

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

In the Matter of:)	
)	
Petition of United Stationers)	CG Docket No. 02-278
Inc., United Stationers Supply)	CG Docket No. 05-338
Co. and Lagasse LLC 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 Communications Commission’s rules,¹ and Paragraph 30 of the Commission’s Order issued on October 30, 2014 (the “*Solicited Fax Order*”),² petitioners United Stationers Inc., United Stationers Supply Co., and Lagasse LLC (collectively, “United” or “Petitioners”), by and through their undersigned attorneys, hereby respectfully request that the Commission grant Petitioners a retroactive waiver of Section 64.1200(a)(4)(iv) of its rules for faxes sent on or before April 30, 2015.³

I. BACKGROUND

The Telephone Consumer Protection Act of 1991 (“TCPA”), as amended in 2005 by the Junk Fax Prevention Act (“JFPA”), imposes restrictions on the use of any telephone facsimile machine, computer, or other device to send unsolicited facsimile advertisements – that is, fax advertisements sent without the recipient’s prior express

¹ 47 C.F.R. § 1.3.

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

³ 47 C.F.R. § 64.1200(a)(4)(iv).

consent and/or permission.⁴ The JFPA, among other things, codified an exception to the TCPA’s prohibition on unsolicited advertising faxes for companies that send fax advertisements to those with whom they have an established business relationship.⁵ The JFPA also amended the TCPA to require the sender of an “unsolicited advertisement” to provide a specified notice on the fax that allows recipients to “opt out” of any future fax transmissions from the sender.⁶

In 2006, in its *Junk Fax Order*, the Commission amended its rules to incorporate the changes in the JFPA.⁷ Among other things, in the *Junk Fax Order*, the Commission adopted a rule that provided 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.”⁸ The *Junk Fax Order*, however, also contained conflicting language in a footnote that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”⁹

Numerous parties filed petitions challenging the Commission’s rule applying the opt-out notice requirement to solicited advertising faxes.

II. THE COMMISSION’S OCTOBER 30, 2014 ORDER

On October 30, 2014, the Commission issued the *Solicited Fax Order*, confirming that the rules adopted by the FCC in 2006 apply not only to unsolicited fax

⁴ 47 U.S.C. § 227(b)(1)(C); *see also* Junk Fax Protection Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

⁵ *See* 47 U.S.C. § 227(b)(1)(C)(i).

⁶ *See id.*, §§ 227(b)(1)(C)(iii) and 227(b)(2)(D).

⁷ *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787 (2006) (the “*Junk Fax Order*”).

⁸ 47 C.F.R. § 64.1200(a)(4)(iv).

⁹ *Junk Fax Order*, 21 FCC Rcd. at 3810 n.154 (emphasis added).

advertisements, but also to *solicited* fax advertisements (*i.e.*, fax advertisements sent with the recipients’ prior express invitation or permission).¹⁰ The Commission denied petitioners’ request for declaratory ruling that Section 227(b) of the TCPA could not be the statutory basis for that requirement, and concluded that the Commission had authority to adopt the rule in question. At the same time, the Commission granted retroactive waivers to the petitioners, who were facing lawsuits alleging that they had violated Section 64.1200(a)(4)(iv) by failing to include the required “opt-out” language in advertising faxes. The FCC determined that, because of confusion among affected parties regarding whether the opt-out language was required in solicited fax advertisements, good cause existed for a retroactive waiver, and that a waiver was also in the public interest.¹¹

Specifically, the FCC acknowledged that the “inconsistent footnote” in the *Junk Fax Order*, which stated that the opt-out notice requirement applied only to *unsolicited* advertisements, “caused confusion or misplaced confidence regarding the applicability of the [opt-out notice] requirement.”¹² The Commission also recognized that “the lack of explicit notice” in the Notice of Proposed Rulemaking that the Commission contemplated requiring opt-out notices on solicited fax advertisements “may have contributed to confusion or misplaced confidence.”¹³ The FCC concluded that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.”¹⁴

¹⁰ See generally, *Solicited Fax Order*.

¹¹ *Id.* ¶¶ 26-28.

¹² *Id.* ¶¶ 24, 28.

¹³ *Id.* ¶ 25.

¹⁴ *Id.* ¶ 26.

The Commission likewise determined that granting the requested retroactive waivers would serve the public interest, noting that “the TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.”¹⁵ Examining the record set forth by petitioners, the Commission found it would be “unjust or inequitable” to subject parties to “potentially substantial damages,” given the confusion and misplaced confidence about the rule’s applicability.¹⁶ The Commission granted a retroactive waiver to the petitioning parties to ensure that the confusion did not result in “inadvertent violations” of the TCPA.¹⁷ In addition, the Commission extended its waiver for a period of six months after the *Solicited Fax Order*, until April 30, 2015.¹⁸

The Commission then stated that “[o]ther, similarly situated parties may also seek waivers such as those granted” in the *Solicited Fax Order*, and directed that it “expect[s] that parties will make every effort to file [petitions for waiver] within six months of the release of this Order.”¹⁹

III. PETITIONERS ARE SIMILARLY SITUATED AND RESPECTFULLY REQUEST A RETROACTIVE WAIVER PURSUANT TO THE ORDER

As set forth more fully below, Petitioners respectfully request that the Commission grant them a retroactive waiver of Section 64.1200(a)(4)(iv) for the same reasons

¹⁵ *Id.* ¶ 27.

¹⁶ *Id.* ¶¶ 27, 28.

¹⁷ *Id.* ¶ 27.

¹⁸ *Id.* ¶ 29.

¹⁹ *Id.* ¶ 30. Petitioners respectfully submit that this Petition is timely, notwithstanding that it was filed after April 30, 2015 (the date six months after the *Solicited Fax Order*). Petitioners just learned of a TCPA class action lawsuit against them, the *Craftwood Lawsuit* (as defined below), that was filed on May 1, 2015. Petitioners did not otherwise previously receive any notice that any person or entity intended to assert a TCPA claim against them. Petitioners filed this Petition immediately after being served with the Complaint in the *Craftwood Lawsuit* and engaging counsel with respect to that action.

that supported the Commission’s retroactive waivers in the *Solicited Fax Order*. As with the petitioners in the *Solicited Fax Order*, the instant Petitioners request a waiver for all faxes sent on or before April 30, 2015.

A. The TCPA Lawsuit Against Petitioners

United Stationers is a leading national wholesale distributor of workplace essentials and stocks a broad assortment of over 160,000 products, including technology products, traditional office products, office furniture, janitorial and break room supplies, industrial supplies, and automotive aftermarket tools and equipment. United Stationers communicates with its customers (which are businesses, not residential consumers) for various purposes by facsimile, after obtaining prior express consent to do so from such customers.

On May 1, 2015, serial TCPA class action plaintiffs, Craftwood II, Inc. and Craftwood Hardware Company (collectively, “Plaintiffs”), filed a TCPA class action lawsuit (the “*Craftwood Lawsuit*”) against Petitioners in the United States District Court for the Central District of California.²⁰ In the *Craftwood Lawsuit*, Plaintiffs claim, individually, and on behalf of a nationwide putative class, that Petitioners violated the TCPA by transmitting facsimile advertisements with deficient opt-out language in violation of the TCPA.²¹ Specifically, Plaintiffs allege in their Complaint that “[w]ithin the four years of the filing of the Complaint, [Petitioners] have implemented an illegal junk fax program.”²² Thus, the alleged conduct at issue occurred prior to six months from the release date of the *Solicited Fax Order*.

²⁰ *Craftwood II, Inc., et al. v. United Stationers Inc., et al.*, Case No. 8:15-cv-0704 (C.D. Cal.). The *Craftwood Lawsuit* was filed by serial TCPA plaintiffs’ attorneys C. Darryl Cordero, Eric M. Kennedy and Scott Z. Zimmerman.

²¹ Although Plaintiffs allege in the Complaint that an allegedly illegal facsimile was sent on March 3, 2015, Plaintiffs waited until after April 30, 2015 to file the *Craftwood Lawsuit*. *See id.*, Docket Entry No. 1, at ¶ 3.

²² *Id.*, Docket Entry No. 1, at ¶ 14.

Moreover, although Plaintiffs allege “upon . . . information and belief” that Petitioners transmitted the faxes at issue in the lawsuit without prior express invitation or permission, an allegation that will be in dispute in the lawsuit,²³ Plaintiffs also allege that:

[Petitioners’] fax advertising program also had one important overarching common fact: [Petitioners] failed to comply with the Opt-Out Notice Requirements. As a result of these violations, [Petitioners] are precluded from asserting either of the two defenses available under the TCPA: (i) “prior express invitation or permission” (or “PEP” for short, § 227(a)(5)), that may have been given by a recipient; and (ii) the three-prong defense based on transmission to a recipient with whom [Petitioners] may have had an “established business relationship” (or “EBR” for short, § 227(b)(1)(C)(i)-(iii)).²⁴

In other words, Plaintiffs seek to hold Petitioners liable for violations of the opt-out notice requirements, regardless of whether the advertising faxes at issue were sent with the prior express consent of the recipient.

Plaintiffs seek to represent a class of:

All persons and entities that were subscribers of facsimile telephone numbers to which material that discusses, describes, or promotes the property, goods or services of [Petitioners], or any of them, was sent via facsimile transmission . . . on or after May 1, 2011.²⁵

²³ The parties in the *Craftwood Lawsuit* dispute, *inter alia*, whether the faxes at issue were solicited. The Commission, however, need not consider this dispute in acting on this Petition, as the Commission has stated that granting 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 rights of action.” *Solicited Fax Order*, ¶ 31. The Commission also stated that, with respect to some of the petitioners that were granted express retroactive waivers under the *Solicited Fax Order*, the record in the underlying litigation indicated “that whether some of the petitioners had acquired prior express written permission of the recipient remains a source of dispute between the parties.” *Craftwood Lawsuit*, Docket Entry No. 1. ¶ 31 n. 104. Thus, whether the requested waiver should be granted is distinct from whether Petitioners had obtained a recipient’s consent to receive facsimile advertisements. The latter issue is a factual determination properly decided by the District Court.

²⁴ *Id.* ¶ 16.

²⁵ *Id.* ¶ 20.

Plaintiffs allege in the Complaint that the “Plaintiff Class numbers in the thousands.”²⁶ Plaintiffs seek to recover from Petitioners *at least* \$15 million, stating in the Complaint that they seek “an award of statutory damages in the amount of \$500 for each violation of the Act and/or the FCC regulations in an amount not less than \$5 million, and trebling of such statutory damages.”²⁷

The *Craftwood Lawsuit* is in its infancy, having only been filed days ago.

Petitioner United Stationers Supply Co. was just served with the Complaint on May 7, 2015, and petitioners United Stationers, Inc. and Lagasse LLC were served on May 8, 2015. Petitioners have not yet responded to the Complaint, and their time to answer the Complaint has not yet expired. Prior to learning of the *Craftwood Lawsuit*, Petitioners did not otherwise receive any notice that Craftwood, or any other person or entity, intended to assert TCPA claims against them arising out of alleged advertising faxes.

**B. Petitioners Are Similarly Situated to the Parties
Granted Express Waivers By The Solicited Fax Order**

Petitioners are similarly situated to the petitioners who were granted retroactive waivers in the *Solicited Fax Order*. In the *Craftwood Lawsuit*, Petitioners are alleged to have sent facsimile advertisements that did not contain adequate opt-out notices. Petitioners did not understand the opt-out requirements to apply to solicited faxes. In short, Petitioners, like those parties that received express retroactive waivers pursuant to the *Solicited Fax Order*, are potentially subject to massive liability for inadvertent violations, based on the application of a provision of the *Junk Fax Order* over which the Commission has recognized there was widespread confusion. The Commission should treat Petitioners the same as the parties who received retroactive waivers in the *Solicited Fax Order*.

²⁶ *Id.* ¶ 21.

²⁷ *Id.*, p. 16, “Prayer for Relief.”

C. A Waiver is Appropriate in this Case

The Commission may waive any of its rules for good cause shown.²⁸ As the Commission has explained, it may grant a waiver where in “special circumstances” a waiver would not frustrate the purpose of the rule and would “better serve the public interest than would application of the rule.”²⁹ The stated purpose of 47 C.F.R § 64.1200(a)(4)(iv) is to ensure that fax recipients have the necessary contact information to opt-out of receiving faxes, should they choose to do so.³⁰ Due to the confusion created by the *Junk Fax Order*, it was not clear to senders that such information was required for solicited faxes as well as for unsolicited faxes. Granting a waiver to Petitioners would satisfy the Commission’s requirements and rationales for waivers.

First, as the Commission acknowledged in the *Solicited Fax Order*, special circumstances warrant deviation from its rules in this case due to the wide-spread confusion amongst affected parties regarding whether the opt-out requirements applied to solicited faxes.³¹ The “combination of factors (the lack of explicit requirement in the Commission’s Notice of Proposed Rulemaking and the contradictory language in the Commission’s order implementing the Junk Fax Prevention Act) presumptively establishes good cause for retroactive waiver” of the

²⁸ See 47 C.F.R. § 1.3.

²⁹ *Solicited Fax Order*, ¶ 23; cf 47 C.F.R. § 1.925(b)(3)(i)-(ii) (“The Commission may grant a request for waiver if it is shown that: The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest. . .”).

³⁰ *Solicited Fax Order*, ¶ 20; see Junk Fax Prevention Act of 2005, ¶ 48, Pub. L. No. 109-21, 119 Stat. 359 (2005) (codified at 47 U.S.C. §227).

³¹ *Solicited Fax Order*, ¶¶ 24-25.

Commission's regulation.³² Second, granting a waiver here is consistent with the stated purpose of the TCPA and its implementing regulations, and would better serve the public interest than would its strict application. The stated purpose of stopping *unwanted faxes* cannot be frustrated because the faxes at issue in this waiver Petition are, by definition, solicited and/or sent pursuant to the recipient's prior express invitation or permission. Moreover, the public interest will not be served by denying Petitioners a waiver and exposing them to potentially unjust and inequitable monetary damages when doing so will not further the TCPA's stated policy objective. Rather, the majority of any potential recovery would go to Plaintiffs' counsel. As the Commission explained, the public interest favors not subjecting businesses that understandably were confused by the regulation and inadvertently (and allegedly) did not comply with it, to potentially crippling damages:

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 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 on 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.³³

Similar to those parties granted an express waiver by the *Solicited Fax Order*, Petitioners sent facsimiles to recipients who had provided their prior express invitation or permission and were not aware that opt-out notices were required on such faxes. Granting a

³² *Id.* ¶ 24.

³³ *Id.* ¶ 27.

waiver in this case is warranted because of the special circumstances acknowledged by the Commission, and because such waiver would not undermine the policy objective of stopping unwanted faxes and would better serve the public interest. Petitioners are therefore similarly situated to the parties granted waivers pursuant to the *Solicited Fax Order* and are equally entitled to a retroactive waiver.

CONCLUSION

For all of these reasons, petitioners United Stationers Inc., United Stationers Supply Co., and Lagasse LLC respectfully request that the Commission grant them the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission already has granted to other, similarly situated parties.

Respectfully submitted,



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