

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

In the Matter of)

) CG Docket No. 02-278

Petition for Waiver of)
Papa Murphy's Holdings, Inc. and)
Papa Murphy's International L.L.C.)

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FEB 22 2016

*Federal Communications Commission
Office of the Secretary*

PETITION FOR WAIVER

Introduction

Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. (collectively, "Papa Murphy's"), the franchisors of the Papa Murphy's Take 'N' Bake Pizza shops across the United States and Canada, through their undersigned counsel and pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules, 47 C.F.R. § 1.3, respectfully request that the Commission grant (1) a retroactive waiver of sections 64.1200(a)(2) and 64.1200(f)(8) of the Commission's rules, 47 C.F.R. §§ 64.1200(a)(2), 64.1200(f)(8), for any text messages Papa Murphy's sent between October 16, 2013, and June 17, 2015, to individuals who had provided written consent to receive text messages from Papa Murphy's prior to October 16, 2013; and (2) a brief prospective waiver of 89 days to allow Papa Murphy's to re-opt in those individuals who had provided written consent to receive text messages prior to October 16, 2013.

In its July 10, 2015 Declaratory Ruling and Order, the Commission found good cause existed to grant the petitioners a retroactive waiver of Section 64.1200(a)(2), (f)(8) from October 16, 2013 to the date of the July 2015 Order and a prospective waiver of 89 days to come into compliance with the prior express written consent requirements.¹ In doing so, the Commission recognized that, based on its own prior statements, there was legitimate confusion over whether an individual's written consent obtained before October 16, 2013, remained valid after that date if the written consent did not precisely track the new "prior express written consent" standard.

¹ See *In re Rules & Reg's Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8013-15 (July 10, 2015) ("July 2015 Order").

Like the petitioners that received the relief in the 2015 Order, Papa Murphy's only transmitted text messages to persons who had affirmatively requested the receipt of such messages through their express **written** consent. However, believing that this written consent remained valid, Papa Murphy's did not re-opt in customers who signed up for its texting program prior to October 16, 2013. Papa Murphy's is currently a defendant in a putative class action lawsuit, and thus, could suffer significant monetary damages because the written consent it obtained could be deemed technically invalid. Papa Murphy's is now in compliance with the Commission's rules and is not currently sending text messages to people who provided their written consent prior to October 16, 2013 (unless they have provided their prior express written consent since that time). Accordingly, as demonstrated below, good cause exists to grant Papa Murphy's a retroactive waiver of Section 64.1200(a)(2), (f)(8) from October 16, 2013, to the date of the July 2015 Order and a prospective waiver of 89 days to reenroll its prior text message recipients.

Background

Papa Murphy's Text Message Program. Prior to June 17, 2015, Papa Murphy's offered individuals the option of receiving coupons and other promotions via text message.^{2,3} At all times, customers who wished to receive such promotions affirmatively provided their written consent to take part in the program through one of the following ways: (1) an interested customer would text a message to a specified short code; or (2) an interested customer would fill out an online sign-up form.⁴ Papa Murphy's only sent text messages to persons who affirmatively opted into the receipt of such messages.⁵ Papa Murphy's did not condition receipt

² Declaration of Andrew Brawley in Support of Petition for Waiver ("Brawley Decl."), ¶ 2.

³ Papa Murphy's completely halted its text messaging program on June 17, 2015, to examine it in light of a putative class action lawsuit alleging violations of the Telephone Consumer Protection Act ("TCPA"). After completing a comprehensive review of its text messaging program, Papa Murphy's renewed its text message program in July 2015, but elected to send text messages to only those people who signed up for the program after the July 2015 program relaunch. Brawley Decl. ¶ 4.

⁴ Brawley Decl. ¶ 2.

⁵ *Id.* ¶ 3.

of promotions on consent to receive text messages.⁶ Further, every text message Papa Murphy's sent informed customers they could stop receiving text messages by replying "stop."⁷

Despite this entirely voluntary enrollment process, which required written consent, Papa Murphy's has been sued in a putative class action alleging violations of the TCPA, on the grounds that the consent Papa Murphy's obtained was not sufficient. The plaintiff is not contesting that he requested to receive text messages.⁸ The plaintiff, who signed up to receive text messages through Papa Murphy's website in 2012 and never attempted to cease receiving the text messages, claims Papa Murphy's violated the TCPA by sending him text messages without his technically proper written consent. Specifically, the plaintiff argues that his 2012 written consent did not meet the precise contours of the new "prior express written consent" standard of Section 64.1200(a)(2), (f)(8), and thus was not effective after October 16, 2013.⁹ Importantly, the plaintiff does not contend that text messages Papa Murphy's sent prior to the October 2013 rule change were violative of the TCPA. Rather, the plaintiff argues only that his consent was no longer valid after the rule change.¹⁰

Relevant TCPA Regulations. The TCPA prohibits making a call "using any automatic telephone dialing system" ("ATDS") to "any telephone number assigned to a . . . cellular telephone service" unless the caller has the "the prior express consent of the called party."¹¹ Until October 16, 2013, the applicable consent standard was simply that the caller needed "prior

⁶ *Id.*

⁷ *Id.*

⁸ The case is captioned *Lennartson v. Papa Murphy's Holdings, Inc. et al.*, No. 3:15-cv-05307-RBL (W.D. Wa.).

⁹ Papa Murphy's does not concede that its consent process did not meet Section 64.1200's current standard, but files this waiver request because it is similarly situated to those petitioners that already received waivers as a result of the FCC's July 2015 Order, in that it faces potential liability for text messages sent to individuals who provided their written consent prior to October 16, 2013.

¹⁰ The issue of whether Papa Murphy's, or any other third party that sent text messages, used an "automatic telephone dialing system" has not been formally raised in the litigation and Papa Murphy's does not concede that such a device was used.

¹¹ 47 U.S.C. § 227(b)(1)(A)(iii).

express consent” to send text messages using an ADTS to a wireless phone number.¹² That consent could be oral or written, and was given when a person “knowingly release[ed] [his] phone number” to a business.¹³

The Commission later amended its rules to prohibit calls made with an ATDS that “introduce[] ... advertisement[s] or constitute[] telemarketing,” unless the caller has obtained the “prior express written consent” of the person being called.¹⁴ This new rule contains various requirements for what qualifies as “prior express written consent.”¹⁵ When announcing this rule change, the Commission made the ambiguous statement that “once our written consent rules become effective . . . an entity will no longer be able to rely on non-written forms of express consent to make autodialed . . . telemarketing calls, and thus could be liable for making such calls absent prior written consent.”¹⁶ In its July 2015 Order, the Commission acknowledged that this language “could have reasonably been interpreted to mean that written consent obtained prior to the consent rule’s effective date would remain valid even if it does not satisfy the current rule” and granted a retroactive waiver of the rule’s application as to calls made and texts sent to individuals that consented in writing before October 16, 2013.¹⁷ The Commission further granted a prospective waiver to the petitioners so that they would have 89 days from the order to obtain new consents.¹⁸

Good Cause Exists to Grant Papa Murphy’s Requested Relief

Good cause exists to grant Papa Murphy’s a retroactive waiver of Section 64.1200(a)(2), (f)(8) from October 16, 2013 to the date of the July 2015 Order and a prospective waiver of 89 days for those text messages it sent to individuals who provided their written consent prior to

¹² 47 C.F.R. § 64.1200(a)(1) (2013).

¹³ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8769 (1992).

¹⁴ 47 C.F.R. § 64.1200(a)(2).

¹⁵ 47 C.F.R. § 64.1200(f)(8).

¹⁶ *In re Rules & Reg’s Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1857 (2012).

¹⁷ July 2015 Order at 8014.

¹⁸ *Id.* at 8015.

October 16, 2013. The Commission has the authority to waive any rule for good cause shown.¹⁹ The Commission has found that good cause exists if: “(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

First, special circumstances warrant deviation from the general rule. As the Commission has explained, its 2012 Order caused “confusion” about whether callers could rely on written consents obtained before October 16, 2013, that may not meet the new “prior express written consent” standard.²¹ The ambiguous statements in the 2012 Order, and the Commission’s acknowledgment that they caused confusion warrants deviation from Section 64.1200(a)(2), (f)(8) and supports a limited waiver.

Second, a waiver would serve the public interest. The TCPA and the Commission’s TCPA rules are intended to “empower consumers to decide which robocalls and text messages they receive.”²² That purpose is not served by potentially subjecting Papa Murphy’s to significant liability for sending text messages to individuals who affirmatively sought out and unambiguously agreed in writing before October 16, 2013, to receive text messages. Moreover, the Commission has already determined that granting a retroactive waiver of the “prior express written consent” standard in similar circumstances was warranted and in the public interest.

Papa Murphy’s is Similarly Situated and Seeks the Same Waiver Provided in the July 2015 Order

As noted, Papa Murphy’s was named as a defendant in putative class action lawsuit alleging violations of the TCPA, in which the plaintiff argues that Papa Murphy’s should face significant liability because his 2012 written consent did not remain valid after October 16, 2013.

¹⁹ 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

²⁰ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 F.C.C. Rcd. 13998, 14008 (Oct. 30, 2014).

²¹ July 2015 Order at 8014 (acknowledging that certain language in the Commission’s 2012 Order “could have reasonably been interpreted to mean that written consent obtained prior to the current rule’s effective date would remain valid even if it does not satisfy the current rule.”).

²² *Id.* at 7964.

The present petition does not request, nor require, the Commission to resolve the factual or legal questions raised in the pending litigation. Rather, Papa Murphy's merely seeks to obtain the same retroactive waiver of Section 64.1200(a)(2), (f)(8) granted to other petitioners in the Commission's July 10, 2015, Order. Papa Murphy's is similarly situated to those petitioners that had—like Papa Murphy's—obtained written consent from individuals prior to October 16, 2014. It is equitable that Papa Murphy's receives the same treatment. Papa Murphy's stopped sending all text messages to people who signed up before October 16, 2013, in June 2015; however it has since reconstituted its text message program and wishes—without the threat of incurring liability—to re-opt in those people who signed up prior October 16, 2013 consistent with the current “express written consent” requirements. Accordingly, Papa Murphy's requests a retroactive waiver, as well as a short prospective waiver, similar to the one granted to the prior petitioners.

Conclusion

For all of the reasons stated above, Papa Murphy's respectfully requests the Commission for a retroactive waiver of Section 64.1200(a)(2) and (f)(8) of the Commission's rules for any text messages Papa Murphy's sent between October 16, 2013, and June 17, 2015, to individuals who had provided written consent to receive text messages from Papa Murphy's prior to October 16, 2013. Papa Murphy's further requests a short prospective waiver, of 89 days, to re-opt in those individuals who signed up for its text message program prior to October 16, 2013, without the threat of incurring liability.

Respectfully submitted this 19 day of February, 2016



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_____)

**DECLARATION OF ANDREW BRAWLEY
IN SUPPORT OF PETITION FOR WAIVER**

I, Andrew Brawley, declare as follows:

1. I am the Email & Mobile Marketing Manager at Papa Murphy's International L.L.C. ("Papa Murphy's"). I have held this position since joining Papa Murphy's in April of 2013. My job responsibilities include overseeing Papa Murphy's mobile marketing efforts, including its text message program. I have personal knowledge of the matters set forth below, and can competently testify thereto.

2. Prior to June 17, 2015, Papa Murphy's offered individuals the option of receiving coupons and other promotions via text message. At all times, customers who wished to receive such promotions affirmatively provided their written consent to take part in the program through one of the following ways: (1) an interested customer would text a message to a specified short code; or (2) an interested customer would fill out an online sign-up form.

3. Papa Murphy's only sent text messages to persons who affirmatively opted into the receipt of such messages. Papa Murphy's did not condition receipt of promotions on consent to receive text messages. Further, every text message Papa Murphy's sent informed customers they could stop receiving text messages by replying "stop."

4. Papa Murphy's completely halted its text messaging program on June 17, 2015, to evaluate the program in light of a putative class action lawsuit alleging violations of the TCPA. After completing a comprehensive review of its text messaging program, Papa Murphy's relaunched its text message program in July 2015, but elected to send text messages to only those people who signed up for the program after the July 2015 program relaunch.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Vancouver, WA on February 19, 2016.



Andrew Brawley

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