

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:	)	
	)	
Petition for Waiver of	)	CG Docket No. 02-278
National Pen Co. LLC,	)	
National Pen Holdings, LLC	)	CG Docket No. 05-338
	)	
	)	

**REPLY IN SUPPORT OF NATIONAL PEN’S PETITION FOR RETROACTIVE  
WAIVER**

National Pen Co. LLC and National Pen Holdings, LLC (collectively “National Pen”) respectfully submit these reply comments in support of their Petition for Retroactive Waiver (“Petition”), CG Docket Nos. 02-278, 05-338 (posted Feb. 13, 2015), and in response to Christopher Lowe Hicklin, DC, PLC’s Comments on National Pen’s Petition for Retroactive Waiver (“Hicklin Comments”), CG Docket Nos. 02-278, 05-338 (posted March 16, 2015). Prior to National Pen’s Petition, the Commission granted a retroactive waiver of Section 64.1200(a)(4)(iv)’s opt-out notice requirement for solicited faxes to a group of business petitioners facing lawsuits that alleged, in part, that the businesses had violated that rule by failing to include specific opt-out language in their faxes even when the faxes were sent with the prior express permission of the recipient. *See* Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014) (“October 30 Order”). The Commission determined that, based on potential confusion surrounding the rule, good cause supported a retroactive waiver and that such a waiver was in the public interest. *See* 47 C.F.R. § 1.3; October 30 Order at ¶¶ 27-28. In addition to granting retroactive waivers to the petitioners in that order, the Commission

determined that “[o]ther, similarly situated entities likewise may request retroactive waivers from the Commission.” October 30 Order at ¶ 22.

Shortly thereafter, National Pen petitioned for a retroactive waiver and explained that it is in exactly the same position as the petitioners who were granted retroactive waivers in the October 30 Order. Petition at 6-7. Specifically, it faces a lawsuit that seeks substantial damages for alleged violations of a rule that the Commission has already recognized created “confusion [and] misplaced confidence.” *Id.* at 7-8 (quoting October 30 Order at ¶ 27). Moreover, like the businesses that received retroactive waivers in the October 30 Order, National Pen pointed to a confusing footnote in the Commission’s *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (“*Junk Fax Order*”).

Hicklin is the plaintiff in a putative TCPA class action against National Pen pending in the United States District Court for the Middle District of Florida in which he has sought millions of dollars of damages from National Pen. He is the only filer who has submitted comments on National Pen’s Petition. To further the interests of his private lawsuit, he seeks to have the Commission deny National Pen the same waiver that the Commission found was in the public interest when it granted waivers to similarly situated businesses in the October 30 Order. Hicklin’s comments largely rehash the same arguments that his counsel (Anderson + Wanca) already made in opposing the relief granted in the October 30 Order. The Commission should reject Hicklin’s arguments for the following reasons: (1) the Commission has already rejected the theory that it does not have the authority to grant a retroactive waiver of its rules where the waiver may have some effect on pending private litigation; (2) contrary to Hicklin’s

assertions, there is a dispute as to whether National Pen received consent from fax recipients; indeed, unlike most petitioners seeking waivers, National Pen has provided actual evidence (in the form of declarations) showing that it received prior express consent from fax recipients; (3) the standard the Commission established in the October 30 Order does not require National Pen to present individualized evidence establishing subjective confusion about the Commission's rules; and (4) Hicklin does not have a due process right to discovery or a hearing to probe National Pen's state of mind. In short, National Pen has amply demonstrated that it is in exactly the same situation as past petitioners to whom the Commission granted retroactive waivers. A waiver for National Pen is in the public interest just as it was for the prior petitioners, and National Pen's Petition should be granted.

**1. The Commission Has the Authority to Waive Its Rules.**

It is well settled that the Commission may suspend, revoke, amend, or waive any of its rules at any time "for good cause shown." 47 C.F.R. § 1.3. Courts have repeatedly upheld this authority. *See, e.g., Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) ("[T]he Commission has authority under its rules, *see* 47 C.F.R. § 1.3., to waive requirements not mandated by statute where strict compliance would not be in the public interest."); *AT&T Corp. v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006) (holding the Commission's decision to waive its rules is subject to a deferential standard of review). The Commission expressly relied on this authority to grant retroactive waivers in the October 30 Order, finding that such waivers were in the public interest. *See* October 30 Order at ¶ 23 & n.82 (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)).

Ignoring this settled law, Hicklin claims that the TCPA itself does not authorize the Commission to waive any of its rules "in a private right of action" and that granting such a waiver would amount to impermissible interference in a private right of action. Hicklin

Comments at 8. His bare assertions, however, provide no legal rationale for eliminating the Commission's authority to grant waivers simply because the Commission's rules under the TCPA may provide the basis for private lawsuits. Congress expressly authorized the Commission to promulgate rules under the TCPA, *see* 47 U.S.C. § 227(b)(2), fully understanding both that the Commission's rules could be enforced in private actions and that the Commission's rulemaking authority came with the settled authority to grant waivers in some circumstances. By granting waivers, moreover, the Commission does not "intervene" (as Hicklin suggests, Hicklin Comments at 8) in a private right of action. Instead, it merely determines whether its own rules apply. As the Commission made clear in its October 30 Order, it was in no way interfering with the courts' ultimate authority to determine whether a violation of the TCPA had occurred. As the Commission explained, "[n]or should the granting of such waivers 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 faxes at issue in the private rights of action." October 30 Order at ¶ 31. Indeed, the Commission has already rejected Hicklin's argument that granting a waiver would somehow impermissibly interfere with private causes of action: "[T]he 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." October 30 Order.

For similar reasons, Hicklin's assertion that the Commission's grant of a retroactive waiver would somehow violate the separation of powers is also incorrect. This argument was also already presented to the Commission by Hicklin's counsel and properly rejected in the October 30 Order. The Commission rightly explained there that "we reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have

‘violated the separation of powers vis-à-vis the judiciary.’” October 30 Order at ¶ 21. Under settled separation-of-powers principles, the political branches impermissibly interfere with judicial authority only when they attempt to change applicable legal rules *after a final judgment*. *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 226-27 (1995).<sup>1</sup> Here, the Commission has attempted no such thing. It has merely granted waivers of its own regulations that may affect the rule of decision to be applied on certain issues in *pending* litigation. Nothing in such a change remotely violates the separation of powers.

Hicklin’s citation of *Natural Resources Defense Council v. EPA* (“NRDC”), 749 F.3d 1055 (D.C. Cir. 2014), is also misplaced. *See* Hicklin Comments at 9. That case has nothing to do with the Commission’s authority to grant a retroactive waiver under the circumstances here. In *NRDC*, the D.C. Circuit held that the EPA did not have the authority to create an affirmative defense to a particular statutory cause of action because (1) courts, and not the EPA, determine the available remedies in private civil suits; and (2) the EPA was not expressly given the authority to create an affirmative defense. 749 F.3d at 1063-64. That decision, of course, addressed the authorities of a different agency under a different statutory scheme. Moreover, neither of the critical factors from *NRDC* is present here. The Commission is not attempting to create an affirmative defense to a cause of action and longstanding rules expressly grant the Commission the authority to grant retroactive waivers, *see* 47 C.F.R. § 1.3. In addition, Hicklin concedes that his counsel “discussed *NRDC* extensively in a letter to the Commission” prior to the Commission granting any retroactive waivers. Hicklin Comments at 9. The Commission

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<sup>1</sup> Indeed, the Executive and Legislative branches may change the rule of decision to be applied in pending cases even where the change in law eliminates an otherwise viable cause of action. *See, e.g., Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 62 (4th Cir. 1948); *see also Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 259 (2d Cir. 1948).

cited that letter in the October 30 Order and has thus already rejected the arguments advanced by Hicklin's counsel.

Finally, Hicklin cites a recent, unpublished decision in which a district court accepted arguments advanced by Hicklin's counsel and held that "[i]t would be a fundamental violation of the separation of powers for the administrative agency to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court." *See Physician Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-CV-0729, 2014 WL 7109630, at \*14 (W.D. Mich. Dec. 12, 2014). That decision should have no effect on the Commission's action here for at least three reasons.

First, the district court apparently assumed that the requirement for an opt-out notice even in solicited faxes was a *statutory* requirement, rather than a requirement created by the Commission's rules. *See id.* To the extent the district court concluded that the Commission could not waive a *statutory* requirement, it simply misunderstood the basis for the opt-out notice rule as applied to solicited faxes.

Second, to the extent the district court held that the Commission lacked authority to grant waivers of its own rules, it exceeded its jurisdiction. It is well settled that the "district courts lack jurisdiction to consider claims to the extent they depend on establishing that all or part of an FCC order subject to the Hobbs Act is 'wrong as a matter of law' or is 'otherwise invalid.'" *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1120 (11th Cir. 2014). If Hicklin wishes to challenge the Commission's decisions in the October 30 Order, he must do so through the correct procedural channel, which requires seeking review in the court of appeals. *See id.* at 1121. Indeed, multiple parties have already sought judicial review of the October 30 Order. *See, e.g.*, Pet. for Review, Dkt. 1, *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir. 2014). In

the meantime, Hicklin cannot preclude the Commission from issuing more retroactive waivers by citing a decision from a district court. *See Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 461 (11th Cir. 2012) (“[D]istrict courts cannot determine the validity of FCC orders.”); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 448 (7th Cir. 2010) (“[D]eeming agency action valid or ineffective is precisely the sort of review that the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders.”).

Third, for the reasons outlined above, the district court’s separation-of-powers rationale is wholly mistaken. Counsel for plaintiffs in TCPA class actions, however, have touted the unpublished decision in *Physician Healthsource* in an effort to nullify the Commission’s decision that it would be in the public interest to grant waivers of its rule requiring an opt-out notice even for solicited faxes. To salvage their potentially lucrative lawsuits, they hope to persuade more district courts across the country to ignore the Commission’s actions and to apply the opt-out notice rule without regard to any waivers granted by the Commission. Given the interlocutory posture of the *Physician Healthsource* ruling, moreover, it may be some time before the decision can be reviewed on appeal (assuming the case does not settle before that point). National Pen respectfully submits that, to ensure that the Commission’s orders are not ignored based on a patently mistaken theory attacking the constitutionality of the Commission’s actions, the Commission should expressly reject the separation-of-powers rationale asserted in *Physicians Healthsource* when it rules on this and other pending petitions for waivers.

**2. National Pen Has Shown Through Specific Evidence that Prior Express Permission Is Disputed in Its Case.**

In an attempt to distinguish National Pen from past petitioners that received a retroactive waiver, Hicklin claims that there is no reasonable dispute over whether National Pen acquired prior express permission from fax recipients. *See Hicklin Comments* at 11. That claim is flatly

contradicted by the record. National Pen submitted three declarations from its customers with its Petition showing that it had acquired prior express permission. *See* Petition Ex. B. In other words, not only is the issue of prior permission in dispute in the TCPA action that Hicklin is pursuing against National Pen, but National Pen has also produced affirmative evidence to show that it acquired express permission from customers prior to sending faxes. Indeed, as Hicklin knows, the three declarations submitted with National Pen’s Petition were just a small subset of the *more than forty such declarations* from customers showing prior permission that National Pen submitted in the TCPA case in opposition to Hicklin’s motion for class certification. *See* Opp’n to Pl.’s Mot. for Class Certification, Ex. A, Dkt. 36-1, 36-2, *Christopher Lowe Hicklin DC PLC v. National Pen Co. LLC*, No. 8:14-cv-02657-VMC-TGW (M.D. Fla. filed Feb. 20, 2015).

Hicklin tries to side-step this evidence with the novel suggestion that, under the Commission’s *Junk Fax Order*, National Pen cannot show prior express permission because it did not “take steps to promptly document” permission at the time it was received—as if the Commission had ruled that contemporaneous documentation was a *requirement* for establishing permission. Hicklin Comments at 12 (quoting *Junk Fax Order*, 21 FCC Rcd at 3812). That simply distorts the Commission’s order. The Commission did not say that prompt documentation was the *only* way to show prior express consent. The Commission merely pointed out that, “[i]n the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given,” and then said that “[w]e *strongly suggest* that senders take steps to promptly document that they received such permission.” 21 FCC Rcd. at 3812 (emphasis added). The Commission was merely making a suggestion about a safe practice to ensure that the sender could later prove consent. It was not establishing prerequisite for proving

permission. At a minimum, the declarations that National Pen has gathered amply show that a dispute exists as to prior consent in the pending TCPA case, and thus make a waiver of the opt-out notice rule relevant to National Pen's case. *Cf.* October 30 Order at ¶ 31 n.104 (“The record indicates that whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties.”).

**3. The October 30 Order Does Not Require Individualized Evidence of Actual, Subjective Confusion.**

Hicklin asserts that “[i]f the standard for waiver is that the petitioner was *actually* confused about whether opt-out notice was required on faxes sent with permission, National Pen's petition must be denied,” apparently because National Pen has not claimed (with specific evidence in support) that identified members of its staff actually read footnote 154 in the *Junk Fax Order* and were confused by it. Hicklin Comments at 13. The plain language of the October 30 Order makes clear, however, that such evidence of actual, subjective confusion is not required. The Commission found that the confusing footnote in the *Junk Fax Order* suggesting that an opt-out notice is required only for “unsolicited” faxes coupled with the lack of explicit notice that its rulemaking would consider applying the opt-out notice requirement to solicited faxes “*presumptively* establishes good cause for retroactive waiver of the rule.” October 30 Order at ¶ 26 (emphasis added). In other words, the Commission based its waiver order on its conclusion that the “lack of explicit notice . . . and the ensuing contradictory footnote . . . resulted in a *confusing situation for businesses*” generally and that “confusing situation”—not individualized evidence of particular petitioners' confusion—warranted a waiver. *Id.* at ¶ 27 (emphasis added). The Commission did not make any factual findings concerning individual, subjective confusion on the part of the original petitioners at issue in the October 30 Order, nor did it require or describe any evidence concerning the state of mind of the original petitioners at

the time they sent their faxes. To the contrary, the Commission pointed primarily to the fact that “all petitioners make reference to the confusing footnote language” in their petitions, *id.* at ¶ 24, and to the fact that “we find nothing in the record here demonstrating 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.” *Id.* at ¶ 26.

National Pen is in exactly the same position as those who were granted waivers in the October 30 Order. National Pen confronted the same “confusing situation for businesses,” October 30 Order at ¶ 27, that those earlier petitioners confronted. National Pen also “note[d] the contradictory language contained in the footnote,” *id.*, multiple times in its Petition for retroactive waiver. *See* Petition at 3, 5, 7. National Pen’s submission thus places National Pen in precisely the same situation as the petitioners who have already received retroactive waivers. To require a different or more burdensome showing from National Pen would be patently unfair and would raise serious due process questions about the Commission’s waiver process.

#### **4. Hicklin Is Not Entitled To Discovery or a Hearing.**

Finally, Hicklin contends that he “has a due-process right to investigate whether National Pen had actual knowledge of the opt-out rules.” Hicklin Comments at 13. Much like Hicklin’s “actual confusion” argument, this argument misunderstands the standard established by the October 30 Order. The waivers granted in that Order do not rest on individualized evidence about each petitioner’s subjective state of mind. And again, none of the businesses that have already received retroactive waivers were subjected to any kind of discovery or hearing prior to receiving the waiver—despite the fact that they, too, were facing private litigation under the TCPA. It would be improper to burden National Pen with such procedures as a prerequisite to obtaining the same retroactive waiver given to the other businesses.

## CONCLUSION

National Pen finds itself in the same position as those who previously were granted a retroactive waiver of the opt-out notice requirement as applied to solicited faxes. Specifically, it faces a lawsuit that seeks substantial damages for alleged violations of a rule that the Commission has already recognized created “confusion and misplaced confidence.” October 30 Order at ¶ 27. Applying the opt-out notice requirement to solicited faxes under these circumstances would do more harm than good, while granting a retroactive waiver to prevent the imposition of statutory fines for inadvertent violations would “serve[] the public interest.” *Id.* None of Hicklin’s arguments demonstrates a flaw in the Commission’s October 30 Order or shows how National Pen is in a different position from any of the businesses that were already granted retroactive waivers. National Pen therefore requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) that has already been granted to similarly situated parties.

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**Respectfully submitted,**

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