

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of:)	
Petition of Direct Energy Services, LLC;)	CG Docket No. 02-278
Direct Energy Business, LLC; Direct Energy,)	
LP; Direct Energy Marketing Inc.; First Choice)	CG Docket No. 05-338
Power, L.P.; CPL Retail Energy L.P.; Direct)	
Energy US Home Services, Inc.; Energy)	
America, LLC; Astrum Solar, Inc.; Bounce)	
Energy, Inc.; Clockwork, Inc.; Clockwork IP,)	
LLC; NYSEG Solutions, LLC; Gateway)	
Energy Services Corporation and WTU Retail)	
Energy L.P. For Retroactive Waiver of)	
42 C.F.R. § 64.1200(a)(4)(iv))	

PETITION FOR RETROACTIVE WAIVER OF 42 C.F.R. § 64.1200(a)(4)(iv)

Pursuant to Section 1.3 of the Federal Communications Commission’s (“Commission”) Rules (47 C.F.R. § 1.3) and Paragraphs 23 and 30 of the Commission’s Order released on October 30, 2014, CG Docket Nos. 02-278 and 05-338, FCC 14-164, Petitioners Direct Energy Services, LLC; Direct Energy Business, LLC; Direct Energy, LP; Direct Energy Marketing Inc.; First Choice Power, L.P.; CPL Retail Energy L.P.; Direct Energy US Home Services, Inc.; Energy America, LLC; Astrum Solar, Inc.; Bounce Energy, Inc.; Clockwork, Inc.; Clockwork IP, LLC; NYSEG Solutions, LLC; Gateway Energy Services Corporation; and WTU Retail Energy L.P. (collectively, “Petitioners”), by and through their attorneys, respectfully request that the Commission grant Petitioners a retroactive waiver of 42 C.F.R. § 64.1200(a)(4)(iv) (the “Regulation”) with respect to faxes transmitted by or on behalf of Petitioners with the prior express invitation 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 Petitioners, to file requests for the same relief.¹

I. INTRODUCTION

Petitioners are affiliated entities that provide: a) energy to customers, b) energy installation, and/or c) other energy-related services. From time to time, Petitioners or third-party vendors acting on their behalf place telephone calls to individuals or businesses to discuss whether they may be interested in learning more about Petitioners' products and/or services. In some cases, individuals expressly request or consent to the receipt of additional information from Petitioners or their vendors via fax.

As explained more fully below, Petitioners are similarly situated in all material respects to those parties who have already received waivers. Petitioner Direct Energy Services, LLC was recently named as a defendant in a class action lawsuit related to Solicited Faxes. The Class Action Complaint ("Complaint") alleged the plaintiffs (an Ohio resident and business owner) and a putative class of other recipients received fax advertisements from Direct Energy Services, LLC or its vendors without a compliant opt-out notice in violation of the Telephone Consumer Protection Act of 1991 ("TCPA"). Although the putative class representatives gave their express invitation or permission² for the fax to be sent, the fax did not contain a compliant opt-out notice. *See Alan L. Laub, DDS and Alan L. Laub, DDS, Inc. v. Consumer Energy Solutions, Inc., Direct Energy Services, LLC, and John Does 1-10*, Civil Action No. 8:15-cv-00073-VMC-AEP, United States District Court for the District of Florida (filed January 13, 2015).

In response to the admitted uncertainty about whether the opt-out notice applied to Solicited Faxes, the Commission recently issued FCC Order 14-164 (the "Fax Order"). In the

¹ The Commission directed such requests for waiver to be filed by April 30, 2015. As such, Petitioners' petition is timely.

² Petitioners use the term "express invitation or permission" as defined in the relevant statute and FCC materials.

Fax Order, the Commission granted retroactive waivers to certain senders of fax advertisements that provided relief from any past obligation to provide opt-out notices to recipients who had consented to receive fax advertisements. The Commission made clear that other similarly situated parties, like Petitioners, may also seek such retroactive waivers.

Indeed, the public interest would not be served by strict enforcement of the Regulation against businesses such as Petitioners that were confused by the Regulation and therefore did not include compliant opt-out notices in faxes sent to recipients who had expressly invited or provided permission to be sent faxes. In contrast, such strict enforcement would only perpetuate the opportunistic litigation against businesses based on past confusion over the Commission's Regulation. Accordingly, Petitioners respectfully seek a retroactive waiver of § 64.1200(a)(4)(iv) with respect to faxes transmitted by or on behalf of Petitioners with the prior express invitation or permission of the recipients or their agents after the effective date of the Regulation.

II. BACKGROUND

The TCPA, as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 ("JFPA" or "Junk Fax Order"), prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement." 47 U.S.C. §§ 227(a)(5) and (b)(1)(C). The TCPA defines an "unsolicited advertisement" as "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, in writing or otherwise." *Id.* § 227(a)(5). The Regulation states an advertisement sent via fax "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice." 47 C.F.R § 64.1200(a)(4)(iv).

However, the Commission's notice of its intent to adopt the Regulation did not make

explicit that the FCC contemplated an opt-out requirement on fax advertisements sent with prior express permission of the recipient. Fax Order, ¶ 25. In addition, the Commission also adopted rules implementing the Junk Fax Order. A footnote in the Junk Fax Order specifically states: “[w]e note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” See Junk Fax Order, 21 FCC Reg. at 3818, ¶ 42 n. 154.

On October 30, 2014, the Commission issued the Fax Order in which it admitted its notice regarding its adoption of the Regulation and the footnote in the Junk Fax Order caused confusion. Fax Order, ¶ 26 (it “is the inconsistent footnote, combined with the other factors explained above [the lack of notice], that led to confusion or misplaced confidence on the part of petitioners. . .”). The Commission further stated:

[W]e recognize that some parties who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether our requirement 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 these parties with temporary relief from any past obligation to provide the opt-out notice to such recipient requirement by our rule. . .

[W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.

Id., ¶¶ 1, 22, 26. Therefore, the Commission granted retroactive waivers to the twenty-four petitioners affected by such confusion and noted that “other, similarly situated parties” may also seek the same relief. *Id.*, ¶¶ 24, 27, 30.

III. DISCUSSION

A. Petitioners Are Similarly Situated To The Petitioners Subject To The Fax Order Waivers.

Petitioners are “similarly situated” to the individual petitioners who were granted retroactive waivers by the Fax Order. Those parties, like Petitioners, sent fax advertisements with the prior express invitation or permission of the recipients and failed to include an opt-out

notice due to the confusion regarding the requirements for such communications. As mentioned *supra*, Petitioner Direct Energy Services, LLC was recently a defendant in a class action lawsuit alleging that it or one of its vendors sent the plaintiffs and a putative class of other recipients fax advertisements without compliant opt-out notice information in violation of the TCPA. *See Laub, supra*. Direct Energy Services, LLC contended the faxes at issue were solicited (i.e. sent with prior express invitation or permission), and fully intended to raise consent as an affirmative defense. Though *Laub* was recently dismissed, Direct Energy Services, LLC and its affiliated entities, Petitioners here, find themselves potentially subject to claims, including potentially other class action lawsuits, and other financial liability due to the reasonable uncertainty regarding the application of Section 64.1200(a)(4)(iv) to Solicited Faxes. As such, Petitioners are “similarly situated” to the individual petitioners who received retroactive waivers pursuant to the Fax Order.

B. Special Circumstances Warrant A Deviation From The General Rule, And A Waiver Of Section 64.1200(a)(4)(iv) Would Better Serve The Public Interest Than Would Strict Application Of The Rule To Petitioners.

Pursuant to Section 1.3 of the Commission’s rules, “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” 47 C.F.R. §§ 1.3, 1.925(b)(3). Good cause is shown where: “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.” Fax Order, ¶ 23. In its October 30, 2014 Fax Order granting retroactive waivers of the opt-out notice requirement, the Commission concluded that both of these conditions were satisfied. These findings apply with equal force to Petitioners, and therefore good cause exists to grant a retroactive waiver in this case as well.

First, the Commission found that special circumstances existed that warrant deviation from the general rule as to Section 64.1200(a)(4)(iv) because the Commission’s notice and prior

orders caused confusion regarding the opt-out notice requirement for Solicited Faxes. Fax Order, ¶¶ 24, 25. Specifically, the Commission found: (1) the inconsistency contained in the Junk Fax Order and the Regulation caused confusion regarding the applicability of the opt-out notice requirement to fax ads sent to those recipients who provided prior express permission; and (2) the lack of explicit notice regarding the Commission’s intent to adopt Section 64.1200(a)(4)(iv) contributed to the confusion regarding the opt-out notice requirement. The Commission held that these two circumstances created special circumstances that warranted deviation from the general rule as to Section 64.1200(a)(4)(iv) and “presumptively establish[ed] good cause for retroactive waiver of the rule.” *Id.*, ¶ 26.

Secondly, the Commission found that granting a retroactive waiver to parties such as Petitioners would serve the public interest. *See id.*, ¶ 27. Indeed, the Commission stated:

“[t]he lack of explicit notice, though legally adequate, and the ensuing contradictory footnote has, as shown in the record, resulted in a confusing situation for businesses or one that caused businesses mistakenly to believe that the opt-out notice requirement did not apply. This confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damages awards under the TCPA’s private right of action or possible Commission enforcement. . . [W]e 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 violation of this requirement . . .”

Id.

The circumstances of the present case are identical in all material respects to those present in the Fax Order: Petitioners were reasonably confused by the inadequate notice surrounding the Junk Fax Order and the inconsistency between the Junk Fax Order and the Regulation. Thus, a finding of “special circumstances” is warranted here, as well. Moreover, here too, the public interest would not be served by strict enforcement of the Regulation against Petitioners, businesses that were reasonably confused as to the application of the opt-out notice

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