

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
)
Petition of Sunwing Airlines Inc., Vacation) CG Docket No. 05-338
Express USA Corp., and Sunwing Vacations)
Inc. for Retroactive Waiver of)
47 C.F.R. § 64.1200(a)(4)(iv))

**REPLY IN SUPPORT OF PETITION FOR RETROACTIVE WAIVER BY SUNWING
AIRLINES INC., VACATION EXPRESS USA CORP., AND SUNWING VACATIONS
INC.**

Date: January 20, 2015

SUNWING AIRLINES INC., VACATION
EXPRESS USA CORP., and SUNWING
VACATIONS INC.

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REPLY IN SUPPORT OF PETITION FOR RETROACTIVE WAIVER

Apparently unhappy with the Commission’s rejection of the arguments made in their comments preceding the Commission’s October 30, 2014 Order (the “Order”), the TCPA Plaintiffs improperly seek to rehash these arguments in their Comments on the Petition for Retroactive Waiver filed by Sunwing Airlines Inc., Vacation Express USA Corp., and Sunwing Vacations Inc. (together, “Petitioners”) and others.¹ But briefing regarding whether Petitioners are entitled to an individual waiver under the Order is not the proper proceeding for reconsideration of the Order itself. Thus, the TCPA Plaintiffs’ arguments regarding whether the Commission can grant waivers of the opt-out requirements, whether the notice of rulemaking or footnote 154 caused confusion, and whether prospective waivers are proper, should be disregarded. Instead, the only issue properly before the Commission here is whether Petitioners are similarly situated to the entities who were granted waivers in the Order and whether the Commission should therefore grant Petitioners’ request for a similar waiver. As Petitioners here

¹ Although the TCPA Plaintiffs’ Response also discusses the petitions of EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke’s Center for Diagnostic Imaging, LLC, and ZocDoc, Inc., this Reply is submitted on behalf of Sunwing Airlines Inc., Vacation Express USA Corp., and Sunwing Vacations Inc. only.

are similarly situated to the entities who were granted waivers in the prior Order, Petitioners' Petition for Retroactive Waiver should be granted.

I. THE COMMISSION HAS ALREADY DECIDED THAT IT HAS AUTHORITY TO GRANT RETROACTIVE WAIVERS REGARDING THE OPT-OUT REQUIREMENTS.

The TCPA Plaintiffs spend much of their brief arguing that the Commission had no authority to grant retroactive waivers of the opt-out requirements as applied to solicited faxes and that the Commission's grant of such waivers violates the separation of powers. But the Commission already considered and rejected this exact argument in its Order:

Finally, we reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have "violate[d] the separation of powers vis-à-vis the judiciary," as one commenter has suggested.² By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.

Order, ¶ 21. If the Commission had the power to make the rule regarding opt-out requests, it must also have the power to grant waivers of the rule.

The TCPA Plaintiffs' argument to the contrary is as flawed as it was when the Commission originally rejected it – the TCPA Plaintiffs repeatedly argue that Petitioners and the Commission are violating separation of powers principles by trying to tell the courts how to rule. But Petitioners are not asking the Commission to dictate what the courts should do. Rather, they are simply asking the Commission to look at its own rules and its Order and determine whether Petitioners are entitled to a retroactive waiver as parties similarly situated to those who were

² The commenter referred to was Brian Wanca, one of the attorneys who filed the TCPA Plaintiffs' Response. *See* Order, n. 77. Mr. Wanca's specific arguments regarding violation of separation of powers principles were therefore already considered and specifically rejected by the Commission in its Order.

originally granted waivers. What the courts do with such waivers is still up to the courts.³

Therefore, the Commission may properly grant Petitioners' Petition for Waiver if it finds that Petitioners were similarly situated to the entities who were granted waivers in the Order.

II. PETITIONERS ARE SIMILARLY SITUATED TO OTHER PETITIONERS WHO WERE GRANTED WAIVERS.

A. THE ORDER DOES NOT REQUIRE INVESTIGATION AND FACTFINDING REGARDING A PETITIONING ORGANIZATION'S MENTAL STATE.

The TCPA Plaintiffs assert that Petitioners are not “similarly situated” to other petitioners that were granted waivers by the Order because Petitioners “[assert] that [they] ‘did not understand the opt-out requirement to apply to solicited faxes, ‘but [they do] not explain why [they] had that misunderstanding.’” *See* Resp. at 30. The TCPA Plaintiffs also assert that they have a “due process” right to inquire into whether Petitioners had actual knowledge of the rules and request that the Commission hold proceedings to investigate Petitioners’ purported knowledge. The TCPA Plaintiffs distort the standard that the Order sets for petitioners seeking a waiver. The Order does not purport to require the Commission to make factual findings and hold an evidentiary hearing or other factfinding process to determine who at what level of a petitioner’s organization had “actual knowledge” of the correct interpretation of the Regulations. Nor should it – such a standard would require extensive investigation and factual determinations for each petitioner, with the potential for inconsistent results. Rather, the Commission has already made a finding that there may have been “[c]onfusion or misplaced confidence about the

³ Indeed, the *Stryker* case cited by the TCPA Plaintiffs is an example of the courts’ ability to handle retroactive waivers as they see fit given the particular facts of each case. Different courts are likely to reach different conclusions depending on the unique circumstances of each case. The *Stryker* court, for example, indicated that the case before it “had ‘already advanced through years of litigation’; a class had been certified and cross-motions for summary judgment [had been] briefed when the Motion to Stay was filed.” *See Physicians Healthsource Inc. v. Endo Pharm., Inc.*, No. 14-cv-02289 (E.D. Pa. Jan. 5, 2015).

rule”, which “warrants some relief from its potentially substantial consequences.” Order, ¶ 27.

To the extent that the TCPA Plaintiffs believe that the Order was in error or that the Commission did not have authority to enter it, that issue is for a reviewing court to decide and does not affect the Commission’s capacity to rule on Petitioners’ petition in accordance with the Order.

B. THE TCPA PLAINTIFFS MISINTERPRET THE ORDER TO REQUIRE AN INQUIRY INTO “RESOURCES” AS A PREREQUISITE FOR OBTAINING A RETROACTIVE WAIVER.

The TCPA Plaintiffs further assert that Petitioners are required to make a showing regarding the details of their financial resources as a basis for seeking a retroactive waiver under the Order. *See* Resp. at 31. But the TCPA Plaintiffs do not cite to a single provision of the Order to support such a requirement. In fact, there is none. The Order provides that retroactive waivers may be sought by “similarly situated” petitioners (Order, ¶ 30), without any reference to the financial condition of a particular petitioner, its “financial resources,” “sales,” or “profits” (Resp. at 31) – all of these are notions that the TCPA Plaintiffs have apparently created with no basis whatsoever in the Order.

Moreover, to the extent that the Commission or anyone else can measure the impact that a hypothetical judgment would have on Petitioners or any other entity seeking a waiver, that exercise itself would be impossibly speculative given the uncertainties of litigation outcomes and the various stages of litigation. Finding any remotely workable yardstick for measuring such an impact is impossible and the TCPA Plaintiffs do not suggest any workable standard – instead they merely urge that the Commission deny Petitioners’ waiver request based on some unknown and arbitrary measure of financial impact. The Commission should reject the TCPA Plaintiffs’ invitation to revisit the Order and impute a standard for the impact of a hypothetical litigation judgment that it declined to adopt in the first place. Instead, for the reasons discussed in the

Petition, the Commission should consider that Petitioners are similarly situated to the parties who were granted waivers in the original Order. As such they are “similarly situated parties,” and the Commission should grant their Petition.

III. THE TCPA PLAINTIFFS’ REFERENCES TO 2006 RECONSIDERATION PROCEEDINGS HAVE NO BEARING ON THE OCTOBER 2014 ORDER AND PETITIONERS’ PETITION.

The TCPA Plaintiffs include in their Response a lengthy discussion of reconsideration proceedings that took place almost a decade ago, following the Commission’s release of the 2006 regulations. *See* Resp. at 33-37. Specifically, The TCPA Plaintiffs refer to a petition for reconsideration of those regulations filed on behalf of CBS, and various comments on that petition, for the proposition that petitioners were aware that the regulations applied to solicited as well as unsolicited faxes. *See id.* The TCPA Plaintiffs do not, however, explain how CBS’s mental state and knowledge in 2006 could have any impact on Petitioners here today. Nor do they explain how those proceedings are relevant to the October 30, 2014 Order. Although that Order specifically acknowledged that it was the Commission’s intent to make the 2006 regulations applicable to solicited and unsolicited faxes, the Commission noted that there was confusion and misplaced confidence caused by the language of the regulations, in particular footnote 154 (21 FCC Rcd at 3810, n. 154), and by the manner of notice provided. *See* Order, ¶1, ¶¶ 24-25. This confusion was the basis for the grant of retroactive waivers in the Order and permission for other similarly situated petitioners to seek the same relief. *See id.* ¶¶ 27-28.

The TCPA Plaintiffs’ references to the 2006 proceedings are at best another attempt to seek reconsideration of the October 30, 2014 Order, under the guise of opposing Petitioners’ request for a waiver under the Order as it stands. Procedurally, such a motion is improper here, because the TCPA Plaintiffs—whose counsel was extensively involved in the proceedings

leading up to the Order—could have raised the issue of the 2006 proceedings with the Commission prior to the entry of the Order. If they did so, then there is no need to raise it for a second time for purposes of opposing Petitioners’ Petition. If the TCPA Plaintiffs did not raise the 2006 proceedings at the appropriate time, then they have waived that argument and it should not be considered here. In any event, the TCPA Plaintiffs do not assert that Petitioners had any involvement in or filed their own comments in the 2006 reconsideration proceedings – because they did not. The TCPA Plaintiffs’ request to revisit the Order based on 2006 proceedings that the Commission had full opportunity to consider should be rejected, and the Commission should grant Petitioners’ Petition.

IV. THE FCC SHOULD GRANT PETITIONERS A PROSPECTIVE WAIVER UNTIL APRIL 30, 2015.

The October 30, 2014 Order granted the waiver recipients a six-month window to comply with the opt-out requirement and provided that “[o]ther, similarly situated parties may also seek waivers such as those granted in this Order.” Order, ¶ 2. The Petitioners have established that they are “similarly situated parties” and therefore should be granted the same form of waiver granted in the Order. The Commission previously determined, after careful consideration, that six months was a reasonable time for compliance and should not now be asked to reconsider this determination. Granting the same waiver to Petitioners ensures a consistent timeline for all petitioners seeking a waiver and eliminates the risk of complex and potentially arbitrary determinations of what timeframe is appropriate for a particular petitioner.

The TCPA Plaintiffs’ only argument to the contrary is one that was already addressed in the Order. The TCPA Plaintiffs argue that granting Petitioners a six-month window to comply with the opt-out requirement will endanger public health and safety. But in granting retroactive

waivers and allowing petitioners six months to comply, the Commission recognized its “responsibility to balance legitimate business and consumer interests” and found that granting waivers would serve the public interest. *See* Order, ¶¶ 27-30.

The TCPA Plaintiffs’ only purported basis for their argument that public safety will be endangered is an imaginative but unrealistic scenario where Petitioners—for some unknown benefit that TCPA Plaintiffs do not articulate—decide that it is worth the time and expense to repeatedly send faxes to the TCPA Plaintiffs for the next six months. But Petitioners have already noted in their Petition that they understand the importance of compliance with the Commission’s rules and that they are implementing procedures to ensure compliance. *See* Petition, p. 6. It simply strains credulity that Petitioners would go to the effort to send mass faxes to the TCPA Plaintiffs or other persons simply because they technically have six months to ensure that they are in compliance with the Commission’s opt-out requirements. Accordingly, as Plaintiff has offered no legitimate reason that Petitioners should not be entitled to the same waiver duration as the entities receiving a waiver in the initial Order, the Commission should grant Petitioners both a retroactive waiver and a waiver until April 30, 2015.

V. CONCLUSION

The Commission has before it one issue: whether Petitioners are similarly situated to those parties who were granted waivers in the Order. For the reasons expressed by Petitioners in their Petition, they are. The TCPA Plaintiffs’ attempt to re-argue positions that their counsel has previously already made, and that the Commission has already rejected, cannot change that fact. Petitioners respectfully request that their Petition for a Retroactive Waiver be granted in its entirety.

Date: January 20, 2015

Respectfully submitted,

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