

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

In the Matter of	)	CG Docket No. 02-278
	)	
Petition of Microwize Technology, Inc. for waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules	)	CG Docket No. 05-338
	)	

**PETITION OF MICROWIZE TECHNOLOGY, INC. FOR RETROACTIVE WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission’s (hereinafter, the “Commission”) rules, and pursuant to the Order issued by the Commission on October 30, 2014, in Docket Nos. 02-278 and 05-338,<sup>1</sup> (hereinafter, the “Order”), Petitioner Microwize Technology, Inc. (hereinafter, “Microwize”), by and through their attorneys, Franco & Moroney, LLC, respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (hereinafter, the “Regulation”) with respect to faxes that have been transmitted by or on behalf of Microwize with the prior express consent or permission of the recipients or their agents after the effective date of the Regulation.

**I. INTRODUCTION**

Microwize requests that the Commission grant it a retroactive waiver of the Regulation with respect to faxes sent with express prior consent or permission. Microwize is a small private company based in Paramus, New Jersey. Microwize sells medical records software and also provides software users training on medical records software, including free training sessions. Microwize is currently a defendant in a class action lawsuit alleging violations of the Telephone Consumer Protection Act (hereinafter, the “TCPA”) currently pending in the Circuit Court of

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<sup>1</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014)

Dane County, Wisconsin.<sup>2</sup> The lawsuit seeks millions of dollars in monetary damages. Prior to the institution of the lawsuit, Microwize had no history of complaints from the Commission, TCPA lawsuits, or complaints from facsimile recipients. The Plaintiff in the lawsuit asserts that Petitioner sent facsimile advertisements with deficient opt-out language in violation of the TCPA. Defendant denies the allegations and is seeking to assert a defense based upon prior express consent or permission of the recipients of the faxes.<sup>3</sup> Consistent with the Order, Microwize seeks a retroactive waiver to provide relief from any past obligation to provide opt-out notices on faxes sent with prior express consent or permission of the recipients.

This request for a waiver is not an acknowledgement or admission by Microwize that it or any party on its behalf sent any facsimile advertisements, or any facsimiles in violation of the TCPA, including any facsimile advertisements that failed to comply with the Regulation's opt-out notice requirement. The granting of the waiver should not be construed in any way to confirm or deny whether Microwize, in fact, had the prior express consent or permission of any recipients to be sent faxes, including the faxes at issue in the lawsuit currently pending against it.

## **II. BACKGROUND**

### **A. Statutory and Regulatory Framework**

The TCPA, as codified in 47 U.S.C. Section 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 ("JFPA"),<sup>4</sup> prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."<sup>5</sup> An "unsolicited advertisement" is any material

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<sup>2</sup> *Wilder Chiropractic, Inc. v. Microwize Technology, Inc.*, Case No. 11 CV 4357, Circuit Court of Dane County, Wisconsin

<sup>3</sup> Whether every fax at issue was solicited is disputed by the parties. This is irrelevant, as the Order states that a retroactive waiver should not "be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private right of action." Order, ¶ 31. Prior express permission is a factual determination to be determined by the court.

<sup>4</sup> See Telephone Consumer Protection Act of 1991, Pub. L. No. 102 243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109 21, 119 Stat. 359 (2005).

<sup>5</sup> 47 U.S.C. Sections 227(a)(5) and (b)(1)(C).

advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior invitation or permission.”<sup>6</sup>

As relevant to this Petition, the Regulation states that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”<sup>7</sup> In addition to the Regulation, the Commission also adopted rules implementing the JFPA.<sup>8</sup> As explained in the Order, a footnote in the implementing rules created confusion regarding the Commission's intent to apply opt-out notice requirement to faxes sent with prior express permission.<sup>9</sup>

The Commission clarified this important issue in the Order, stating that the Commission “confirmed that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.”<sup>10</sup> Due to the confusion,<sup>11</sup> however, the Commission decided to grant retroactive waivers to affected parties. Affected parties are those, like Microwize, who have sent faxes with the recipient's prior express consent or permission and may reasonably have been uncertain about the opt-out notice requirements for such faxes. The Commission stated:

[W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been

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<sup>6</sup> *Id.*, Section (a)(5).

<sup>7</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration, 21 FCC Red at 3812, ¶ 48 (2006) (the “Junk Fax Order”), *see* 47 C.F.R. Section 64.1200(a)(4)(iv).

<sup>8</sup> *See generally* Junk Fax Order.

<sup>9</sup> April 6, 2006 Order, 21 FCC Rcd at 3818, ¶ 42 n. 154 (“We note that the opt-out requirement only applies to communications that constitute unsolicited advertisements.”) (emphasis added).

<sup>10</sup> Order, ¶ 1.

<sup>11</sup> The Commission detailed the reasons for the confusion in the Order: “Specifically, there are two grounds that we find led to confusion among affected parties that the opt out notice did not apply to fax ads sent with the prior express permission of the recipient, the combination of which presents us with special circumstances warranting deviation from the rule. The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Further, the notice of intent to adopt the Regulation did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with prior express permission of the recipient.” Order, ¶ 24-25 (emphasis in original).

uncertain about whether our requirements 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 those parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

Order, ¶ 1.

The Commission stated that other affected parties similarly situated as the petitioners, like Microwize, should file applications for waiver within six months of the release of the Order on October 30, 2014.<sup>12</sup>

### **III. DISCUSSION**

#### **A. The Commission Should Grant Microwize A Waiver.**

Microwize respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any facsimiles sent with prior express consent or permission of the recipients by Microwize or on Microwize's behalf after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown. Generally, the Commission may grant a waiver of its rules in a particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest. Further, a waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule. As shown, both rationales apply and Microwize is entitled to a waiver under this standard for the same reasons the parties granted waivers in the Order received them.

#### **B. Waiver Would Not Undermine the TCPA Policy Objective**

Granting a waiver to Microwize would not undermine the TCPA's policy objective "to allow consumers to stop unwanted faxes."<sup>13</sup> Microwize does not send fax advertisements to

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<sup>12</sup> Order, ¶ 2.

consumers to advertise its goods and services. This policy is not undermined where, as here, Microwize sent faxes with prior express consent or permission to its customers that had requested information concerning Microwize’s goods or services.

Further, this Petition does not put at issue the protections afforded by the opt-out notice requirements going forward or the statutory authority to require opt-out information on fax ads (or, alternatively, that Section 227(b) of the Act was not the statutory basis of that requirement). Going forward, Microwize will include a compliant opt-out notice on any fax advertisements that fall within the purview of the TCPA and its regulations and rules.

**C. Special Circumstances Warrant Deviation from the General Rule**

The Commission explained in the Order that special circumstances compel deviation from the general rule rather than strict adherence. The Order found there was “industry-wide confusion” as to whether faxes sent with prior express consent or permission must include an opt-out notice, based in part on the special circumstances of the confusing footnote in the April 6, 2006. Microwize, like many other companies, understood and believed that a facsimile sent with express permission was not within the purview of the TCPA. For Microwize, a waiver is consistent with the public interest because denial of a waiver would subject Microwize to potentially millions of dollars in monetary damages. In the Order, the Commission made it clear that the public interest favors not subjecting businesses to TCPA class action lawsuits seeking millions of dollars in monetary damages due to confusion concerning the Regulation. Specifically, the Commission stated:

The record in this proceeding demonstrates that a failure 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 ... This confusion or misplaced confidence, in turn, left some businesses potentially

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<sup>13</sup> Order, ¶ 27.

subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed upon them by unwanted fax ads. On balance, however, we 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 violations of this requirement while retaining the protections afforded by the rule going forward.

Order, ¶ 27.

Similar to those parties granted an express waiver by the Order, Microwize sent facsimiles to recipients who had provided prior express consent or permission to receive those faxes. Therefore, Microwize is similarly situated to the petitioners who were granted waivers in the Order and equally entitled to the same limited retroactive waiver. Due to the nature and extent of Microwize's faxes, the waiver will not undermine the TCPA policy objective and the public interest will be better served by the Commission granting the waiver.

#### **IV. CONCLUSION**

Microwize is similarly situated to those parties who were granted waivers in the Order and is seeking the same retroactive waiver of the Regulation in order to provide Microwize with the same temporary relief other petitioners were granted. For these reasons, Microwize respectfully request that the Commission grant it a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any Solicited Faxes sent by Microwize (or on its behalf) after the effective date of the Regulation.

Dated: April 29, 2015

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