Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

Petition of Joseph T. Ryerson & Son, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)

CG Docket No. 02-278
CG Docket No. 05-338

PETITION FOR WAIVER BY JOSEPH T. RYERSON & SON, INC.

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Dated: June 4, 2015
Pursuant to 47 C.F.R. § 1.3 and the Federal Communications Commission’s (“FCC” or “Commission”) Order released on October 30, 2014, in the above-captioned dockets (the “October 30 Order”), Joseph T. Ryerson & Son, Inc. (“Ryerson”) respectfully requests that the FCC grant it a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) (the “Opt-Out Rule”) for all facsimile advertisements previously sent by Ryerson with the recipients’ prior express permission but that did not meet the Opt-Out Rule’s opt-out notice requirements. Within the last few weeks, Ryerson has become the subject of a putative class action lawsuit for allegedly sending a facsimile advertisement that allegedly lacked the requisite opt-out notice. As set forth below, there is good cause for granting the requested waiver.

I. Background

Ryerson is a defendant in a putative class action lawsuit alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), that is pending in the United States District Court for the Eastern District of Missouri as Connector Castings, Inc. v. Joseph T. Ryerson & Son, Inc. d/b/a Ryerson, and John Does 1-10, Case No. 15-cv-00851-NAB. The complaint contends that the plaintiff allegedly received a single fax from Ryerson in April 2014 that allegedly did not comply with the Opt-Out Rule. Ryerson was served with the complaint on May 14, 2015 and promptly retained counsel. This petition follows.

Ryerson does not ask the Commission to resolve the question of whether the plaintiff in Connector Castings or any other alleged fax recipient consented to the receipt of faxes. Ryerson merely asks the Commission for a waiver of the Opt-Out Rule requirements on par with the waiver the FCC has provided to similarly situated parties.
II. Request for retroactive waiver

In its October 30 Order, the FCC granted a retroactive waiver to all petitioners explicitly referenced in the Order and invited other “similarly situated parties” to seek retroactive waiver as well. See October 30 Order, at ¶ 30. The Commission encouraged parties making waiver requests to “make every effort to file within six months” of the October 30 Order, but acknowledged that “all future waiver requests will be adjudicated on a case-by-case basis and [the Commission does] not prejudge the outcome of future waiver requests in this Order.” Id.

Here, Ryerson was not aware of any claims against it for violations of the TCPA until May 14, 2015 — two weeks after the expiration of the six-month period set forth in the October 30 Order. Ryerson therefore had no reason to file a petition within the original six-month period because it did not believe that there was any question about the legality of the faxes that it may have sent to its customers and, in any event, no faxes of this nature had been sent since April 2014. Upon being served with the Complaint, Ryerson acted promptly in retaining counsel and filing this Petition. Accordingly, Ryerson’s Petition should not be prejudiced simply because it was not filed by April 30, 2015.

Because the FCC’s findings in support of a retroactive waiver apply with equal force to Ryerson and Ryerson is in a similar position to the original petitioners, a retroactive waiver should be granted. Ryerson therefore asks the Commission to waive compliance with Section 64.1200(a)(4)(iv) for all faxes previously sent by or on behalf of Ryerson with the recipient’s consent.
The Commission may waive any provision of its rules for “good cause shown.” 47 C.F.R. § 1.3.1 As the FCC concluded in the October 30 Order, good cause for a retroactive waiver exists here in part because the “inconsistency” between a footnote in an earlier FCC order (stating that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements” (emphasis added)) and the Opt-Out Rule has “caused confusion or misplaced confidence” regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission. See October 30 Order, at ¶ 24. The Commission correctly noted that this “confusion” has “left some businesses potentially subject to significant damage awards.” Id. at ¶ 27. As a result of the litigation recently filed against it, Ryerson now faces the costs of defense and a potential judgment. “[O]n balance . . . it serves the public interest . . . to grant 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.

Thus, for the same reasons set forth in the October 30 Order, there is good cause for granting a retroactive waiver to Ryerson. See generally October 30 Order, at ¶¶ 22-31.

III. Conclusion

For the foregoing reasons, Ryerson respectfully requests that it be granted a waiver from the opt-out notice requirements of 47 C.F.R. §64.1200(a)(4)(iv) for all facsimiles sent by Ryerson after the regulation’s effective date and before the date of this Petition for which Ryerson had the recipient’s consent.

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1 The “good cause” for a waiver exists when “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.” Northeast Cellular Tel. Co., L.P. v. FCC, 897 F. 2d 1164, 1166 (D.C. Cir. 1990). The FCC already concluded in the October 30 Order that there are special circumstances in this case and the public interest is served by waiver. October 30 Order, at ¶¶ 24, 27.
Dated: June 4, 2015

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CERTIFICATE OF SERVICE

I, Blaine C. Kimrey, hereby certify that on this 4th day of June, 2015, a true and correct copy of the foregoing was served by U.S. mail to the following parties:

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