

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

In the Matter of)
Rules and Regulations Implementing the Telephone) CG Docket No. 02-278
Consumer Protection Act of 1991)
Petitions for Waiver and/or Retroactive Waiver of)
47 CFR Section 64.1200(a)(2) Regarding the)
Commission’s Prior Express Written Consent)
Requirement)
Petition for Reconsideration by Lori Wakefield)

ORDER ON RECONSIDERATION

Adopted: August 27, 2020

Released: August 28, 2020

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In the 2019 TCPA Waiver Order, the Consumer and Governmental Affairs Bureau (Bureau) found good cause to grant limited retroactive waivers of the 2012 prior-express-written-consent requirements to two petitioners, bebe stores, inc. and ViSalus, Inc., for calls they made on or before October 7, 2015.1 The Bureau found those petitioners had demonstrated that they were similarly situated to petitioners who had been granted the same relief in a 2015 TCPA Declaratory Ruling.2 The waivers applied only to calls for which petitioners had “some form of written consent previously obtained prior to the 2012 rule changes.”3

2. On July 15, 2019, Lori Wakefield sought reconsideration of the 2019 TCPA Waiver Order.4 Wakefield, who did not participate in the original proceeding, contends that she was adversely affected by the waiver because ViSalus argued in their civil action that the 2019 TCPA Waiver Order was “a bar to certain forms of relief.”

3. With this Order, we deny the Petition based on Wakefield’s lack of standing under section 1.106(b)(1) of the Commission’s rules, which provides that a petition for reconsideration may be filed only by a “party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission.”5 Wakefield was not a party to the proceeding and has not demonstrated

1 Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission’s Prior Express Written Consent Requirement, CG Docket No. 02-278, Order, 34 FCC Rcd 4851 (CGB 2019) (2019 TCPA Waiver Order).

2 Id. at 4855, para 11.

3 Id. (emphasis in original).

4 See Petition for Reconsideration in Non-Rulemaking Proceeding, filed by Lori Wakefield, CG Docket No. 02-278 at 2-5 (filed July 15, 2019) (Wakefield Petition or Petition).

5 47 CFR § 1.106(b)(1).

that her interests are adversely affected by the waiver grant. We emphasize the importance of Commission procedural rules that encourage parties to participate in proceedings that affect them, and we reiterate that, when they do not, we only address subsequent appeals when the petitioner demonstrates that it suffered a specific harm as a result of the Commission's action.

II. BACKGROUND

4. In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) to address telephone marketing calls and other calling practices that can be an invasion of consumer privacy. The Commission's implementing rules, in relevant part, prohibited: (1) making telemarketing calls using an artificial or prerecorded voice to *residential telephones* without prior express consent;⁶ and (2) making any non-emergency call using an automatic telephone dialing system (autodialer) or an artificial or prerecorded voice to a *wireless telephone number* without prior express consent.⁷ Prior to 2012, the Commission's rules stated that the consent could be provided in either oral or written form.⁸

5. The Commission modified its rules in 2012 to require prior express *written* consent for all telephone calls using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless numbers and residential lines; oral consent would no longer satisfy the rule.⁹ The Commission defined "prior express written consent" as consent that (a) includes the signature of the consenter and their telephone number; (b) is obtained only after the caller informs the consenter clearly and conspicuously that the caller will use an automatic telephone dialing system or an artificial or prerecorded voice; and (c) informs the consenter that they are not required to give consent as a condition of any purchase.¹⁰

6. In 2015, the Commission clarified that these consent requirements apply "per call [not per consenter] and . . . telemarketers should not rely on a consumer's written consent obtained before the 2012 rules took effect if that consent does not satisfy the current rule."¹¹ The Commission also granted retroactive limited waivers to the Direct Marketing Association and the Coalition of Mobile Engagement Providers, allowing them to rely on previous written consents for a limited time.¹² This came in light of evidence of confusion on the part of the petitioners as to whether pre-2012 written consent would suffice after the new rules became effective. The Commission gave affected parties 90 days to obtain consent that complied with the new rules; until then, they could rely on the old written consent.¹³ Subsequently, in the *2016 TCPA Waiver Order*, the Bureau granted retroactive waivers to seven additional petitioners

⁶ See 47 CFR § 64.1200(a)(2) (2011).

⁷ See *id.* § 64.1200(a)(1) (2011). This restriction also applied to such calls directed to emergency numbers and other specified locations.

⁸ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1833, para. 7 (2012) (*2012 TCPA Order*).

⁹ *2012 TCPA Order*, 27 FCC Rcd at 1838, para. 20.

¹⁰ 47 CFR § 64.1200(f)(8); see also *2012 TCPA Order*, 27 FCC Rcd at 1844, para. 33.

¹¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8014, para. 100 (2015) (*2015 TCPA Declaratory Ruling*).

¹² *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8014, para. 100.

¹³ *Id.* at 8014, para. 101. The Commission explained that "the 'old' written express consents provided by consumers before October 16, 2013, remain effective for a period of 89 days following release of this Declaratory Ruling. Petitioners must come into full compliance within 90 days after release of this Declaratory Ruling for each subject call." *Id.* at 8015, para. 102.

who claimed they also needed time to obtain new consents from consumers, as required by the 2012 TCPA Order.¹⁴

7. Bebe stores and ViSalus filed petitions seeking similar waivers after the 2016 TCPA Waiver Order and the Bureau sought comment on their petitions.¹⁵ In 2019, the Bureau granted the requested waivers to bebe stores and ViSalus.¹⁶ The waivers were for calls made on or before October 7, 2015.¹⁷ And they applied only to calls for which the petitioners had obtained “some form of written consent previously obtained prior to the 2012 rule changes.”¹⁸

8. Wakefield did not file comments in response to the waiver petition filed by ViSalus. Now, in her petition seeking reconsideration of the 2019 TCPA Waiver Order, Wakefield argues that the Bureau erred in granting the waiver because ViSalus was not similarly situated to bebe stores, as bebe stores had contended that its customers had consented to the use of their information for marketing and promotional purposes, but ViSalus had merely claimed that its customers’ consent was to be contacted regarding “ViSalus News.”¹⁹ Wakefield stated that ViSalus acknowledged that it did not have evidence of that customer consent.²⁰ Wakefield explained that ViSalus did not produce evidence in its civil trial that consumers had consented to such telephone solicitations.²¹ In addition, Wakefield contended that ViSalus was not confused by the Commission’s prior-express-written-consent rule, but instead had ignored the TCPA rules.²² For these reasons, Wakefield argues, we should reconsider the 2019 TCPA Waiver Order.²³

9. In opposition to the Wakefield Petition, ViSalus contends that the waiver was correctly granted because: (i) it was similarly situated as the other parties that received such waivers;²⁴ (ii) the

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission’s Prior Express Written Consent Requirement*, CG Docket No. 02-278, Order, 31 FCC Rcd 11643 (CGB 2016) (2016 TCPA Waiver Order). The petitions, all filed in CG Docket No. 02-278, were filed by Mammoth Mountain Ski Area, LLC (filed Feb. 23, 2015), Kale Realty, LLC (filed July 23, 2015), F-19 Holdings, LLC, and All Affiliated Franchisees (filed July 29, 2015), National Association of Broadcasters (filed Aug. 18, 2015), National Cable & Telecommunications Association (filed Oct. 1, 2015), Rita’s Water Ice (filed Dec. 2, 2015), and Papa Murphy’s Holdings, Inc. and Papa Murphy’s International L.L.C. (filed Feb. 22, 2016).

¹⁵ See *Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Retroactive Waiver Filed by bebe Stores, Inc.*, CG Docket No. 02-278, Public Notice, 31 FCC Rcd 12767 (CGB 2015); *Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Retroactive Waiver Filed by ViSalus, Inc. under the Telephone Consumer Protection Act*, CG Docket No. 02-278, Public Notice, 33 FCC Rcd 6027 (CGB 2018). There were no comments filed regarding the ViSalus petition.

¹⁶ 2019 TCPA Waiver Order, 34 FCC Rcd at 4851, para. 1.

¹⁷ *Id.* at 4855, para 11.

¹⁸ *Id.* (emphasis in original).

¹⁹ Wakefield Petition at 5.

²⁰ *Id.*

²¹ *Id.* at 2-5.

²² *Id.* at 5-6.

²³ *Id.* at 6.

²⁴ Opposition of ViSalus, Inc. to Petition for Reconsideration, CG Docket No. 02-278 at 3 (filed July 25, 2019) (ViSalus Opposition).

Commission did not require actual proof of confusion for any of the waivers;²⁵ and (iii) the waiver applied only to calls for which ViSalus obtained written consent, i.e., calls for which ViSalus did not have written consent were not covered by the waiver.²⁶ ViSalus also contends that Wakefield lacks standing because she was neither a party to the proceeding nor adversely affected by the waiver.²⁷

III. DISCUSSION

10. Based on the record before us, we deny the Wakefield Petition because Wakefield fails to meet the threshold showing for reconsideration. We find that Wakefield lacks standing to seek reconsideration of the *2019 TCPA Waiver Order*.

11. Commission rules provide that only parties to the proceeding or “any other person whose interests are adversely affected”²⁸ may request reconsideration of a Bureau order.²⁹ Petitions filed by persons who are not a party to the proceeding must “state with particularity the manner in which the person’s interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.”³⁰

12. Wakefield concedes she did not participate but does not explain why it might not have been possible, only that she was “uncertain that she was an ‘interested person’ entitled to comment on ViSalus’s Petition.”³¹ As a party to active litigation with ViSalus, she did have the right to participate and could have done so even if she was not certain that the waiver would have bearing on the litigation.

13. We also find that Wakefield fails to show that she was adversely affected by the ViSalus waiver. The Bureau limited the waiver to calls for which ViSalus had some form of written consent.³² As ViSalus correctly observes, calls for which it had not obtained written consent are outside the scope of the waiver.³³ Wakefield states in her petition for reconsideration that “she had not provided ViSalus with any consent to call her at all.” To the extent this is true, any calls ViSalus may have made to her are not covered by the waiver.³⁴ Because any calls ViSalus made to Wakefield were outside the bounds established by the *2019 TCPA Waiver Order*, Wakefield was not affected by the waiver at all and thus could not have been adversely affected. Although Wakefield is alleging here that ViSalus “raised the

²⁵ *Id.*

²⁶ *Id.* at 4. ViSalus observes that Wakefield admits that she was not adversely affected by the waiver, specifically, “a decision by the Commission not to enforce its own rules against ViSalus would be of no moment for her claim, because ViSalus had no evidence that she had consented to be robo-called *at all*.” *Id.* at 5 (quoting Petition at 2, n.5 (emphasis in original)).

²⁷ *Id.*

²⁸ 47 CFR § 1.106(b)(1). Section 1.106(b)(1), provides, in relevant part, that: “any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person’s interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.”

²⁹ *Id.* § 1.106(c)(2).

³⁰ *Id.* § 1.106(b)(1).

³¹ Wakefield Petition at 2 n.5.

³² *2019 TCPA Waiver Order*, 34 FCC Rcd at 4855, para 11.

³³ ViSalus Opposition at 4 (“[C]alls for which ViSalus *had not* secured written consent are *not* covered by the waiver.”) (Emphasis in original).

Order as a bar to certain forms of relief in the Wakefield action,³⁵ this allegation is never explained and does not refute that the waiver was limited to written consent.

14. The Wakefield Petition fails to show that the petitioner was adversely affected by the *2019 TCPA Waiver Order*. As a result, we deny Wakefield's request for reconsideration. Because we find that Wakefield fails to satisfy the threshold showing for reconsideration, we deny the Petition and decline to address the remaining arguments.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to sections 227 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 227 and 405, and sections 1.106, 64.1200 of the Commission's rules, 47 CFR §§ 1.106, 64.1200, and pursuant to the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 CFR §§ 0.141, 0.361, the Petition for Reconsideration filed by Lori Wakefield, on July 15, 2019, IS DENIED.

16. IT IS FURTHER ORDERED that this Order on Reconsideration is EFFECTIVE UPON RELEASE.

FEDERAL COMMUNICATIONS COMMISSION

Patrick Webre
Chief
Consumer and Governmental Affairs Bureau

³⁵ Wakefield Petition at 2, n.5.