

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

In the Matter of)	
)	
Petition for Waiver Of UBM LLC)	CG Docket No. 02-278
)	
)	CG Docket No. 05-338
)	
)	

**PETITION FOR WAIVER OF SECTION 64.1200(a)(4)(iv)
OF THE COMMISSION’S RULES**

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PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Rules¹ of the Federal Communication Commission (the “Commission”), and the Commission’s Order dated October 30, 2014 (“Waiver Order”),² Petitioner UBM LLC (“UBM”) respectfully requests that the Commission grant UBM a retroactive waiver of Section 64.1200(a)(4)(iv) of its Rules (“Regulation”), to the extent the Regulation may apply to any faxes transmitted by UBM (or on its behalf) with the prior express permission of the recipients or their agents.³

In its Waiver Order, the Commission clarified that an opt-out notice is required under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”), and the Commission’s Regulation, 47 C.F.R. § 64.1200(a)(4)(iv), for facsimile advertisements sent with the recipients’ prior express permission or invitation (“solicited fax advertisements”) and must comply with the requirements of 47 U.S.C. § 227(b)(1)(C) and (2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii).⁴ At the same time, the Commission recognized that “good cause” exists for granting a retroactive waiver of this requirement—specifically, the state of justified, industry-wide confusion, which has given rise to substantial liability for inadvertent violations.⁵ Accordingly, the Commission retroactively waived its Regulation for twenty-seven petitioners and invited similarly situated parties to seek the same relief on or before April 30, 2015.⁶

Good cause exists for granting UBM’s request for a retroactive waiver. UBM is similarly positioned to the original petitioners. It has been subject to the special circumstances addressed

¹ 47 C.F.R. §§ 1.2, 1.3; 5 U.S.C. § 554 (e).

² *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (“Waiver Order”).

³ UBM has denied, and continues to deny, that it faxed advertisements or that any alleged faxes were unsolicited.

⁴ Waiver Order at ¶ 1.

⁵ *Id.* at ¶¶ 23-28, 48, *ref.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 2005, Report and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3812, n. 154 (2006) (“Junk Fax Order”).

⁶ *Id.* at ¶¶ 30, 48.

in the Waiver Order, including confusion regarding proper application of the Regulation—caused by an inconsistent footnote in the Junk Fax Order and lack of explicit notice. As a result, UBM is facing the possibility of substantial costs or liability, such that waiver is in the public interest.⁷ For these reasons, and those set forth below, UBM respectfully requests a retroactive waiver of Section 64.1200(a)(4)(iii).

I. BACKGROUND.

UBM is currently facing a putative class action lawsuit by Grind Lap Services, Inc. (“Grind Lap” or “Plaintiff”), *Grind Lap Services, Inc. v. UBM LLC*, No. 14-cv-06448 (N.D.Ill.) (filed Aug. 21, 2014) (cited as “*Grind Lap*”), for the alleged faxing of a one-page document on March 21, 2012. In particular, Plaintiff alleges that UBM “violated 47 U.S.C. § 227 et seq. [sic] by not providing an opt-out notice on [the subject fax] as required by the TCPA.”⁸

The subject fax is a “renewal request” for EDN, a trade magazine tailored to electrical engineers that UBM made available in print at no cost on a reader-requested basis. The renewal request asks Plaintiff to re-confirm its then-existing subscription to EDN. It is addressed to Plaintiff and includes its address, fax number and account number. It also lists a toll-free number that Plaintiff could call regarding its subscription—or, to request not to receive future faxes.⁹

One of UBM’s defenses is that it obtained prior express consent before sending the renewal request.¹⁰ In addition, UBM has asserted that the renewal request is not an “unsolicited advertisement,” but a permitted “transactional communication” pertaining directly, and exclusively, to Grind Lap’s then-existing subscription to EDN.¹¹ For its part, Grind Lap denies that it consented to receive faxes from UBM, denies that it subscribed to EDN and maintains that

⁷ Waiver Order at ¶¶ 24-27.

⁸ Class Action Complaint, *Grind Lap*, Dkt #1 at ¶¶ 14, 37 (filed Aug. 21, 2014).

⁹ See e.g., *id.* at Exh. A.

¹⁰ Answer And Affirmative Defenses, *Grind Lap*, Dkt. # 39 at p 16 (filed on Mar. 30, 2015).

¹¹ *Id.*; Defendant’s Memorandum Of Law In Support Of Its Motion For Summary Judgment, *Grind Lap*, Dkt. #42.

the subject fax is an advertisement.¹² However, these factual disputes are properly resolved in the private lawsuit and does not impact UBM's request for a retroactive waiver.¹³

A. The TCPA And Its Implementing Regulations.

The TCPA prohibits the use of a fax machine to send unsolicited advertisements.¹⁴ The Junk Fax Prevention Act of 2005 ("JFPA") amended the Act and codified the established business relationship ("EBR") defense for fax advertisements sent pursuant to relationships that Congress recognized as implying consent.¹⁵ As a condition of this defense, unsolicited fax advertisements must include an opt-out notice to inform recipients how to contact the sender and stop future faxes.¹⁶ The JFPA makes no mention of the Regulation and does not extend the opt-out requirement to *solicited* fax advertisements.

The Commission adopted the Regulation in the Junk Fax Order along with the requirements for the EBR exemption.¹⁷ At the same time, the Commission stated, in a footnote, that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements."¹⁸ The Junk Fax Order is the first articulation of any regulation calling for opt-out language on solicited fax advertisements; indeed, the Commission did not explicitly reference any such requirement in its Notice of Proposed Rulemaking.¹⁹

B. The Commission's Waiver Order.

The Commission issued the Waiver Order in response to numerous petitions challenging the Regulation. Declining to invalidate its rule, the Commission clarified: "senders of fax ads

¹² See e.g., Class Action Complaint, *Grind Lap*, Dkt #1, *gen.*

¹³ See e.g., Waiver Order at ¶ 26.

¹⁴ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227; 47 U.S.C. § 227 (a)(5) and (b)(1)(C).

¹⁵ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

¹⁶ 47 U.S.C. § 227(b)(2)(D).

¹⁷ Junk Fax Order, 21 FCC Rcd at 3812.

¹⁸ *Id.* at 3809, n. 154.

¹⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act*, Notice of Proposed Rulemaking, 20 FCC Rcd. 19758, 19767-70 (2005) ("Junk Fax NPRM").

must include certain information on the fax ads that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.”²⁰ Concurrently, the Commission acknowledged—given the unique backdrop of the Regulation’s inception and its subsequent impact on liability—that requiring retroactive, strict adherence is not in the public interest.

The Commission determined that “good cause” exists for waiving the Regulation.²¹ First, special circumstances warrant deviation. Specifically, the inconsistent footnote in the Junk Fax Order and lack of explicit notice created “confusion” and engendered “misplaced confidence” that the opt-out rule does not apply to solicited fax advertisements.²² Second, waiver is in the public interest. Inadvertent violations—arising after the Junk Fax Order when the industry was afflicted by understandable confusion—could result in substantial liability.²³ Based on this “good cause,” the Commission “grant[ed] retroactive waivers...to provide...temporary relief from any past obligation to provide the opt out notice to such recipients required by our rules.”²⁴ The Commission also invited “similarly situated” parties to seek the same waiver on or before April 30, 2015.

The Commission explicitly declined to resolve factual disputes in its Order. It granted waivers without “confirm[ing] or deny[ing] 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.”²⁵

²⁰ Waiver Order at ¶ 1.

²¹ *Id.* at ¶¶ 23-28, 48.

²² *Id.* (“the footnote stated that ‘the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.’ The use of the word ‘unsolicited’ in this one instance may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient”).

²³ *Id.* at ¶ 27.

²⁴ *Id.* at ¶¶ 24-25.

²⁵ *Id.* at ¶ 31.

Similarly, the Commission did not make any evidentiary rulings regarding whether there was actual confusion on the part of the petitioners.²⁶

II. UBM SHOULD BE GRANTED A RETROACTIVE WAIVER.

UBM falls squarely within the class of persons for whom the Commission intended to retroactively waive Section 64.1200(a)(4)(iv). UBM is “similarly situated” to the original petitioners; and, equivalent good cause supports its Petition. Thus, UBM should receive the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission has already provided.

A. UBM Is Similarly Situated To The Original Petitioners.

Like the original petitioners, UBM has been sued in a putative class action lawsuit for an alleged violation of 47 U.S.C. § 227 (b)(1) and the Regulation. This lawsuit seeks substantial damages—similar to the liability described by the original petitioners and the Commission.

UBM has asserted the same defense as the original petitioners: it had express permission to send the subject fax—a subscription renewal notice.²⁷ UBM is also confronted with the possibility of substantial costs or liability for an alleged violation that occurred on March 21, 2012—after the Junk Fax Order—when there was reasonable confusion regarding the applicability of the Regulation.²⁸ UBM was subject to the same “misplaced confidence” that the Commission describes in its Order; and, consequently, had no legal certainty that an opt-out notice is required for solicited faxes. Thus, UBM is “similarly situated” to the original parties.

B. Good Cause Exists For Waiving the Regulation.

The Commission’s rules allow it “at any time” to waive its own regulations for good cause.²⁹ “Good cause” exists upon a showing of “special circumstances warranting an exception

²⁶ *Id.* at ¶ 26.

²⁷ Answer *Grind Lap*, Dkt. #39 at p. 16; Waiver Order at ¶ 11.

²⁸ Complaint, *Grind Lap*, Dkt. #1 at ¶ 14, Exh. A; Waiver Order at ¶¶ 24-27.

²⁹ 47 C.F.R. § 1.3; *Keller Commc'ns, Inc. v. F.C.C.*, 130 F.3d 1073, 1076 (D.C. Cir. 1997).

in the public interest.”³⁰ The Commission has already determined that both elements are present with regard to Section 64.1200(a)(4)(iv) and, accordingly, has granted retroactive waivers to twenty-seven petitioners.³¹ Equivalent “special circumstances” and “public interest” concerns exist with regard to UBM, such that retroactive waiver of the Regulation is warranted.

First, the special circumstances detailed in the Order counsel in favor of deviation from the Regulation with regard to UBM. The “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of explicit notice—resulted in “misplaced belief” that the opt-out notice requirement does not apply to solicited fax advertisements.³² UBM was affected by this “confusing situation;” lacked certainty regarding the scope of the Regulation; and, is now accused of a violation that allegedly occurred after the Junk Fax Order.³³

Second, granting UBM a retroactive waiver of the Regulation is in the public interest.³⁴ As the Commission made clear, public interest favors shielding businesses from substantial liability for inadvertent, alleged violations resulting from the generalized state of confusion:

[F]ailure 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...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...³⁵

Waiver in UBM’s case serves the same public interest concerns that the Commission seeks to ameliorate through its Waiver Order. UBM faces a potential class action lawsuit for an alleged violation of the Act and Regulation that occurred after the Junk Fax Order; and, has asserted that the subject fax was a *solicited* transactional communication. Yet, despite the Commission’s

³⁰ *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1225 (D.C. Cir. 1999).

³¹ Waiver Order at ¶ 36.

³² *Id.* at ¶¶ 15, 23-26, 27-28.

³³ Complaint, *Grind Lap*, Dkt. # 1 at ¶ 12, Exh. A.

³⁴ *Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

³⁵ Waiver Order at ¶ 27.

acknowledgement that “misplaced confidence” and lack of certainty on the part of petitioners, similarly situated to UBM, was reasonable, UBM’s alleged failure to include the required opt-out notice on March 21, 2012 leaves it vulnerable to substantial costs or damages. Thus, retroactive waiver of the Regulation, here, is in the public interest.

Draconian application of the Regulation, despite the confusion and lack of certainty, could expose UBM to substantial costs or class-wide damages for engaging in consensual communications with its subscribers. Consequently, there is “good cause” for granting the requested waiver.

For all of these reasons, Petitioner UBM LLC, respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in its October 30, 2014 Order for any solicited faxes sent after the effective date of the Regulation.

Respectfully submitted,

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