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

In the Matter of Petition of Endo Pharmaceuticals Inc., Endo Pharmaceuticals Solutions Inc., Endo Pharmaceuticals Valera Inc., Endo Health Solutions Inc., Endo Pharma LLC, and Endo Pharma Delaware Inc. for Retroactive Waiver of C.F.R. § 64.1200(a)(4)(iv)	CG Docket No. 02-278 CG Docket No. 05-338

REPLY IN SUPPORT OF PETITION FOR RETROACTIVE WAIVER

Petitioners Endo Pharmaceuticals Inc., Endo Pharmaceuticals Solutions Inc., Endo Pharmaceuticals Valera Inc., Endo Health Solutions Inc., Endo Pharma LLC and Endo Pharma Delaware Inc., and their similarly situated parent companies and subsidiaries (together "Endo" or "Petitioners"), by and through their undersigned attorneys, respectfully submit these reply comments in support of Endo's petition for retroactive waiver of C.F.R. § 64.1200(a)(4)(iv) (the "Petition") and in response to the sole comments opposing that request filed by the plaintiff ("Physicians Healthsource") in a putative class action lawsuit brought against Endo under the Telephone Consumer Protection Act ("TCPA"). No other comments have been filed in connection with Endo's Petition.

ARGUMENT

I. The Commission Has Authority To Grant Retroactive Waivers Of C.F.R. § 64.1200(a)(4)(iv).

As an initial matter, Physicians Healthsource argues that "the Commission has no authority to 'waive' violations of the regulations prescribed under the TCPA in a private right of

action, and doing so would violate the separation of powers."[1] In the Order,[2] the Commission rejected this very argument, which had been advanced by the same lawyer who represents Physicians Healthsource, stating, "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."[3] As the Commission has already expressly rejected this exact argument, there is no reason to indulge Physicians Healthsource by revisiting it here, and the Commission should summarily deny Physicians Healthsource's attempt to re-litigate the issue.

As the Commission stated in the Order, it has broad and well-settled authority to waive any of its rules "for good cause shown."[4] Physicians Healthsource, despite multiple attempts to circumvent this well-established rule, has not identified *any* authority that would eliminate that authority in situations – like this one – where those rules provide the basis for private litigation. Congress expressly empowered the Commission to promulgate regulations construing the TCPA,[5] and it did so with the Commission's authority to waive any of its rules for good cause having been well-settled. As the Commission explained, "the mere fact that the TCPA allows for private rights of action based on violations of [the Commission's] rules implementing that

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[1] TCPA Plaintiff's Comments on Petition for Retroactive Waiver Filed by Endo Pharmaceuticals Inc. ("Pl's Comments"), at 9.

[2] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, 29 FCC Rcd. 13998 (2014) (the "Order").

[3] Order ¶ 21.

[4] *Id.* ¶ 23 (citing 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)). *See also 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").

[5] 47 U.S.C. § 227(b)(2).

statute in certain circumstances does not undercut [the Commission's] authority, as the expert agency, to define the scope of when and how [those] rules apply."[6] In addressing petitions for retroactive waivers, the Commission is not "interven[ing] in a private right of action,"[7] rather, it is merely "interpreting a statute, the TCPA, over which Congress provided [the Commission] authority as the expert agency."[8]

Physicians Healthsource's other attempts to undermine the Commission's broad authority to waive its own rules are similarly unavailing. First, Physicians Healthsource's reliance on the D.C. Circuit Court of Appeal's decision in *Natural Resources Defense Council v. EPA ("NRDC")*, 749 F.3d 1055 (D.C. Cir. 2014) – which concerned an entirely different statute and regulatory framework – is misplaced.[9] In *NRDC*, the Court held that the Environmental Protection Agency ("EPA") had exceeded its statutory authority by creating an affirmative defense to a private right of action under the Clean Air Act.[10] Unlike the FCC, the EPA does not enjoy the express authority to waive or amend its own rules for good cause. Moreover, *NRDC* is also inapposite because the Commission's decision to grant retroactive waivers of C.F.R. § 64.1200(a)(4)(iv) does not raise any issues of statutory authority. As discussed above, the Commission's decision to grant a retroactive waiver does not modify any provision in the TCPA, including the private right of action; it merely waives enforcement of one of the FCC's own rules, as the Commission is authorized to do.

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[6] Order ¶ 21.

[7] *See* Pl's Comments, at 9.

[8] Order ¶ 21.

[9] Pl's Comments, at 11.

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

Second, Physicians Healthsource's reliance on the *Stryker* case in support of its argument that the Commission's decision to grant retroactive waivers violates the separation of powers is not persuasive.[11] The *Stryker* court's analysis of the separation of powers issue is set forth in a single paragraph of dicta in an unpublished decision by a district court.[12] The *Stryker* court cites no authority to support its conclusion that the Commission's grant of retroactive waivers would violate the separation of powers, and includes no analysis of the controlling case law from the D.C. Circuit recognizing the Commission's authority to grant waivers pursuant to 47 C.F.R. § 1.3.[13] Moreover, the *Stryker* court appears to have been under the impression that the opt-out notice requirements for solicited faxes are a statutory requirement, rather than a requirement created by the Commission's own rules.[14] To the extent the *Stryker* court concluded that the Commission could not waive a statutory requirement, it misunderstood the basis for the opt-out notice rule as applied to solicited faxes.

Third, although the Commission's regulations can have the legal force of a statute,[15] Physicians Healthsource fails to appreciate the critical distinction that the rule – unlike a statute – was enacted by the Commission itself rather than Congress. Although the Commission does not have authority to waive a congressionally-enacted statute, it is well-established that it has the authority to waive regulations of its own making.[16]

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[11] Pl's Comments, at 11-12.

[12] *See Physicians Healthsource, Inc. v. Stryker Sales Corp*., No. 1:12-CV-0729, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014), *as amended* (Jan. 12, 2015).

[13] *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.

[14] *See Physicians Healthsource, Inc.*, 2014 WL 7109630, at *14.

[15] Pl's Comments, at 12.

[16] *See Supra* 2-3.

Fourth, Physicians Healthsource's argument that the Commission is not empowered to issue retroactive rules similarly misconstrues the Order and governing legal framework. In granting retroactive waivers, the Commission is not retroactively *imposing* any new rules or regulatory requirements. Rather, what the Commission is in fact doing is *waiving* compliance with a pre-existing regulatory requirement due to the reasonable and widespread confusion identified in the Order. Physicians Healthsource's argument fails to appreciate this critical distinction.

II. Endo Is Similarly Situated To The Petitioners Granted Retroactive Waivers Pursuant To The Order.

A. The Order Does Not Require Individualized Evidence of Actual Confusion.

Physicians Healthsource argues that Endo is not similarly situated to the petitioners granted waivers pursuant to the Order because Endo "does not claim its lack of understanding [that the opt-out requirements applied to solicited faxes] resulted from reading footnote 154 or the 2005 notice of rulemaking."[17] In doing so, Physicians Healthsource attempts to impose an "actual confusion" standard of proof upon Endo that is higher than the standard the Commission applied to the original petitioners. Physicians Healthsource's argument, however, finds no support in the Order and is undercut by the plain language of Endo's Petition.

In support of its decision to grant retroactive waivers, the Commission explained that "[t]he record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission."[18] The Commission noted that "all petitioners [made] reference to the confusing footnote language in

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[17] Pl's Comments, at 13.

[18] Order ¶ 24.

the record."[19] The Commission then stated, in clear and unequivocal terms, "[w]e find that this specific combination of factors *presumptively establishes good cause for retroactive waiver* of the rule."[20] In doing so, the Commission did not subject any of the original petitioners to an individualized analysis of whether they were actually confused by the inconsistencies between the footnote in the *Junk Fax Order* and the rule. Rather, the Commission stated only 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."[21] This is the only specific finding regarding the original petitioners' subjective understanding in the Order. In no way does it suggest that the Commission held the original petitioners to a standard of "actual confusion" resulting from express reliance upon the inconsistencies between the *Junk Fax Order* footnote and the rule, or support an argument that subsequent petitioners for these same waivers should be held to a higher standard of proof.

In any event, Endo stated throughout its Petition that it was similarly situated to the original petitioners and did not understand the opt-out requirements to apply to *solicited* faxes.[22] The Petition also explains that the basis for the Commission's finding was the inconsistencies between the footnote in the *Junk Fax Order* and the rule, and that – like the original petitioners – this inconsistency led to its mistaken understanding that the opt-out rules did not apply to solicited faxes.[23] Endo's failure to appreciate that the opt-out requirements applied to solicited

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[19] *Id*.

[20] *Id*. at ¶ 26 (emphasis added).

[21] *Id*.

[22] Endo Petition, at 4, 5, 6, 7.

[23] Endo Petition, at 3-4, 6.

faxes was not, as Physicians Healthsource claims, indicative of its "ignoran[ce] of the law,"[24] but rather a symptom of the widespread confusion experienced by businesses, like Endo, that the Commission acknowledged in the Order.[25]

B. Physicians Healthsource is Not Entitled to Discovery or a Hearing.

Physicians Healthsource also advances an alternative argument that, in the event the Commission rightfully denies its attempts to impose its fabricated higher standard of "actual confusion" on Petitioners, Physicians Healthsource has a due process right to inquire into "whether Endo had actual knowledge of the opt-out rules."[26] First, Physicians Healthsource's proposal conveniently ignores the fact that the Commission granted waivers to the original petitioners without requiring or conducting any investigation of those petitioners' actual knowledge of the opt-out requirements. Instead, the Commission stated only that "nothing in the record here demonstrat[es] that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement."[27] Second, Physicians Healthsource cites no legal precedent in support of this baseless argument. Rather, Physicians Healthsource's due process arguments are a transparent attempt to obtain discovery to which it is not entitled in the underlying litigation.

C. The Order Does Not Contemplate an Individualized Analysis of Potential Liability.

Finally, Physicians Healthsource argues that Endo is not similarly situated to the petitioners granted retroactive waivers pursuant to the Order because "Endo has failed to

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[24] Pl's Comments, at 13.

[25] Order ¶ 27.

[26] Pl's Comments, at 14.

[27] Order ¶ 26.

establish its potential liability is 'significant' in comparison to its financial resources."[28] Once again, Physicians Healthsource mischaracterizes the Commission's reasoning in the Order and asks the Commission to impose a higher standard than was applied to the original petitioners. In the Order, the Commission did not undertake individual analyses of each petitioners' potential liability or financial hardship, much less impose an evidentiary burden requiring petitioners to state how many faxes may be at issue or estimate their potential liability in the underlying litigation.[29] Rather, the Commission explained simply that the "confusion or misplaced confidence" engendered by the inconsistent footnote in the *Junk Fax Order* could subject parties to potentially "substantial" and "significant" damages.[30] Subjecting Endo to an individualized analysis of its potential liability as a prerequisite to granting its Petition would be inconsistent with the treatment the Commission afforded the original petitioners.

Regardless, Endo – like the original petitioners – *is* potentially subject to "significant" and "substantial" damages. As explained in the Petition, Physicians Healthsource has sued Endo in a class action lawsuit alleging widespread violations of the TCPA. Although Endo disputes Physicians Healthsource's allegations, there can be no serious question that Physicians Healthsource purports to seek significant and/or substantial damages in this lawsuit.

CONCLUSION

For these reasons and those stated in Endo's Petition for Retroactive Waiver, Petitioners respectfully request that the Commission grant it and their similarly situated parent companies

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[28] Pl's Comments, at 14-15.

[29] *See* Order, ¶ 27-28. Moreover, several large companies were among the petitioners granted waivers pursuant to the Order. *Id*. at ¶ 36. In granting waivers to these parties, the Commission took no notice and included no discussion of the respective companies' net values or available liquid assets. Physicians Healthsource's discussion of Endo's assets is irrelevant. *See* Pl's Comments, at 15.

[30] *Id*. at ¶27.

and subsidiaries a retroactive waiver from liability of the Commissions rule C.F.R. § 64.1200(a)(4)(iv).

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