

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of: : CG Docket No. 02-278
 : 05-338
 :
Petition of Jeana Fleitz, LLC d/b/a The X- :
Ray Lady, for Retroactive Waiver of 47 :
U.S.C. § 64.1200(a)(4)(iv) :
 :

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commissions (“FCC” or the “Commission”) regulations, 47 C.F.R. § 1.3, Jeana Fleitz, LLC d/b/a The X-Ray Lady (“X-Ray Lady”), respectfully request that the Commission grant it a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Rule”) for facsimile transmissions sent by or on behalf of X-Ray Lady, on or before April 30, 2015, with the prior express consent or permission of the recipient. X-Ray Lady’s waiver request is supported by good cause and consistent with the public interest as well as previous waivers granted by the Commission.

I. FACTUAL BACKGROUND

A. X-Ray Lady is a Small Business Offering Continuing Education Courses.

X-Ray Lady is a business which was started in 1973 by Jeana Fleitz. X-Ray Lady employs seven individuals. The company offers affordable home study continuing education courses to radiologic technologists, limited radiographers, and those in specialty areas of mammography, ultrasonography, computed tomography, magnetic resonance imaging, nuclear medicine, and bone densitometry. The courses offered by X-Ray Lady are nationally approved by the American Society of Radiological Technology. Such courses are necessary for professionals in these fields to remain properly licensed.

B. X-Ray Lady Learned of Potential Exposure to Liability Under the Junk Fax Prevention Act of 2005.

Like many companies, X-Ray Lady served with a lawsuit and putative class action, which alleged that X-Ray Lady violated the Telephone Consumer Protection Act (“TCPA”). The Complaint specifically alleges that X-Ray failed to abide by the Opt-Out Rule promulgated by regulations of the Junk Fax Prevention Act of 2005.

While X-Ray Lady disputes the allegations in the Complaint, X-Ray Lady seeks to cutoff liability for any fax sent by X-Ray Lady as permitted by the Anda Order, in the event the fax failed to comply with the Opt-Out Rule as the result of the confusion and conflicting authority regarding whether the Opt-Out Notice was required on both non-solicited and solicited faxes.

C. The Anda Order Permits Waivers of the Opt-Out Requirement Regulation Related to the Junk Fax Prevention Act of 2005.

The Junk Fax Prevention Act of 2005, amended the TCPA, and prohibits the use of a fax machine to send an unsolicited fax advertisement unless:

- (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
- (ii) the sender obtained the number of the telephone facsimile machine through--
 - (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or
 - (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution...
- (iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

"Unsolicited advertisement" is defined as "material advertising the commercial availability of or quality of any property, goods, or services which is transmitted to any person *without that person's express invitation or permission*, in writing or otherwise." 47 U.S.C.

§227(a)(5) (emphasis added)

Paragraph (2)(D) of the TCPA authorized the commissions to make rules to “provide that a notice contained in an *unsolicited* advertisement complies with the requirements under this subparagraph only if” the fax has a clear and conspicuous notice on the first page of the unsolicited advertisement stating that the recipient can request to opt-out of any future unsolicited advertisements by fax. 47 U.S.C. § 227(b)(1)(D) (emphasis added). The Commission issued an order in 2006 stating that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Red 3787 (2006) (“2006 Order”).

The Commission recognized that the statutory language, accompanying rule, and 2006 Order were confusing as to whether faxes sent pursuant to prior express consent required opt-out language. As a result, on October 31, 2014, the FCC published an order in response to a petition by Anda Inc., holding that the 2006 Order created confusion as to when a fax advertisement must contain an opt-out notice when sent to persons granting prior permission or consent. *Petition 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, 29 FCC Rcd 133998, FCC 14-164 (Oct. 30, 2014) (“Anda Order”), ¶15.

Importantly, the Anda Order invited persons similarly situated to Anda to file petitions for a retroactive waiver of the opt-out notice requirement. On August 28, 2015, the Commission granted waiver to more than 100 petitioners who were similarly situated to Anda, including several petitioners who filed their petitions after April 30, 2015, six months after the release date of the Anda Order.

II. GOOD CAUSE EXISTS TO GRANT X-RAY LADY A RETROACTIVE WAIVER OF THE OPT-OUT RULE.

Any failure of X-Ray Lady to comply with the Opt-Out Rule, which X-Ray Lady neither admits nor denies, was the result of confusion with respect to whether the fax advertisements sent with the recipient's prior express invitation or permission required the opt-out notice. This was the Commission's basis for granting the retroactive waivers in the Anda Order and the 2015 Order. The Commission recognized that good cause is based on the inconsistency between a footnote in the 2006 Order and the Opt-Out Rule, which "caused confusion or misplaced confidence," regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission. Anda Order ¶24 (citing the 2006 Order footnote 154).

The Commission determined that granting retroactive waivers serves the public because the "confusion or misplaced confidence ... left some businesses potentially subject to significant damage awards" and "on balance...it serves the public interest...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." *Id.* ¶27.

X-Ray Lady is similarly situated to the Petitioners in Anda and granting the X-Ray Lady's waiver request is in the public interest, and necessary to provide the same protection and treatment granted to prior petitioners. In the event X-Ray Lady is not granted not this waiver, it will be potentially exposed to large damage awards not based on its failure to comply with the FCC's rule and regulations, but rather, based upon confusion and an uncertain environment that plagued numerous business, which have already been granted a waiver.

III. CONCLUSION

For the foregoing reasons, X-Ray Lady respectfully request that the Commission grant it a waiver of 47 C.F.R. §64.1200(a)(4)(iv), effective retroactively, for faxes sent by or on behalf of X-Ray Lady through April 30, 2015, with the recipients prior express invitation or consent.

Respectfully submitted this 6th day of April, 2016.

Respectfully submitted,

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