BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:

Petition of SourceMedia LLC
For Retroactive Waiver of
47 C.F.R. § 64.1200(a)(4)(iv).

PETITION OF SOURCEMEDIA LLC FOR RETROACTIVE WAIVER

Petitioner SourceMedia LLC (“SourceMedia” or “Petitioner”), by and through its undersigned counsel, and pursuant to the Orders issued by the Federal Communications Commission (the “Commission”) on October 30, 2014 (the “October 2014 Order”) and August 28, 2015 (the “August 2015 Order”), and Section 1.3 of the Commission’s Rules, respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the “Regulation”) with respect to fax advertisements that have been transmitted by SourceMedia prior to April 30, 2015 with the prior express consent or permission of the recipients or their agents after the effective date of the Regulation. The Commission recently granted a number of such waivers for similarly-situated parties who filed petitioners before and after April 30, 2015. SourceMedia files this Petition for the same relief.

I. Background

The Telephone Consumer Protection Act (“TCPA”) prohibits, inter alia, the sending of unsolicited advertisements to telephone facsimile machines, subject to certain exceptions. 47 U.S.C. § 227(b)(1)(C). “Unsolicited advertisement” is defined to mean “material advertising the commercial availability of or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in
writing or otherwise.” 47 U.S.C. §227(a)(5) (emphasis added). The TCPA also exempts advertisements “from a sender with an established business relationship with the recipient,” in which instance the statute requires the unsolicited advertisement to include certain “opt-out” language. 47 U.S.C. § 227(b)(1)(C)(i)-(iii).

The Regulation states that fax advertisements “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.” But, in other rule-making, the Commission stated that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” 21 FCC Red at 3810, n.154 (emphasis added). “Unsolicited advertisements,” however, are limited by the terms of the TCPA to advertisements transmitted without express invitation or permission.

This apparent conflict led to considerable confusion. In the October 2014 Order, the Commission recognized this confusion, and granted a retroactive waiver of the Regulation to certain petitioners facing lawsuits premised, in part, on the failure to include opt-out language in faxes sent with prior express invitation or permission. See October 2014 Order ¶¶ 1, 26-27. The October 2014 Order further afforded those similarly situated to the petitioners therein an opportunity to request retroactive waiver, with the “expect[ation] that parties will make every effort to file within six months” of the release.” Id. at ¶ 2.

In the August 2015 Order, issued approximately 10 months later, the Commission granted 117 waivers to parties filing waiver requests through June 23, 2015. The Commission noted that although some of the petitions granted were filed after the six-month date referenced in the October 2014 Order, each of these petitions sought waiver for faxes sent prior to the April 30, 2014 deadline imposed by the October 2014 Order. August 2015 Order ¶ 20. It concluded that “granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients.” Id.
SourceMedia is a media company that provides news, analysis and information focused on financial services industries through print publications and news websites. SourceMedia communicates with its customers and others by sending facsimiles that describe its products and services. These recipients have consented to receive such facsimiles.

On October 23, 2014, SourceMedia was served with a putative class action lawsuit filed in the United States District Court for the Southern District of New York, entitled *Morgan & Curtis Associates, Inc. v. Source Media LLC d/b/a Source Media, Inc.* (No. 1:14-cv-07987-VSB). The lawsuit – brought by a named plaintiff who was a customer of SourceMedia’s – asserts claims under the TCPA on the grounds that a single fax was transmitted to the named plaintiff in October 2013 and claims, among other things, that SourceMedia is liable under the TCPA because that fax did not display a proper opt-out notice. Although the plaintiff claims the alleged fax advertisements\(^1\) were not sent by express invitation or permission, its proposed classes include *all* persons who received the faxes at issue regardless of whether they were solicited or unsolicited.\(^2\) The plaintiff alleges that the fax at issue constitutes an advertisement and that the fax did not contain a compliant opt-out notice. SourceMedia filed a Motion to Dismiss the case in its entirety, which, on September 11, 2015 was granted in part (with relation to a non-TCPA claim) and denied with respect to the TCPA claims. SourceMedia’s time to answer the complaint has not yet expired, and to date no scheduling order has been entered and no discovery has commenced.

---

1. SourceMedia denies the fax constituted an “advertisement,” but does not ask the Commission to determine that issue.

2. The parties dispute, *inter alia*, whether the faxes at issue were solicited. However, the Commission need not consider that 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.” October 2014 Order ¶ 31. Whether a recipient consented to receive SourceMedia’s faxes is a factual determination properly decided by the court before which the matter is pending.
II. Legal Standard for Waiver

47 CFR § 1.3 provides that “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.” A waiver may be granted if: “(1) special circumstances warrant deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.” October 2014 Order, at ¶ 23.

III. The Retroactive Waiver Request Should Be Granted.

The Commission has determined that confusion over the Regulation was generated by the apparent inconsistency between the two rules discussed above, and the fact that the Commission’s notice of rulemaking by which it eventually adopted the Regulation “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” October 2014 Order ¶ 25. Thus, the Commission concluded that there was “good cause for retroactive waiver of the [Regulation].” Id. at ¶ 26.

The Commission also found that granting waiver can serve the public interest, holding that the confusion over the Regulation could result in ruinous damage to litigants. Id. at ¶ 27. The Commission also found that “the TCPA’s legislative history makes clear [the Commission’s] responsibility to balance legitimate business and consumer interests,” and that responsibility would be disserved by subjecting parties to devastating legal consequences. Id.

The same conclusions are applicable here. The fax at issue in the underlying litigation was sent one year prior to the issuance of the October 2014 Order, and thus well before the clarification that the October 2014 Order offered. Moreover, like the petitioners subject to the October 2014 Order, SourceMedia faces potentially ruinous class-action litigation filed by a TCPA plaintiff who was a SourceMedia customer that gave consent to receive the faxes. In addition, to the extent relevant, SourceMedia has imposed new internal procedures to ensure
proper opt-out language is included in all future fax advertisements, regardless of consent, invitation, or existing business relationship, which procedures are now in full effect.

Finally, as the Commission noted in granting 117 petitions in the August 2015 Order, including those petitions made outside of the 6-month window referenced in the October 2014 Order, “granting waivers to these parties [who filed petitions after April 30, 2015] does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients.” August 2015 Order ¶ 20. SourceMedia seeks a retroactive waiver up to April 30, 2015, which is no more and no less than any other petitioner seeks. Under the circumstances, granting SourceMedia such a waiver will be just, and will promote the public interest.

IV. Conclusion

For the foregoing reasons, SourceMedia respectfully requests that the Commission grant it a retroactive waiver from the provisions of 47 C.F.R. § 64.1200(a)(4)(iv).

Dated: September 21, 2015

Respectfully submitted,

Aguilar Bentley LLC
By: /s/ Lisa D. Bentley
Lisa D. Bentley (LB-1565)
Anna Aguilar (AA-9894)

5 Penn Plaza; 19th Floor
New York, New York 10001
(646) 648-0469

Attorneys for SourceMedia