not contain a compliant opt-out notice regardless of whether the recipients had provided consent to receive faxes.

Petitioners will assert in the underlying litigation that they are not liable under the TCPA in part due to the fact that Plaintiff consented to receive faxes from Petitioner. Petitioners are similarly situated as to parties granted retroactive waivers because it is alleged that a fax was sent without a compliant

opt-out notice. Petitioner contends that its fax was sent with consent from the Plaintiff and that Petitioners did not believe that the opt-out requirement applied to consensual faxes. Now, Petitioners find themselves subject to liability and legal costs based on the confusion created by the FCC's 2006 order.

A waiver is appropriate from the FCC where the underlying purpose of the rule would not be served and/or factual circumstances mandate a waiver to avoid inequity or is contrary to the public interest. 47 C.F.R. 1.925(b)(3)(i)(ii). The stated purpose of 64.1200 is to allow consumers to stop the receipt of unsolicited faxes. This purpose would not be met where the Rules would subject the Petitioner to liability and legal costs based on an issue involving faxes that were not unsolicited and where there was confusion regarding the scope of the rules with respect to such faxes. A grant of waiver would serve the public interest and good cause exists for a grant of waiver.

Thus, Petitioners respectfully request retroactive waivers from liability under the TCPA and FCC Regulations relating to opt-out requirements applicable to faxes that were sent with the permission of the recipient.

Dated:

Respectfully submitted,

___/s/ Joseph D. Ackerman_____

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