

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

In the Matter of)
) CG Docket No. 02-278
Junk Fax Prevention Act 2005)
) CG Docket No. 05-338
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

**WILDER CHIROPRACTIC, INC.'S COMMENTS ON THE
MICROWIZE TECHNOLOGY, INC.'S PETITION FOR WAIVER**

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EXECUTIVE SUMMARY

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv)—the regulation requiring opt-out notices on fax advertisements sent with “prior express invitation or permission”—to defendants in private TCPA actions and allowed “similarly situated” persons to seek waivers. The Commission stressed that “all future waiver requests will be adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.” The Microwize Technology, Inc. (“Microwize”) petition, requesting a similar retroactive waiver, is one of the last of the follow-on waiver petitions contemplated by the October 30 Order. The Commission should deny the Microwize petition.

No good cause exists here to grant Petitioner’s request for a retroactive waiver. Petitioner is not “similarly situated” to other petitioners who were granted waivers. Undisputed evidence shows that Petitioner was not confused about whether a fax sent with the consent of the recipient was required to contain an opt-out notice. On the contrary, Petitioner has admitted in private litigation that it attempted to include opt-out notices on all faxes it sent. The issue here is that the opt-out notice it included was not compliant. The waiver only applies to those who were confused about whether or not opt-out notices were required on so-called solicited faxes in the first place. Because Petitioner cannot in good faith claim that it was confused as to the legal requirement, Petitioner does not meet the requirements for a waiver.

Regardless of whether the Commission reviews the Petition to determine whether Petitioner was *actually* confused about the opt-out requirement or will *presume* the petitioner was confused in the absence of evidence that the petitioner was merely ignorant of the law or had actual knowledge of the opt-out rules, the Commission should deny the Petition. Petitioner does not claim it was actually “confused” about the law. Similarly, any presumption that Petitioner was confused is rebutted by the fact that Petitioner included opt-out language on all its faxes.

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Commenter Wilder Chiropractic, Inc. is the plaintiff in a private TCPA action pending in the Circuit Court of Dane County, Wisconsin against petitioner Microwize Technology, Inc. (“Microwize”).¹ Microwize filed a petition on April 29, 2015, seeking a retroactive waiver of the regulation requiring an opt-out notice on fax advertisements sent with “the prior express consent or permission of the recipients or their agents”.²

The Commission issued an order on 24 similar petitions on October 30, 2014 (the “Opt-Out Order”).³ That order rejected the challenges to the validity of the Commission’s ability to promulgate and enact the opt-out regulation, but granted retroactive “waivers” purporting to relieve the 24 petitioners of liability in private

¹ See *Wilder Chiropractic, Inc. v. Microwize Technology, Inc.*, Case No. 11 CV 4537, Cir. Ct. Dane County, WI.

² Petition of Microwize Technology, Inc. for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 (filed April 29, 2015) (the “Microwize petition”).

³ *In re Rules & 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*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) (“Opt-Out Order”).

TCPA litigation.⁴ The Opt-Out Order allowed other “similarly situated” parties to request waivers, and invited comments on those requests.⁵ Wilder Chiropractic requests the Commission deny Microwize’s request for a waiver because Microwize knew it was required to place an opt-out notice on its faxes, and did so, although the opt-out notices were non-compliant. Accordingly, Microwize is not “similarly situated” to others receiving waivers, and is not entitled to a waiver. The Commission should deny the Petition.

First, the Commission should deny Microwize’s request for a petition because it is not similarly situated to the other petitioners granted waivers. Microwize offers no support for its contention that it only sent faxes with the prior express permission or invitation (consent) from recipients, and evidence obtained in private litigation indicates otherwise. The testimony establishes that Microwize obtained fax numbers provided from persons voluntarily, but Microwize did not explicitly obtain prior express permission or consent to send persons advertisements by fax. Instead, Microwize erroneously assumed that because it had fax numbers, it had the consent to send faxes. This does not establish the requirements for a waiver, and does not align with the situations of other petitioners granted waivers.

⁴ *Id.* ¶¶ 19–20, 32 and n.70.

⁵ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Nov. 28, 2014) (“Public Notice”) (“With this Public Notice, we seek comment on the Petitions as described below. Specifically, the Petitioners seek retroactive waivers of the opt-out notice requirement for fax ads they sent where prior express invitation or permission had been obtained from the recipient”).

Second, no good cause exists here to grant Microwize's request for a retroactive waiver. Microwize was not confused about whether a fax sent with the consent of the recipient was required to contain an opt-out notice. In fact, Microwize included opt-out language all of its faxes, as testified by a Microwize employee familiar with the faxing. Microwize cannot assert that it was "confused" about whether an opt-out was needed when it included, or attempted to include, opt-out language on all its faxes. Instead, Microwize requests the Commission overlook the deficient opt-out language included on its faxes. This does not meet the requirements for a waiver, because the waiver only applies to those who were confused about whether or not opt-out notices were required on faxes sent with the prior express consent of recipients, not to those who were confused about the language required on the opt-out notices. Moreover, granting Microwize a waiver would undermine the public policy behind the TCPA, and no special circumstances exist that warrant a waiver here.

The Commission should deny the petition.

FACTUAL BACKGROUND

Microwize is a health care technology consulting company that sells and markets software and software support to health care professionals, and conducts training seminars on software used in the medical field. Microwize is an authorized reseller of two software products developed by McKesson: Lytec and Medisoft. Microwize makes money by selling software and conducting training seminars on the software nationwide.

Microwize had a database of persons who had either purchased a product or service from it or had contacted it at some point in time for information about the software products. Microwize began sending what it referred to as “fax promotions” to persons in its database. Microwize hired a fax broadcaster to send these fax promotions in bulk between 2006 and 2008. In 2008, Microwize switched another fax broadcaster to take advantage of lower rates.

A Microwize employee would create the “fax promotions” by downloading content from McKesson, and include additional information given to her by Robert Gabriel, CEO of Microwize. Each of the “fax promotions” was similar: every fax contained a Microwize logo and Microwize’s contact information. The faxes only varied to the extent they promoted the different products, Medisoft and Lytec, and the different program topics. Each of the “fax promotions” contained opt-out language.⁶

In late 2010, a new employee, Jennifer Kennedy, took over the creation of the “fax promotions,” which were then sent to the fax broadcaster. Kennedy based the latest “fax promotions” on the prior Microsoft Word version of the promotions, updating the template as needed. Kennedy did not change the language of the opt-out provision.

Wilder Chiropractic, Inc. (“Wilder Chiropractic”), the plaintiff in the private litigation, and commenter here, is a Wisconsin corporation, provides chiropractic health care in Madison, Wisconsin. Wilder Chiropractic is owned by Dr. Jeffrey M.

⁶ Deposition Transcript of Jennifer Kennedy, 39:11-17 (“A. Microwize has always used opt out language for all faxes. Q. It has always been similar, if not identical, to Exhibit 1? A. That is correct.”).

Wilder. On September 28, 2010, Wilder Chiropractic received a Microwize fax advertising one of its seminars.⁷ Wilder Chiropractic did not give Microwize permission to send it fax advertisements and never had any business relationship with Microwize. Wilder Chiropractic subsequently filed a lawsuit in the Circuit Court of Dane County, Wisconsin, alleging the fax violated the TCPA.

On December 3, 2013, the Circuit Court granted Wilder Chiropractic's Motion for Partial Summary Judgment, holding that the fax sent to Wilder Chiropractic was an advertisement under the TCPA, and that the opt-out notice did not comply with the TCPA.

ARGUMENT

I. Microwize is not “similarly situated” to other petitioners who were granted waivers.

In its Opt-Out Order, the Commission found that “good cause” existed to grant the 24 waivers because an “inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission.”⁸ The Commission also permitted “similarly situated parties” to seek similar waivers.⁹

Microwize is not similarly situated to the parties who have received waivers from the Commission. Microwize provides absolutely no support for its statement

⁷ The fax is attached as Exhibit A.

⁸ Opt-Out Order, ¶24.

⁹ *Id.*, ¶2.

that it sent faxes with the “prior express permission or invitation” (consent) of consumers. Microwize does not describe to the Commission its business practices, faxing activity or the manner in which it allegedly obtained consent from consumers. This complete lack of facts does not establish that Microwize obtained “prior express permission” to send advertisements by fax to recipients (sometimes referred to herein as “solicited faxes”). The Commission has stated that it will assess waiver requests “on a case-by-case basis.”¹⁰ This necessarily requires that petitioners provide the Commission with enough supporting information to make an assessment of substantial similarity. Because the petition is wholly devoid of facts, Microwize cannot show that it is “similarly situated” to other petitioners who were granted waivers.

Moreover, the evidence gathered in the case belies the bald assertion that Microwize sent faxes with the prior express consent or permission of its customers. First, it is undisputed that the plaintiff, Wilder Chiropractic, did not give permission or consent to receive any advertising faxes from Microwize.¹¹ Second, Microwize has argued in court filings that “all faxes were sent to entities with which Microwize had an established business relationship (“EBR”)”, not with “prior express consent or permission” as it asserts to the Commission.¹² Robert Gabriel

¹⁰ Opt-Out Order, ¶ 30, n.102.

¹¹ Affidavit of Jeffrey M. Wilder, ¶ 6.

¹² Microwize’s Response in Opposition to Plaintiff’s Motion for Summary Judgment, p. 11, filed May 7, 2015.

testified that he believed Microwize had “a business relationship [with fax recipients] so I was sending something pertaining to the business relationship.”¹³

These facts do not constitute grounds for a waiver. The Commission underscored that the “waiver does not extend to a similar requirement to include opt-out notices on fax ads sent pursuant to an established business relationship, as there is no confusion regarding the applicability of this requirement to such faxes.”¹⁴ Moreover, the Commission emphasized “that simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”¹⁵ Thus, Microwize cannot show it is similarly situated to those parties who were granted a waiver of the requirement that faxes sent with “prior express permission” contain opt-out notices. Microwize’s petition should be denied.

II. No good cause exists to grant the Microwize waiver.

A. Microwize was not confused about the opt-out notice requirement.

No good cause exists to grant the Microwize petition because Microwize does not claim that was “confused” or had “misplaced confidence” regarding whether opt-out notices was required on its fax advertisements. Instead, it is clear that Microwize knew that the law required an opt-out notice on all faxed advertisements. In the Opt-Out Order, the Commission noted that “nothing in the record here demonstrat[es] that the petitioners understood that they did, in fact,

¹³ Deposition Transcript of Robert Gabriel, 90:9-12.

¹⁴ Opt-Out Order, ¶2, n. 2. *See also FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Oct. 30, 2014) (“Public Notice Confirmation”), n. 6.

¹⁵ Opt-Out Order, ¶26.

have to comply with the opt-out notice requirement . . . but nonetheless failed to do so.”¹⁶ Yet here, the record contains such evidence. Microwize’s testimony is unequivocal: “Microwize has always used opt out language for all faxes.”¹⁷ Robert Gabriel confirmed that Microwize “always” had opt-out language on its faxes.¹⁸ Accordingly, the fax at issue contained an opt-out notice—albeit a non-compliant one. There is no evidence that Defendant was “confused” or “uncertain” about the requirement to include an opt-out notice. The only issue is whether the notice that was included was compliant, which is not grounds for a waiver.¹⁹ Accordingly, there is no “good cause” to grant Microwize a waiver.

B. Granting a waiver would undermine the TCPA’s policy objectives.

Microwize argues that a waiver from § 64.1200(a)(4)(iv) would not undermine the TCPA’s policy objective because it did not send advertisements by facsimile or send faxes without the recipients’ consent.²⁰ Microwize provides absolutely no support for these statements, and, in fact, the evidence obtained private litigation belies these assertions.

The Circuit Court already determined that the fax Microwize sent to Wilder Chiropractic was an advertisement, and there is nothing in the record to indicate that any of the faxes Microwize ordered the fax broadcasters to send were not also advertisements. Microwize sent more than 40,000 to the persons in its database and

¹⁶ *Id.*, ¶¶25-26 (emphasis added).

¹⁷ Deposition Transcript of Jennifer Kennedy, 39:13-14.

¹⁸ Deposition Transcript of Robert Gabriel, 81:13-19.

¹⁹ *See Opt-Out Order*, ¶ 33 (noting that substantial compliance with the requisite opt-out language does not suffice).

²⁰ Petition, pp. 4-5.

has not established that it obtained the prior express permission or consent to send any of those persons advertisements by fax. The TCPA's policy objective would be seriously undermined if the Commission granted Microwize a waiver of the rules requiring certain opt-out language on all its advertising faxes.

C. There are no special circumstances that justify a waiver.

Microwize argues that without a waiver from the Commission, Microwize might be subjected to “potentially millions of dollars in monetary damages.”²¹ Microwize then promises the Commission, “Going forward, Microwize will include a compliant opt-out notice on any fax advertisements” it sends.²² These statements do not justify a waiver.

The Commission made clear that “the risk of substantial liability in private rights of action is, by itself, [not] an inherently adequate ground for waiver.”²³ Without more support that Microwize had the prior express permission or consent to send recipients fax ads and a statement that Microwize was confused about the requirement to include an opt-out notice on such faxes, the bare assertion that Microwize might be subject to large monetary damages in private litigation does not warrant deviation from the requirements of §64.1200(a)(4)(iv).

Moreover, the Commission specifically denied requests for waiver of the requirement that opt-out notice can “comply substantially” with §64.1200(a)(4)(iv).²⁴ The evidence that Microwize included deficient opt-out language on all its faxes,

²¹ *Id.*, p. 5.

²² *Id.*, p. 5.

²³ Opt-Out Order, ¶ 28.

²⁴ *Id.*, ¶ 33.

combined with a promise to comply in the future and the Commission's own language establish that a waiver is not appropriate here.

The Commission should deny the Microwize petition.

III. Regardless of whether the standard for a waiver from §64.1200(a)(4)(iv) is *actual* confusion or *presumed* confusion, the Microwize petition does not meet the standard.

The public notice seeks comments “consistent with the guidelines set forth in the *Fax Order*.” The Opt-Out Order states that the lack of notice in the 2005 rulemaking and an inconsistent footnote in the 2006 *Junk Fax Order* “led to confusion or misplaced confidence on the part of petitioners,” justifying a waiver.²⁵ It also states these factors “caused businesses mistakenly to believe that the opt-out notice requirement did not apply.”²⁶ These statements suggest the Commission found that the 24 petitioners covered by the order were entitled to waivers because, prior to sending their faxes, they did in fact (1) receive inadequate notice, (2) read the regulation and the footnote, and (3) suffer actual “confusion or misplaced confidence” as a result.²⁷

At the same time, however, the order states these factors “*may have* contributed to confusion or misplaced confidence,” that the combination of factors “*presumptively* establishes good cause for retroactive waiver,” and that “nothing in the record here demonstrat[es] that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement . . . but nonetheless failed to do

²⁵ Opt-Out Order, ¶26.

²⁶ *Id.* ¶27.

²⁷ Plaintiff does not concede that any of the 24 petitioners met these standards.

so.”²⁸ The Commission also emphasized that “simple ignorance” of the law “is not grounds for a waiver.”²⁹ These statements suggest the Commission found the regulation objectively “confusing,” giving rise to a *presumption* that the 24 petitioners were “confused,” and that Plaintiffs failed to rebut that presumption with evidence the petitioners knew opt-out notices were required or were simply ignorant of the regulation. Regardless of the standard by which the Commission reviews the petitions, the Microwize petition must be denied.

If the standard is actual confusion, the Commission should refuse to issue a waiver because Microwize does not actually claim it was confused about whether an opt-out notice was required on so-called solicited faxes. If the standard is a rebuttable presumption of confusion, then the Commission should consider the testimony of the Microwize CEO and employees as rebuttal to any presumption of confusion. Microwize does not claim that it was actually confused about the requirement that faxes sent with prior express permission or consent contain statutorily-compliant opt-out notices. Instead, Microwize testified that it included opt-out language on all its faxes, without exception. The Commission cannot find that Microwize was actually confused or presumptively confused about the opt-out notice requirement.

CONCLUSION

The Commission should deny the Microwize petition for waiver because it is not similarly-situated to parties granted a waiver of the opt-out notice

²⁸ Opt-Out Order ¶¶25-26 (emphasis added).

²⁹ *Id.* ¶26.

requirements. Microwize does not establish that it obtained prior express permission to send persons advertisements by fax. Moreover, Microwize was not confused about the need to include opt-out language on its faxes. It testified that it included opt-out language without exception, and so cannot have been confused about the requirement. The Commission should deny the petition.

Respectfully submitted,

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