

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:)	
)	CG Docket No. 02-278
Royal Canin U.S.A., Inc.’s Petition for)	
Retroactive Waiver of 47 C.F.R.)	CG Docket No. 05-338
§ 64.1200(a)(4)(iv))	

**REPLY COMMENTS OF ROYAL CANIN U.S.A., INC.
IN SUPPORT OF PETITION FOR A RETROACTIVE WAIVER**

Royal Canin U.S.A., Inc. (“Royal Canin”) submits these reply comments to the comments filed by Anderson + Wanca (“A+W”) on behalf of certain plaintiffs pursuing lawsuits against Royal Canin and other defendants under the Telephone Consumer Protection Act of 1991 (“TCPA”).¹ Both of the arguments in Plaintiffs’ comments are misguided and should be rejected.

First, Plaintiffs’ argument that the Commission lacks the authority to grant retroactive waivers merely reasserts a position that the Commission has already explicitly rejected. It should be rejected for that reason alone. Moreover, Plaintiffs’ position is plainly erroneous because it ignores the Commission’s well-established authority to waive its own regulations for good cause.

Second, Plaintiffs’ argument that Royal Canin and the other petitioners since the October 30, 2014 Order² are not similarly situated with the petitioners before the Opt-Out Order is a

¹ TCPA Plaintiffs’ Comments on Thirty-One Petitions for Retroactive Waiver Filed on or Before April 30, 2015, CG Docket Nos. 02-278 & 05-338 (filed May 22, 2015) (“Plaintiffs’ Comments”).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991- Junk Fax Prevention Act of 2005 Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, Order, FCC 14-164, 29 FCC Rcd. 13,998, (2014) (“Opt-Out Order”).

transparent attempt to impose a different standard on these two groups. Plaintiffs argue that each petitioner must now show, on an individual basis, that they were *actually confused* by footnote 154 of the Commission’s 2006 Order or by the lack of notice before enacting 47 C.F.R. § 64.1200(a)(4)(iv) (“the Opt-Out Notice Rule”). But the Opt-Out Order did not require the petitioners to make any such individualized showing when it granted retroactive waivers to them. Rather, it decided that the petitioners had shown “good cause” for a retroactive waiver because the Commission’s 2006 Order and notice process may have caused reasonable confusion, and a retroactive waiver therefore would be in the public interest. Because there was no evidence that the petitioners understood the opt-out requirement, despite these factors, it presumed confusion and granted them retroactive waivers.

Royal Canin is similarly situated. Like the prior petitioners, it did not believe that the opt-out requirement applied to solicited faxes. And, like the prior petitioners, it cited footnote 154 and the deficient notice and comment process as “good cause” for granting the petition. Royal Canin therefore is in the same position as the prior petitioners, and the Commission should also grant its petition. Indeed, it would be arbitrary and capricious for the Commission to accept Plaintiffs’ arguments because it would apply different standards to similarly situated parties.

Accordingly, for the reasons set forth herein and in Royal Canin’s Petition for Retroactive Waiver,³ the Commission should reject Plaintiffs’ comments and grant Royal Canin’s Petition.

³ Royal Canin U.S.A., Inc.’s Petition for Retroactive Waiver, CG Docket Nos. 02-278 & 05-338 (filed Apr. 27, 2015) (“Royal Canin Petition”).

I. THE COMMISSION HAS THE AUTHORITY TO GRANT ROYAL CANIN'S PETITION

As a threshold matter, Plaintiffs' position that the Commission lacks authority to grant Royal Canin's petition rehashes arguments that the Commission has already rejected. In its Opt-Out Order, the Commission specifically "reject[ed]" Plaintiffs' counsel's argument that granting a retroactive waiver of the Commission's regulations "while related litigation is pending" would "violate the separation of powers vis-à-vis the judiciary."⁴ Plaintiffs now make exactly the same arguments in their comments.⁵ Thus, because the Commission already decided these issues, after a lengthy procedure, it should summarily deny Plaintiffs' attempt to re-litigate them.

Moreover, Plaintiffs' attempt to curtail the Commission's waiver powers is based on a series of erroneous arguments that reflect a fundamental misunderstanding of the governing legal framework.

1. Plaintiffs completely fail to acknowledge the Commission's explicit authority to "suspend[], revoke[e], amend[], or waive[]" its regulations "for good cause shown."⁶ Indeed, the D.C. Circuit has repeatedly recognized the Commission's authority to grant waivers like the one requested in Royal Canin's Petition.⁷ Thus, in granting retroactive waivers, the Commission is acting pursuant to a well-established procedure.

⁴ Opt-Out Order ¶ 21 (quoting Letter from Brian J. Wanca, Counsel, Anderson + Wanca, to Marlene H. Dortch, Secretary, FCC (filed May 5, 2014)).

⁵ Plaintiffs' Comments at 5-8 (Part I).

⁶ 47 C.F.R. § 1.3.

⁷ See, e.g., *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) (recognizing that the Commission "has authority under [47 C.F.R. § 1.3] to waive requirements . . . where strict compliance would not be in the public interest"); *Northeast Cellular Tel. Co. v. FCC*, 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. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.") (internal citation omitted);

2. In granting a waiver, the Commission is not modifying the TCPA’s statutory private right of action or otherwise interfering with any court proceeding, as Plaintiffs suggest.⁸ It is simply exercising its authority to waive *its own regulations*. The Opt-Out Notice Rule is not a statutory requirement under the TCPA; it is a rule created by the Commission.⁹ Thus, insofar as the Commission had the power to issue the Opt-Out Notice Rule, it also has the power to grant waivers of its own rule for “good cause.”¹⁰

3. Plaintiffs correctly state that a properly-enacted regulation can have the legal force of a statute,¹¹ but incorrectly miss a critical distinction: a regulation, unlike a statute, was enacted by the Commission itself, not by Congress. As such, while the Commission *does not* have the authority to waive a congressionally-enacted statute, it *does* have the authority to waive its own regulations.

4. Plaintiffs’ argument that the Commission lacks authority to “issue retroactive rules” is similarly misguided.¹² The Opt-Out Order did not retroactively impose any new regulatory requirements. It did exactly the opposite: it retroactively *waived* a regulatory

WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“The agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.”).

⁸ Plaintiffs’ Comment at 5-6.

⁹ Opt-Out Order ¶ 5.

¹⁰ 47 C.F.R. § 1.3. To be clear, Royal Canin does *not* concede that the Opt-Out Notice Rule is a valid and enforceable rule under the TCPA. That issue was presented in the petitions leading up to the Opt-Out Order, and it is currently on appeal in the D.C. Circuit. Royal Canin expressly reserves the right to argue that the Opt-Out Notice Rule is invalid. Even if the Opt-Out Notice Rule were valid and enforceable, however, the Commission has the authority to waive it.

¹¹ Plaintiffs’ Comments at 7-8.

¹² Plaintiffs’ Comments at 8.

requirement. In other words, it relieved entities from having to comply with the 2006 Opt-Out Notice Rule (until April 30, 2015). Thus, Plaintiffs' argument fails to acknowledge the key distinction between a waiver and the issuance of a new regulatory rule.

5. Plaintiffs mistakenly rely on the D.C. Circuit's decision in *Natural Resources Defense Counsel v. EPA* ("NRDC").¹³ In that case, the court of appeals held that by creating an affirmative defense to the Clean Air Act's private right of action, the Environmental Protection Agency exceeded its *statutory* authority.¹⁴ But granting a retroactive waiver of the Opt-Out Notice Rule does not raise any such issues of statutory authority.¹⁵ As explained earlier, the Commission's retroactive waiver does not modify the TCPA's private right of action or any other aspect of that statute; it simply waives *one of its own rules*, as it is authorized to do. Thus, NRDC is inapposite.¹⁶

6. Finally, Plaintiffs invoke one paragraph of dicta from a lone district court case, *Physicians Healthsource, Inc. v. Stryker Sales Corp.* ("Stryker"), in support of its argument that the Commission's grant of retroactive waivers violates separation of powers.¹⁷ As explained

¹³ Plaintiffs' Comments at 6-7 (citing *Natural Res. Def. Council v. E.P.A.*, 749 F.3d 1055, 1064 (D.C. Cir. 2014)).

¹⁴ *Natural Res. Def. Council*, 749 F.3d at 1057 ("[T]he affirmative defense for private civil suits exceeds EPA's statutory authority."); *see also id.* at 1062-64.

¹⁵ As explained above, the Commission's Opt-Out Notice Rule raises significant issues of statutory authority, which are on appeal, but the retroactive waiver does not.

¹⁶ Plaintiffs admit that their counsel previously made these arguments regarding NRDC to the Commission, and the Commission did not even address them—presumably because they were irrelevant and incorrect. Plaintiffs' Comments at 6-7.

¹⁷ *See* Plaintiffs' Comments at 7 (citing *Stryker*, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014)). The *Stryker* court's statements concerning the Opt-Out Notice Rule were dicta because its decision rested on its finding that the fax at issue was unsolicited. *Stryker*, 2014 WL 7109630, at *13.

above, however, the Commission has already specifically rejected their separation-of-powers argument in its Opt-Out Order,¹⁸ and *Stryker* provides no basis for departing from that decision. *Stryker* does not even mention the controlling case law from the D.C. Circuit recognizing the Commission's authority to grant retroactive waivers under 47 C.F.R. § 1.3.¹⁹ Indeed, it provides *no analysis* and cites *no case law* in support of its comment. Thus, *Stryker* does not deprive the Commission of its authority to grant a retroactive waiver.

Moreover, *Stryker* is distinguishable on its facts. The court stated that it would violate 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.*”²⁰ But no case was filed against Royal Canin until almost five months *after* the Commission issued its Opt-Out Order. In *Stryker*, by contrast, the case had been filed before the Opt-Out Order. Thus, there was no “case or controversy presently proceeding” against Royal Canin when the Commission retroactively waived its regulation and announced that similarly-situated parties would be eligible for similar waivers. Accordingly, not only is *Stryker's* rationale incorrect and unsupported by any law, but its apparent concern about interfering with an ongoing case does not apply.

Thus, the Commission has the authority to grant Royal Canin's petition for a retroactive waiver.

¹⁸ See Opt-Out Order ¶ 21.

¹⁹ See, e.g., *Nat'l Ass'n of Broadcasters*, 569 F.3d at 426; *Northeast Cellular Tel. Co.*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1157.

²⁰ *Stryker*, 2014 WL 7109630, at *14 (emphasis added).

II. THE COMMISSION SHOULD GRANT ROYAL CANIN'S PETITION

In its Opt-Out Order, the Commission granted retroactive waivers to the 24 petitioners at issue (“Prior Petitioners”) and expressly invited “similarly situated entities” to “request retroactive waivers from the Commission, as well.”²¹ Royal Canin was one of approximately 60 petitioners who filed petitions pursuant to the Opt-Out Order (“Post-Order Petitioners”). Plaintiffs now mistakenly argue that Royal Canin and the other Post-Order Petitioners are not similarly situated to the Prior Petitioners because they have not claimed they were “actually confused” by footnote 154 or by the notice and comment process.²² Each of Plaintiffs’ arguments lacks merit and should be rejected.

1. Plaintiffs are attempting to impose a standard that has no support in the Opt-Out Order and its record. In deciding that there was “good cause” to grant a retroactive waiver to the Prior Petitioners, the Commission did not find that each of them had actually relied on footnote 154 or the deficiencies in the public notice process. Indeed, the Commission did not engage in *any* individualized fact-finding as to the source of confusion of the Prior Petitioners.²³ Instead, the Commission found that there was “good cause” for granting a retroactive waiver to the Prior Petitioners because the “inconsistent footnote” in its 2006 Order and the lack of explicit notice in the Commission’s Notice of Proposed Rulemaking *may have* caused reasonable confusion among the petitioners.²⁴ The Commission stated that footnote 154 “*may have caused some*

²¹ Opt-Out Order ¶ 22.

²² Plaintiffs’ Comments at 8-9.

²³ The Commission noted that all the Prior Petitioners had “made reference” in their petition to the confusing footnote 154, Opt-Out Order ¶ 24, but the Prior Petitioners did not claim that they had all *actually relied* on the footnote before sending the faxes at issue.

²⁴ Opt-Out Order ¶ 27 (noting that “a failure to comply with the rule . . . *could be* the result of reasonable confusion or misplaced confidence”) (emphasis added); *see also id.* ¶¶ 24-26, 28.

parties to misconstrue the Commission’s intent”²⁵ It further stated that “the lack of explicit notice [of the rule] *may have* contributed to confusion or misplaced confidence about this requirement.”²⁶ The Commission found that there was “nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out requirement for fax ads sent with prior express permission but nonetheless failed to do so.”²⁷ Accordingly, the Commission concluded that “this specific combination of factors *presumptively* establishes good cause for retroactive waiver of the rule.”²⁸ Thus, the Commission did not condition its waiver on a claim or showing by the Prior Petitioners that each of them had relied on footnote 154 or the notice provided during the rule-making process and were actually confused by them.²⁹ The Prior Petitioners, for example, were not required to claim or prove on an individualized basis that they read footnote 154, interpreted it in a way that later turned out mistaken, and relied on that misinterpretation in sending the facsimiles at issue. Rather, because the Commission found that the rule and the process were confusing, it created a *presumption* of confusion and granted a retroactive waiver.³⁰

²⁵ *Id.* ¶ 24 (emphasis added).

²⁶ *Id.* ¶ 25 (emphasis added).

²⁷ *Id.* ¶ 26.

²⁸ *Id.* (emphasis added).

²⁹ *See, e.g., id.* ¶ 24.

³⁰ Plaintiffs erroneously rely on the Commission’s statement that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.” *Id.* ¶ 26. But that statement merely reiterated that the Commission had granted the waiver based on specific factors that may have caused confusion and that amounted to good cause. The Commission did not, however, require the Prior Petitioners to claim or prove, on an individual basis, any actual confusion based on these factors.

Royal Canin is similarly situated to the Prior Petitioners and is equally entitled to a retroactive waiver. Like the Prior Petitioners, Royal Canin did not understand that the opt-out requirements applied to solicited facsimiles. Royal Canin’s Petition, like the Prior Petitioners’ petitions, references the confusion generated by the Commission’s prior statements with respect to the Opt-Out Notice Rule, including the inconsistent footnote 154 and the lack of notice in the Commission’s Notice of Proposed Rulemaking.³¹ Thus, as with the Prior Petitioners’ petitions, the “specific combination of factors” addressed in Royal Canin’s Petition “presumptively establishes good cause for retroactive waiver of the rule.”³²

It would be contrary to the purpose and intent of the Opt-Out Order to require Royal Canin to prepare an evidentiary submission to obtain a waiver. The Opt-Out Order granted a retroactive waiver to the petitioners because of the confusing 2006 Order and deficient notice and comment process. It acknowledged that there was a flaw in the process and granted the waiver to correct it. It did not engage in an individualized fact-finding process that required each petitioner to come forward with evidence regarding their confusion. Thus, it would defy the purpose and intent of the Opt-Out Order to now require Royal Canin and the Post-Order Petitioners to prepare individual evidentiary submissions to obtain a waiver.

Moreover, applying a higher standard to Royal Canin than was applied to the Prior Petitioners would be unfair to Royal Canin and would violate its due process rights. The Commission must apply its regulations in a manner that is not arbitrary and capricious.³³ If the

³¹ Royal Canin Petition at 5.

³² *Id.* ¶¶ 26-27.

³³ 5 U.S.C. § 706(2)(A).

Commission were to impose such a different standard on later petitioners, such as Royal Canin, that would be an arbitrary and capricious ruling.³⁴

In addition, such a heightened standard would effectively set an unprecedented limit on the Commission's authority to grant waivers under 47 C.F.R. § 1.3, in effect requiring that even where the Commission has promulgated an admittedly confusing or otherwise generally problematic rule, the Commission must undertake in-depth fact-finding for each potential recipient of a waiver even where doing so would be contrary to the public interest. That would set a bad precedent and hamstring the Commission's ability to implement its rules fairly and effectively.³⁵

2. Plaintiffs' far-fetched argument that they have a due process right to "investigate" the state of Petitioners' knowledge also should be rejected. Not only would this proposal be utterly inconsistent with the Opt-Out Order, as explained above, but Plaintiffs cite absolutely no legal precedent for such a proceeding. Moreover, implementing Plaintiffs' proposal would be particularly objectionable as to Royal Canin's petition because the district court recently stayed all proceedings in the action against Royal Canin, pending a decision by the United States Supreme Court on a dispositive issue.³⁶ Thus, Plaintiffs are effectively seeking to use this

³⁴ See, e.g., *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985) (holding that the Commission's decision to "waive[] a deadline in one case but not in another" was arbitrary and capricious); *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975) (remanding where parties similarly situated to the petitioner had been granted a waiver from a nighttime radio broadcasting rule, since "agency action cannot stand when it is 'so inconsistent with its precedent as to constitute arbitrary treatment amounting to an abuse of discretion'") (quoting *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)).

³⁵ See *WAIT Radio*, 418 F.2d at 1157 ("The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.").

³⁶ See *Fauley v. Royal Canin U.S.A., Inc., et al.*, No. 1:15-cv-02170, Minute Entry, Docket No. 23 (N.D. Ill. May 22, 2015).

process to obtain “discovery” to which they are not entitled in federal court. The Commission should not permit this unprecedented request.

3. Finally, Plaintiffs mistakenly argue that Royal Canin’s petition and the other Post-Order Petitions should be denied because Royal Canin has not “established their potential liability is ‘significant’ in comparison to their financial resources.”³⁷ Again, there is absolutely no support for this requirement in the Opt-Out Order. In granting waivers to the Prior Petitioners, the Commission did not conduct individual analyses of the potential liability and financial hardship of each petitioner.³⁸ Rather, the Commission simply explained that the public interest was better served by a finding that the inconsistent footnote in the 2006 Order created “confusion or misplaced confidence, [which,] in turn, left some businesses potentially subject to significant damage awards”³⁹ The Commission balanced this against competing public interests, which the Commission was satisfied would still be served by the fact that the rule was not waived indefinitely.⁴⁰ Imposing Plaintiffs’ newly-proposed higher standard for proof of “significant” potential liability would be unfair to Royal Canin, given the Commission’s treatment of the Prior Petitioners.

Moreover, like the Prior Petitioners, Royal Canin is “potentially subject to [a] significant damage award[.]” Royal Canin has been sued in a class action lawsuit in federal court alleging

³⁷ Plaintiffs’ Comments at 9.

³⁸ See Opt-Out Order ¶ 27. Moreover, among the Prior Petitioners receiving waivers were several large companies, including Merck & Company, Inc., Staples, Inc., and UnitedHealth Group, Inc. *Id.* ¶ 36.

³⁹ *Id.* ¶ 27.

⁴⁰ *Id.* ¶¶ 27, 29.

widespread violations of the TCPA based on the lack of an Opt-Out Notice.⁴¹ Although Royal Canin disputes Plaintiffs' allegations, there can be no serious dispute that Plaintiffs are attempting to impose significant damages on Royal Canin in this lawsuit. Thus, Royal Canin is in the same position as the Prior Petitioners, and this is another basis for granting its petition.

III. CONCLUSION

For the reasons stated above and in Royal Canin's Petition, Royal Canin respectfully requests that the Commission grant it a retroactive waiver of the Opt-Out Notice Rule (47 C.F.R. § 64.1200(a)(4)(iv)) for any and all facsimile advertisements sent prior to April 30, 2015 without the opt-out requirements of the rule.

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Respectfully submitted,

Jennifer P. Bagg
jbbagg@harriswiltshire.com
Harris, Wiltshire & Grannis LLP
1919 M Street N.W.
Washington, D.C. 20036
Tel: (202) 730-1322
Fax: (202) 730-1301

/s/ Stephen D. Raber
Stephen D. Raber
sraber@wc.com
Richmond T. Moore
rmoore@wc.com
Williams & Connolly LLP
725 Twelfth St. NW
Washington DC 20005
Tel: (202) 434-5000
Fax: (202) 434-5029

Attorneys for Royal Canin U.S.A., Inc.

⁴¹ See Royal Canin Petition at 2 n.2 (attaching copy of complaint).