Before the
FEDERAL COMMUNICATIONS COMISSION
Washington, D.C. 20554

In the Matter of:	CG Docket No. 02-278
Petition of Cartridge World North America, LLC For Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules	CG Docket No. 05-338

CARTRIDGE WORLD NORTH AMERICA, LLC'S REPLY TO TCPA PLAINTIFFS' COMMENTS AND IN SUPPORT OF ITS PETITION FOR RETROACTIVE WAIVER

Cartridge World North America, LLC ("Cartridge World") submits this Reply in support of its Petition for Retroactive Waiver and addresses the comments filed by Whiteamire Clinic, P.A., Inc., Big Thyme Enterprises, Inc., and Career Counseling, Inc. ("Plaintiffs"). Contrary to Plaintiffs' contention, the Federal Communications Commission (the "Commission") has the authority to grant the waiver sought by Cartridge World, the Commission previously rejected Plaintiffs' argument to the contrary, and Plaintiffs offer no explanation for why the Commission should now reverse its course. The timing of Cartridge World's Petition, moreover, is irrelevant and the Commission has expressly noted that it will not reject petitions on this basis. Finally, the Commission has confirmed that parties are entitled to a presumption of confusion when seeking a limited retroactive waiver of Section 64.1200(a)(4)(iv) for solicited faxes, which Plaintiffs have failed to rebut; nor are petitioners required to plead specific, detailed grounds, for individual confusion. Because Cartridge World is similarly situated to previous petitioners who have been granted relief, Cartridge World respectfully submits that its request for a limited retroactive waiver of Section 64.1200(a)(4)(iv) should be granted.

I. THE FCC HAS AUTHORITY TO WAIVE REGULATIONS AND EXERCISING THIS AUTHORITY DOES NOT VIOLATE THE SEPARATION OF POWERS

Without any substantive discussion, Plaintiffs argue that the Commission does not have authority to "waive" violations of regulations because "[n]umerous commenters in these proceedings . . . have argued" in favor of this result.[1] Pursuant to the Code of Federal Regulations governing the Commission, "[t]he provisions of this chapter may be suspended, revoked, amended, ***or waived for good cause shown, in whole or in part, at any time by the Commission***, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. ***Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown***."[2] Plaintiffs' argument has no merit and the Commission clearly possesses authority to waive its rules.[3]

Apart from the above, and contrary to Plaintiffs' claim, granting the requested waiver will not implicate or violate the separation of powers.[4] In deciding whether to grant Cartridge World's requested waiver, the Commission is engaging in the act that Congress expressly delegated to it as the "authoritative interpreter" of the TCPA.[5] Consistent with this, the

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[1] TCPA Plaintiffs' Comments on Petitions for Retroactive Waiver filed by Cartridge World North America, LLC, Schwabe North America, Inc., and Amsterdam Printing & Litho, Inc., CG Dkt. Nos., 02-278, 05-338, at 3 ("Plaintiffs' Comments").

[2] 47 C.F.R. § 1.3 (emphasis added).

[3] *See, e.g. Northeast Cellular v. F.C.C*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("The FCC has authority to waive its rules if there is 'good cause' to do so. 47 C.F.R. § 1.3. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest."); *see also In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order*, 30 FCC Rcd. 14057, DA 15-1402, ¶¶ 12-13 (Dec. 9, 2015) ("December 2015 Fax Order"); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order*, 30 FCC Rcd. 8598, DA 15-976, ¶ 14 (Aug. 28, 2015) ("August 2015 Fax Order"); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order*, 29 FCC Rcd. 13998, FCC 14-164, ¶¶ 21 and 23 (Oct. 30, 2014) ("2014 Fax Order").

[4] In light of the Commission's previous conclusions on this issue, and waivers that have been granted to other petitioners, Plaintiffs' claim of "no 'historical precedent'" for the relief requested is disingenuous. Plaintiffs' Comments at 3.

[5] 2014 Fax Order, FCC 14-164, at ¶ 21; *NCTA v. Brand X*, 545 U.S. 967, 980-81 (2005) ("Congress has delegated to the Commission the authority to 'exercute and enforce' the Communications Act, . . . and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act . . . .") (citations omitted); *see also* 47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to implement the

Commission has previously determined that granting the waiver which Cartridge World seeks does not implicate the separation of powers:

> "[W]e dismiss arguments that by granting waivers while litigation is pending violates the separation of powers as several commenters have suggested. As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations, does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply."[6]

Plaintiffs fail to address any of the above, merely rely on previously rejected arguments, do not explain why a departure from the Commission's prior conclusions is warranted, and ultimately offer no reason for denying Cartridge World's Petition.

II. THE TIMING OF CARTRIDGE WORLD'S PETITION IS IRRELEVANT AND THE COMMISSION HAS GRANTED NUMEROUS PETITIONS FILED AFTER APRIL 30, 2015

Plaintiffs next argue that Cartridge World's Petition should be rejected on the basis that it is untimely. Plaintiffs are wrong and the Commission has concluded that it will not "reject petitions solely on the basis that they were filed after April 30, 2015."[7]

While pointing to a non-existent standard, Plaintiffs ignore that the Commission has granted numerous petitions filed after April 30, 2015 because those petitions – like Cartridge World's Petition – sought limited retroactive waivers seeking relief for pre-April 30, 2015 transmissions. In its August 28, 2015 Order, the FCC expressly noted the following:

> "We observe that a few of the petitions . . . were filed in May and June of this year, after the six-month (April 30, 2015) date referenced in the *2014 Anda*

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requirements of this subsection."); 47 C.F.R. § 1.2 (discussing the FCC's authority to review petitions and issue declaratory rulings).

[6] August 2015 Fax Order, DA 15-976, at ¶ 13 (citing *NCTA v. Brand X*, 545 U.S. 967, 983-84 (2005): "[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur . . . . Instead, the agency may . . . choose a different construction [than the court], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."). *See also* 2014 Fax Order, FCC 14-164, at ¶ 21.

[7] December 2015 Fax Order, DA 15-1402, at ¶ 18.

> *Commission Order*. We examined these petitions, as we did each petition filed, independently. **These petitions sought waiver for faxes sent prior to the April 30, 2015 deadline imposed by the *2014 Anda Commission Order*. As such, 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.**"[8]

Likewise, in its December 9, 2015 Order, the Commission again rejected Plaintiffs' argument:

> "[W]e decline to reject petitions solely on the basis that they were filed after April 30, 2015. We observe that all of the petitions resolved by this Order were filed after the six-month date (April 30, 2015) . . . . We examined these petitions, as we did each petition filed, independently. **These petitions sought waiver for faxes sent prior to the April 30, 2015 deadline . . . . As such, granting waivers to the five parties here does not contradict the purpose or intent of the initial waiver order because these parties are similarly situated to the initial waiver recipients.**"[9]

The FCC has made clear in its August 28th and December 9th Orders that the date by which a petition for a waiver is filed is irrelevant. The relevant inquiry is whether the petition seeks relief for pre-April 30, 2015 transmissions. Additionally, the Commission has never adopted a standard by which a petitioner must justify why it did not file a petition before April 30, 2015 or demonstrate that it made "every effort" to file by this date.[10] Plaintiffs' argument is irrelevant and Cartridge World's Petition should be granted.

III. PLAINTIFFS FAILED TO REBUT THE APPLICABLE PRESUMPTION

The Commission has confirmed that petitioners are entitled to a presumption of confusion when seeking a limited retroactive waiver of Section 64.1200(a)(4)(iv) for solicited faxes.[11] Plaintiffs have failed to rebut this presumption by pointing to what they contend is evidence of ignorance at the time the transmissions occurred. Plaintiffs miss the point as the standard requires that they rebut the applicable presumption by pointing to evidence that the petitioner

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[8] August 2015 Fax Order, DA 15-976, at ¶ 20 (emphasis added).
[9] December 2015 Fax Order, DA 15-1402, at ¶ 18 (emphasis added).
[10] Plaintiffs' Comments at 4-7.
[11] August 2015 Fax Order, DA 15-976, at ¶ 15.

understood that it had to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so. That this is the correct standard is supported by the Commission's October 30, 2014 Order and its decision to grant Crown Mortgage Company's petition. In its October 30th Order, the Commission granted waivers based on its finding of "good cause" and described "two grounds" for having found "good cause": 1) "the inconsistent footnote" in the "Junk Fax Order" adopted in 2006 and 2) the "lack of explicit notice" that the opt-out requirement would apply to solicited faxes.[12] Because good cause existed, the Commission granted waivers based on "special circumstances":

> "We emphasize, however, that simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver. **Rather, it is the inconsistent footnote, combined with the [lack of explicit notice] . . . along with particular facts and concerns relevant to the public interest at this time . . . [that] warrants deviation from the rule.**"[13]

In doing so, the Commission presumed that petitioners were unaware that the opt-out notice applied to solicited faxes and granted the petitions *because*, *as here*, "nothing in the record . . . demonstrat[ed] that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so."[14] Consequently, the Commission granted the same waiver that Cartridge World is now requesting to Crown Mortgage Company, which unlike Cartridge World, affirmatively stated in its petition that "[w]hen faxes were sent, nobody at Crown was aware of the TCPA, let alone the TCPA's so-called 'opt out language.'"[15] Because Plaintiffs have failed to point to any evidence indicating that Cartridge World was aware of the opt-out requirement for solicited faxes and

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[12] 2014 Fax Order, FCC 14-164, at ¶¶ 24-26.
[13] *Id.* at ¶¶ 24 and 26 (emphasis added).
[14] *Id.* at ¶ 26.
[15] Petition of Crown Mortgage Company for Declaratory Rulings and/or Waiver of the "Opt Out" Requirement, CG Dkt. Nos. 02-278 and 05-338, fn. 2; 2014 Fax Order, FCC 14-164, at ¶ 36 ("IT IS FURTHER ORDERED that retroactive waivers of the Commission's rule 47 C.F.R. § 64.1200(a)(4)(iv) ARE GRANTED to . . . Crown Mortgage Company . . . .").

notwithstanding decided to ignore the requirement, Plaintiffs have not rebutted the applicable presumption.

Independent of the above, Plaintiffs have also failed to establish that Cartridge World's Petition is based on "ignorance of the law." As Plaintiffs' Complaint and the discovery requests and responses attached to Plaintiffs' Comments confirm, *transmissions occurred in or after July 2012*. In their attempt to argue that the Petition is based on ignorance of the law, they point to an interrogatory that sought a response for a timeframe *before the transmissions at issue were sent*. Plaintiffs have not pointed to any evidence of ignorance at the time any transmissions occurred and have thus failed to rebut the presumption to which Cartridge World is entitled. Additionally, the Commission has confirmed that it does "not require petitioners to plead specific, detailed grounds for individual confusion, and . . . cannot impose that requirement now."[16] For this independent reason, Plaintiffs' argument fails as well.

Alternatively, and in the event the Commission finds Plaintiffs' argument persuasive – which it should not – Cartridge World respectfully requests that the Commission grant it a waiver for any transmissions sent by Cartridge World or its vendors on or after July 1, 2012 but before April 30, 2015.

IV. CONCLUSION

Plaintiffs have not presented any arguments that warrant denial of Cartridge World's Petition. Plaintiffs primarily rely on arguments that have previously been rejected by the Commission without offering an explanation for why the Commission should now change course, and Plaintiffs have failed to rebut the presumption to which Cartridge World is entitled. Because Cartridge World is similarly situated to previous petitioners who have been granted

[16] December 2015 Fax Order, DA 15-1402, at ¶ 17.

relief, Cartridge World respectfully submits that its request for a limited retroactive waiver of Section 64.1200(a)(4)(iv) should be granted.

Dated: October 21, 2016

Respectfully submitted,

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