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

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	

TCPA Plaintiffs' Comments on Thirty-One Petitions for Retroactive Waiver
Filed on or Before April 30, 2015

Commenters are plaintiffs in private TCPA actions relating to 30 of the 61 petitions subject to the Commission's Public Notice of May 8, 2015.[1] Petitioners seek "retroactive

[1] *Petition of Consumer Energy Solutions, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Mar. 26, 2015); *Petition of Am. Health Serv. Sales Corp. for Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (filed Apr. 6, 2015); *Petition of Nomax, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 13, 2015); *Petition of Heska Corp. for Waiver*, CG Docket Nos. 02-278, 05-338 (Apr. 14, 2015); *Petition of Odyssey Services, Inc. for Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 14, 2015); *Petition of GE Healthcare, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 15, 2015); *Petition of Competitive Health, Inc. & First Access, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 17, 2015); *Petition of Kaberline Healthcare Informatics, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 22, 2015); *Petition of CCI Investments, LLC, d/b/a CareWorks Consultants, Inc. for Retroactive Waiver of 47 C.F.R § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 27, 2015); *Petition of Royal Canin U.S.A., Inc. for Retroactive Waiver of 47 C.F.R § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 27, 2015); *Petition of Salix Pharms., Inc. & Salix Pharms., Ltd. for Retroactive Waiver of 47 C.F.R § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 27, 2015); *Petition of Cephalon, Inc., et al. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 28, 2015); *Petition of Navinet, Inc. for Waiver of Section 64.1200(a)(iv)(4) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 28, 2015); *Petition of First Index, Inc. for Waiver of Section 64.1200(a)(iv)(4) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 28, 2015); *Petition of Integrated Pain Management, S.C., et al. for Waiver of Section 64.1200(a)(iv)(4) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 28, 2015); *Petition of Am. Homepatient, Inc. for Waiver of Section 64.1200(a)(iv)(4) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 29, 2015); *Petition of Electrical Enlightenment, Inc. & Enlightenment Companies for Retroactive Waiver of 47 C.F.R. § 64.122(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 29, 2015); *Petition of ChappellRoberts, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 29, 2015); *Petition of Microwize Technology, Inc. for Waiver of Section 64.1200(a)(iv)(4) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 29, 2015); *Petition of MedTech Imagining,*

waivers" of 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring opt-out notice on fax advertisements sent with "prior express invitation or permission."[2]

The Commission issued an order October 30, 2014 ("Opt-Out Order") rejecting challenges to the validity of the opt-out regulation,[3] but granting retroactive "waivers" purporting to relieve the covered petitioners of liability from both Commission forfeiture actions and the private right of action in 47 U.S.C. § 227(b)(3).[4] The Commission invited "similarly situated" parties to file petition for waivers by April 30, 2015.[5] The Consumer and Governmental Affairs Bureau sought comments on 61 post-order petitions on May 8, 2015.[6]

Inc. for Waiver of Section 64.1200(a)(iv)(4) of the Commission's Rules, CG Docket Nos. 02-278, 05-338 (Apr. 29, 2015); *Petition of 2217044 Ontario Inc., et al. for Waiver of Section 64.1200(a)(iv)(4) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (Apr. 29, 2015); *Petition of Greenway Health, LLC for Retroactive Waiver of 47 C.F.R. § 64.1200 (a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 29, 2015); *Petition of CVS Health Corp. & Caremark, L.L.C. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 30, 2015); *Petition of Hoffman Pizza, Inc. & Glen Spiegler for Retroactive Waiver of 47 C.F.R. § 1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 30, 2015); *Petition of Am. Capital Croup & Carl Heaton for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 30, 2015); *Petition of C&T Pizza, et al. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 30, 2015); *Petition of Rehab Missouri, LLC d/b/a Rehab Xcel, et al. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 30, 2015); *Petition of Business Financial Services, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Apr. 30, 2015); *Petition of Be-Thin, Inc. & Keven Eberly for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (filed Apr. 30, 2015); *Petition of Mgmt. Info. Tech. Corp., et al. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv),* CG Docket Nos. 02-278, 05-338 (filed Apr. 30, 2015).

[2] *Id.*

[3] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; 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*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) ¶¶ 19–20, 32 & n.70 (ruling regulation "implement[s]" the TCPA by empowering consumers to "halt unwanted faxes" and regulation is enforceable through the TCPA's private right of action).

[4] *Id.* ¶¶ 22–31.

[5] *Id.* ¶ 30.

[6] *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission's Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (May 8, 2015).

Procedural History

On October 30, 2014, the Commission issued the Opt-Out Order, granting "retroactive waivers" intended to relieve the covered TCPA defendants of liability in private TCPA actions for violations of § 64.1200(a)(4)(iv) from its effective date, August 1, 2006, to October 30, 2014, as well as prospective waivers for any future violations through April 30, 2015.[7] The Commission invited "similarly situated" parties to petition for similar waivers by April 30, 2015, stating all future petitions would be "adjudicated on a case-by-case basis" and that the Commission did not "prejudge the outcome of future waiver requests in the order."[8]

Plaintiff's counsel filed comments on two post-order waiver petitions November 18, 2014,[9] five petitions December 12, 2104,[10] six petitions January 13, 2015,[11] one petition February 13, 2015,[12] one petition March 13, 2015,[13] and two petitions April 10, 2015.[14] In

---

[7] Opt-Out Order ¶ 29.

[8] Opt-Out Order ¶ 30 & n.102.

[9] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Beck Simmons LLC's Comments on Francotyp-Postalia Petition (Nov. 18, 2014); *id.*, Physicians Healthsource, Inc.'s Comments on Allscripts Petition (Nov. 18, 2014).

[10] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. (Dec. 12, 2014).

[11] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke's Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. (Jan. 13, 2015).

[12] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Physicians Healthsource, Inc.'s Comments on A-S Medication Solutions LLC's Petition for Wavier of Section 64.1200(a)(4)(iv) of the Commission's Rules and/or Declaratory Relief (Feb. 13, 2015).

each set of comments, Plaintiffs asked the Commission to clarify whether the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required[15] or whether the Commission created a *presumption* that petitioners are confused in the absence of evidence they were "simpl[y] ignorant" or knowingly violated the law.[16]

Plaintiffs' counsel noted they expected dozens of TCPA fax defendants to petition for waivers before April 30, 2015, and advised the Commission should expect waiver requests from defendants in non-fax TCPA litigation, as well. For example, on December 5, 2014, Wells Fargo cited the Opt-Out Order as authority for a retroactive waiver absolving TCPA defendants of liability for cellular-phone calls where the "called party" is not the "intended recipient."[17] Plaintiffs reiterate their request that the Commission clarify the standards it applied in the Opt-Out Order, both for future requests for waivers from the opt-out notice rules and requests for waivers from the Commission's rules generally.

---

[13] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Christopher Lowe Hicklin, DC, PLC's Comments on National Pen's Petition for Retroactive Waiver (Mar. 13, 2015).

[14] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs' Comments on Petitions for Retroactive Waivers filed by Boehringer Pharmaceuticals and Esaote North America (Apr. 10, 2015).

[15] Opt-Out Order ¶ 26 (stating waiver was justified because footnote 154 of the 2006 Junk Fax Order "led to confusion or misplaced confidence on the part of petitioners"); *id.* ¶ 32 (stating Commission granted waivers "to parties that have been confused by the footnote").

[16] *Id.* (stating combination of footnote 154 and lack of notice "presumptively establishes good cause for retroactive waiver," finding no evidence "that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement," and "emphasiz[ing]" that "simple ignorance" of the law "is not grounds for a waiver").

[17] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Assoc.*, CG Docket No. 02-278, Reply Comments of Wells Fargo (Dec. 5, 2014) at 9 & n.35 (citing Opt-Out Order ¶ 26).

Argument

I. The Commission has no authority to "waive" violations of the regulations prescribed under the TCPA in a private right of action.

The TCPA creates a private right of action for any person to sue "in an appropriate court" for "a violation of this subsection or the regulations prescribed under this subsection,"[18] and directs the Commission to "prescribe regulations" to be enforced in those lawsuits.[19] The "appropriate court" then determines whether "a violation" has taken place.[20] If the court finds "a violation," the TCPA automatically awards a minimum $500 in damages for "each such violation" and allows the court "in its discretion" to increase the damages up to $1,500 per violation if it finds they were "willful[] or knowing[]."[21]

The TCPA does not authorize the Commission to "waive" its regulations in a private right of action.[22] It does not authorize the Commission to intervene in a private right of action.[23] It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.[24] Nor does it limit a private plaintiff's right to sue to cases where the Commission declines to prosecute.[25] The Commission plays no role in determining whether "a violation" has taken place, whether a violation was "willful or knowing," whether statutory damages

---

[18] 47 U.S.C. § 227(b)(3).

[19] *Id.* § 227(b)(2).

[20] *Id.* § 227(b)(3)(A)–(B).

[21] *Id.* § 227(b)(3).

[22] *Id.*

[23] *Id.*

[24] *Id.*; *C.f.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

[25] *C.f., e.g.*, 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain "right-to-sue" letter from Equal Employment Opportunity Commission).

should be increased, or how much the damages should be increased. These duties belong to the "appropriate court" presiding over the lawsuit.[26]

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.[27] Thus, the TCPA and the Communications Act create a dual-enforcement scheme in which the Commission promulgates regulations that both the Commission and private litigants may enforce but where the Commission plays no role in the private litigation and private citizens play no role in agency enforcement.[28] This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards[29] that are enforceable both in private "citizen suits"[30] and in administrative actions.[31]

The D.C. Circuit Court of Appeals recently held the EPA could not issue a regulation creating an affirmative defense for "unavoidable" violations in private litigation under the Clean Air Act in *Nat. Res. Def. Council v. EPA*,[32] holding it is "the Judiciary" that "determines 'the scope'—*including the available remedies*" of "statutes establishing private rights of action"[33] and that, consistent with that principle, the Clean Air Act "vests authority over private suits

---

[26] 47 U.S.C. § 227(b)(3).

[27] *Id.* § 503(b).

[28] *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA "authorizes private litigation" and agency enforcement, so consumers "need not depend on the FCC").

[29] 42 U.S.C. § 7412(d).

[30] 42 U.S.C. § 7604(a).

[31] 42 U.S.C. § 7413(d).

[32] 749 F.3d 1055, 1062 (D.C. Cir. 2014).

[33] *Id.* (quoting *City of Arlington v. FCC*, --- U.S. ---, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

in the *courts*, not EPA."[34] TCPA Plaintiffs discussed *NRDC* extensively in a letter to the Commission after it was issued April 18, 2014,[35] and in subsequent comments on waiver petitions.[36] The Opt-Out Order does not cite *NRDC*.

On December 12, 2014, the United States District Court for the Western District of Michigan ruled a Commission "waiver" from § 64.1200(a)(4)(iv) is not enforceable in private TCPA litigation.[37] The court held "[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," that "nothing in the waiver . . . invalidates the regulation itself," and that "[t]he regulation remains in effect just as it was originally promulgated."[38] The court concluded, "the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power."[39]

The argument that the Commission is merely waiving "its own rules" fails because "[i]nsofar as the statute's language is concerned, to violate a regulation that lawfully implements [the statute's] requirements *is* to violate the statute."[40] The Commission already

---

[34] *Id.*

[35] Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).

[36] *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, TCPA Pls.' Comments on Stericycle Pet. at 7 (July 11, 2014); *id.*, TCPA Pls.' Comments on Unique Vacations, Inc. Pet. at 6–8 (Sept. 12, 2014).

[37] *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, --- F. Supp. 3d ---, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014).

[38] *Id.*

[39] *Id.*

[40] *Global Crossing Telecommc'ns, Inc. v. Metrophones Telecommc'ns, Inc.*, 550 U.S. 45, 54 (2007) (citing *MCI Telecommc'ns Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995) (holding Commission rule "has the

ruled in the Opt-Out Order that the regulation lawfully implements the TCPA,[41] so a violation of the regulation *is* a violation of the statute.

The argument that a waiver is permissible because "regulations can be applied retroactively" fails because "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[42] The TCPA does not expressly authorize the Commission to issue retroactive rules.[43] It authorizes it to "implement" the statute.[44] To "implement" is inherently prospective, meaning "to begin to do or use (something, such as a plan): to make (something) active or effective."[45]

II. The Thirty Post-Order Petitioners are not "similarly situated" to the petitioners covered by the Opt-Out Order.

A. If the standard is actual confusion, the petitions must be denied because Petitioners either do not claim actual confusion or do not claim their confusion was caused by the public notice or footnote 154.

If the standard for a waiver is that the petitioner was *actually* "confused" about whether opt-out notice was required on faxes sent with permission, then each of the petitions must be denied. Most Petitioners do not claim actual confusion. The Petitioners that do claim confusion do not claim their confusion resulted from reading footnote 154 or

---

force of law" and the Commission "may therefore treat a violation of the prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates")).

[41] Opt-Out Order ¶ 19–20.

[42] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[43] 47 U.S.C. § 227(b)(2); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 102 (N.D. Ill. 2013).

[44] § 227(b)(2).

[45] *See* http://www.merriam-webster.com/dictionary/implement.

the 2005 notice of rulemaking, the only sources of "confusion" identified in the Opt-Out Order.[46] Based on the record before the Commission, it is just as likely these Petitioners obtained bad legal advice or, more likely, were simply ignorant of the law, which the Opt-Out Order held was insufficient for a waiver.[47]

B. If the standard is "presumptive" confusion, Plaintiffs have a due-process right to inquire into whether Petitioners had actual knowledge of the rules if that factor is dispositive of their private rights of action.

If the standard for a waiver is that a petitioner is considered "presumptively" confused in the absence of evidence it "understood that [it] did, in fact, have to comply with the opt-out notice requirement,"[48] then Plaintiffs have no evidence of actual knowledge at this time with which to rebut the presumption. Only Petitioners have that information, and their petitions are silent on the issue. Plaintiffs have a due-process right to investigate whether Petitioners had actual knowledge of the opt-out rules if that factor is dispositive of their private rights of action under the TCPA, and the Commission should hold such "proceedings as it may deem necessary" for that purpose.[49]

C. Petitioners have not established their potential liability is "significant" in comparison to their financial resources.

The Opt-Out Order ruled the petitioners were "subject to significant damage awards under the TCPA's private right of action" and that "the risk of substantial liability," although

---

[46] Opt-Out Order ¶ 26.

[47] *Id.*

[48] *Id.*

[49] 47 C.F.R. § 1.1.

not dispositive, was "a factor" in the Commission's decision.[50] Petitioners claim they are subject to "significant" damages, but do not state how many faxes they sent or estimate their potential liability. Nor do they give any indication of their financial resources or establish their potential risk is "significant" in comparison. On this record, neither Plaintiffs nor the Commission is in a position to determine whether the Petitioners face "significant" risk in their private TCPA lawsuits. To the extent this issue was a factor in the Commission's Opt-Out Order, it should deny Petitioners' waiver requests.

Conclusion

The Commission should deny the petitions because the Commission has no authority to "waive" a regulation in a private right of action under the TCPA. The Petitioners addressed in these comments are not "similarly situated" to the petitioners covered by the Opt-Out Order, since (1) they either do not claim actual confusion or do not claim they were confused by footnote 154 or the public notice, (2) they were most likely simply ignorant of the law, and (3) they have not shown they face "significant" potential liability.

Dated: May 22, 2015

Respectfully submitted,

By: s/Brian J. Wanca

Brian J. Wanca
Glenn L. Hara
Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501

[50] Opt-Out Order ¶¶ 27–28.