

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

| | | |
|---|---|----------------------|
| In the Matter of: |) | |
| |) | |
| Petition of Business Promotion, LLC for |) | CG Docket No. 02-278 |
| Retroactive Waiver of 47 C.F.R |) | |
| § 64.1200(a)(4)(iv) |) | CG Docket No. 05-338 |
| |) | |

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission’s (“FCC” or the “Commission”) rules,¹ Business Promotion, LLC,² (“Business Promotion” or “Petitioner”) respectfully requests that the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules (the “Opt-Out Rule”)³ with respect to any fax advertisements that may have been transmitted by, or on behalf of, Petitioner with the prior express consent or permission of the recipients or their agents prior to April 30, 2015.

On October 30, 2014, the Commission granted a retroactive waiver of the Opt-Out Rule to a group of petitioners facing lawsuits that alleged, in part, that the petitioners failed to include opt-out notices on solicited fax advertisements in violation of the Opt-Out Rule.⁴ In the *Anda*

¹ 47 C.F.R. § 1.3.

² The lawsuit that precipitated this Petition also names d/b/a BP Dental Marketing and d/b/a BP Dental. *See Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry v. Business Promotion LLC d/b/a BP Dental Marketing and d/b/a BP Dental, et al.*, Case No: 15SL-CC00532 (Circuit Court of St. Louis County, Twenty-First Judicial Circuit State of Missouri). While Business Promotion does not operate under either d/b/a, this waiver request is also made on behalf of BP Dental Marketing and BP Dental.

³ 47 C.F.R. § 64.1200(a)(4)(iv).

⁴ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, Order, 29 FCC Rcd 13998 (2014) (“*Anda Order*”).

Order, the Commission found good cause to support a retroactive waiver of the Opt-Out Rule and that such a waiver was in the public interest.⁵ The Commission invited similarly situated entities to seek retroactive waivers of the Opt-Out Rule.⁶

With this Petition, Petitioner seeks a retroactive waiver similar to those granted in the Anda Order. It is in the public interest and good cause exists to grant the Petition. As explained below, Petitioner only faxes recipients who provide their prior express consent to receive the faxed information. The faxes are not unsolicited. Notwithstanding this, an opportunistic plaintiff just last week served Petitioner with a class action lawsuit alleging that Business Promotion sent faxes in violation of the Telephone Consumer Protection Act (“TCPA”). Requiring a party in Petitioner’s position to commit substantial resources to defend such litigation, litigation undoubtedly based on past confusion over the Commission’s rules, does not serve the public interest and contravenes the genesis of the Anda Order. Good cause exists to grant Petitioner a retroactive waiver of the Opt-Out Rule.

I. Background

A. Regulatory Framework

The TCPA requires that an unsolicited fax advertisement contain an opt-out notice that states that the recipient may request not to receive future unsolicited advertisements and provides the recipient with contact information of the sender for making such a request.⁷ In 2006, as part of its implementation of the JFPA, the Commission amended its rules to require opt-out notices for fax advertisements – even where a recipient “has provided prior express invitation or

⁵ *Id.* at ¶¶26-28.

⁶ *Id.* at ¶ 30.

⁷ 47 U.S.C. § 227(b)(2)(D). The TCPA was amended by the Junk Fax Prevention Act of 2005 (“JFPA”) to cover fax advertisements. *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

permission to the sender.”⁸ However, a footnote in the Junk Fax Order stated that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”⁹ This inconsistency caused great confusion among businesses that fax advertisements. This confusion, in turn, spurred the filing of numerous petitions requesting the Commission clarify the parameters of the rule.

With its Anda Order, the Commission clarified that the sender of a fax advertisement must include an appropriate opt-out notice regardless of whether the recipient consented to receive the fax advertisement.¹⁰ Notably, the Anda Order recognized the widespread confusion caused by the Junk Fax Order. In light of this confusion, the Commission granted retroactive waivers of the Opt-Out Rule to 24 petitioners and gave those petitioners until April 30, 2015 to come into compliance with the Opt-Out Rule.¹¹

The Commission invited entities similarly situated to the petitioners in the Anda Order to request retroactive waivers of the Opt-Out Rule.¹² While the Commission indicated its expectation that these waiver requests be filed within six months (*ie.* April 30, 2015),¹³ the Commission did not adopt a specific deadline for accepting such waiver requests.¹⁴

B. Business Promotion Background

Business Promotion is a small business providing internet and social media services to its customers. Unlike many online marketing companies that offer only a single online marketing

⁸ *In re 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 Rcd 3787, App. A (2006) (“Junk Fax Order”) *codified at* 47 C.F.R. § 64.1200(a)(4)(iv).

⁹ Junk Fax Order at n. 154 (emphasis added).

¹⁰ Anda Order at ¶ 1.

¹¹ *Id.* at ¶ 36.

¹² *Id.* at ¶ 30.

¹³ *Id.*

¹⁴ *Id.* at n. 102. “At the same time, we note that all future waiver requests will be adjudicated on a case-by-case basis and do not prejudice the outcome of future waiver requests in this Order.”

service, such as web design, Business Promotion provides its customers with a full range of online and social media support, including web design, company brandings, appointment reminders, search engine optimization, and social media setup and management. Faxing advertisements is not a core part of Business Promotions business, but *some customers*, primarily healthcare providers including doctors' offices and dentists' offices, *request* that Business Promotion *send information about its services by fax*. Business Promotion does not send advertisements by fax unless a customer or potential customer provides prior express consent to receive information by fax, and Business Promotion now includes opt-out notices on all fax advertisements it sends.

Petitioner was named as a defendant in a class action lawsuit filed by serial TCPA litigator Schultz and Associates.¹⁵ The plaintiff, Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry, is also serial TCPA plaintiff.¹⁶ Plaintiff served Petitioner last week on May 13, 2015.¹⁷

¹⁵ *Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry v. Business Promotion LLC d/b/a BP Dental Marketing and d/b/a BP Dental, et al.*, Case No: 15SL-CC00532 (Circuit Court of St. Louis County, Twenty-First Judicial Circuit State of Missouri).

¹⁶ *Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry (“Degnen”) v. Free Continuing Education Association, LLC d/b/a FCEA, et al.*, Case No. 4:15-cv-00527-RLW (United States District Court, Eastern District of Missouri, Eastern Division); *Degnen v. DentalFix RX LLC, et al.*, Case No: 15SL-CC00541 (Circuit Court of St. Louis Count, Twenty-First Judicial Circuit State of Missouri); *Degnen v. Jose-Luis Ruiz, D.D.S., et al.*, Case No. 15SL-CC00547 (Circuit Court of St. Louis Count, Twenty-First Judicial Circuit State of Missouri); *Degnen v. Robert A Tripke, et al.*, Case No: 15SL-CC00548 (Circuit Court of St. Louis Count, Twenty-First Judicial Circuit State of Missouri); *Degnen v. Zimmer Dental, Inc. d/b/a Zimmer Dental, et al.*, Case No: 15SL-CC00587 (Circuit Court of St. Louis Count, Twenty-First Judicial Circuit State of Missouri); *Degnen v. Gregory L. Jack, et al.*, Case No: 15SL-CC01274 (Circuit Court of St. Louis Count, Twenty-First Judicial Circuit State of Missouri); and *Degnen v. I Care Credit, LLC d/b/a ICare Financial, et al.*, Case No: 15SL-CC00340 (Circuit Court of St. Louis Count, Twenty-First Judicial Circuit State of Missouri).

¹⁷ Petitioner respectfully requests that the Commission treat Petitioner as it would any other petitioner similarly situated to the Anda Order petitioners because, factually speaking, it is

The Opt-Out Rule forms the basis for the Plaintiff's claimed damages. The plaintiff's claim seeks relief for any fax Petitioner sent without a proper opt-out notice, and it relies on the fact that a fax advertisement must contain an opt-out notice regardless of whether the recipient consented to receive the fax.

Under the circumstances, good cause exists to grant Petitioner's request for a retroactive waiver of the Opt-Out Rule with respect to any solicited fax advertisements that may have been transmitted by or on behalf of Petitioner prior to April 30, 2015.¹⁸

II. Argument

A. The Commission Has Found Good Cause to Grant Retroactive Waivers of the Opt-Out Rule

The Commission may suspend, revoke, amend, or waive any of its rules for good cause shown.¹⁹ Good cause requires a showing that “(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.”²⁰ Just as the Commission found good cause in the Anda Order, good cause exists here.²¹

First, the undeniable confusion caused by the Junk Fax Order justifies a finding of “special circumstances.” As acknowledged by the Commission in the Anda Order, the inconsistency between the text of the rule in Section 64.1200(a)(4)(iv) and footnote 154 in the

similarly situated to those petitioners and it filed this Petition within one week of being served with the lawsuit.

¹⁸ Petitioner does not request that the Commission resolve issues of fact raised by the lawsuit, including whether the faxes at issue were solicited or not. Such factual determinations are properly left to the trial court.

¹⁹ 47 C.F.R. § 1.3.

²⁰ Anda Order at ¶ 23 (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)).

²¹ Anda Order at ¶¶ 26-27.

Junk Fax Order caused confusion among senders of fax advertisements.²² And this confusion “establishes good cause for retroactive waiver of the rule.”²³

Second, granting Business Promotion a waiver serves the public interest. As the Commission knows, entities that violate the Opt-Out Rule face potentially significant liability both from lawsuits initiated under the TCPA’s private right of action and from forfeitures for violations of the Commission’s rules. Because of the confusion surrounding the Opt-Out Rule and the potentially significant liability, the Commission has decided that it serves the public interest to grant retroactive waivers of the Opt-Out Rule to ensure that parties are not subject to liability for inadvertent violations of the rule caused by reasonable confusion as to its application.²⁴

B. As it has in Similar Instances, the Commission Should Grant Petitioner’s Expedited Request

Like the parties in the Anda Order, Petitioner’s misplaced confidence in the Junk Fax Order’s footnote led to Petitioner’s confusion regarding the application of the Opt-Out Rule to solicited fax advertisements. It is Petitioner’s policy to send fax advertisements *only* with the prior express consent of a customer or potential customer; therefore, Petitioner, like many other similarly situated parties, believed it was in compliance with the Commission’s Opt-Out Rule. As the Commission noted in the Anda Order, ignorance of the TCPA or the Commission’s rules is not generally grounds for waiver or a defense to a violation.²⁵ In this specific circumstance,

²² *Id.* at ¶ 24.

²³ *Id.* at ¶ 26.

²⁴ *Id.* at ¶ 27.

²⁵ *Id.* at ¶ 26.

however, the Commission has determined that the confusion experienced by Petitioner establishes good cause for retroactive waiver of the Opt-Out Rule.²⁶

Petitioner's situation also mirrors many of those in the Anda Order and other parties seeking similar retroactive waivers – entities that face litigation based on the confusion surrounding the Opt-Out Rule. The confusion led to Petitioner being swept into a putative class action lawsuit.

The Commission has a responsibility to balance the interests of legitimate business with consumer interests in implementing the TCPA and its rules and not to impose liability where reasonable confusion may have caused inadvertent violations of the Opt-Out Rule.²⁷ Here, the public interest is served by granting Petitioner a retroactive waiver for solicited fax advertisements sent prior to April 30, 2015 just as the Commission did to the parties in the Anda Order.²⁸

III. Conclusion

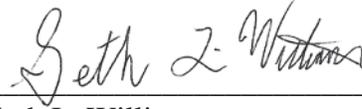
For the forgoing reasons, Petitioner respectfully requests that the Commission grant it a retroactive waiver with respect to any fax advertisements that may have been transmitted without an appropriate opt-out notice by or on behalf of Petitioner with the prior express consent or permission of the recipients or their agents prior to April 30, 2015. Such a waiver is consistent with the Commission's Anda Order and the Commission's position that good cause exists and the public interest is served by such a waiver in light of the reasonable confusion generated by the Junk Fax Order.

²⁶ *Id.*

²⁷ *Id.* at ¶ 27.

²⁸ *Id.* at ¶ 27.

Respectfully Submitted,



Seth L. Williams

Jane L. Wagner

Marashlian & Donahue, LLC

1420 Spring Hill Road

Suite 401

McLean, VA 22102

Tel: (703) 714-1300

Fax: (703) 714-1330

Counsel for Business Promotion, LLC

Dated: May 20, 2015