

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)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

**TCPA Plaintiffs’ Comments on Petitions for Retroactive Waiver filed by
athenahealth, Inc. and Ohio National Mutual, Inc.**

Commenters St. Louis Heart Center, Inc. and JT’s Frames, Inc., are plaintiffs in private TCPA litigation against Petitioners athenahealth, Inc. (“Athena”) and Ohio National Mutual, Inc. (“Ohio National”).¹ Athena and Ohio National have filed petitions seeking a “retroactive waiver” 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 on 24 similar petitions on October 30, 2014 (“Opt-Out Order”).³ That order rejected several challenges to the validity of the opt-out regulation,⁴ but granted retroactive “waivers” purporting to relieve the covered petitioners of

¹ *St. Louis Heart Ctr., Inc. v. athenahealth, Inc.*, No. 15-cv-1215 (E.D. Mo.); *JT’s Frames, Inc. v. Weinberg & Assocs., Inc.*, No. 2015 CH 11746 (Cir. Ct. Cook Cty., Ill.).

² *Petition of athenahealth, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338 (filed Aug. 6, 2015) (Athena Petition); *Petition of Ohio National Mutual, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (filed Aug. 21, 2015) (Ohio National Petition).

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).

⁴ *Id.* ¶¶ 19–20, 32 & n.70 (ruling that Commission issued regulation under its statutory authority to “implement” the TCPA by empowering consumers to “halt unwanted faxes” and regulation is enforceable through the TCPA’s private right of action).

liability from both Commission forfeiture actions and the private right of action in 47 U.S.C. § 227(b)(3).⁵ The Consumer and Governmental Affairs Bureau sought comments on the Athena Petition and Ohio National Petition on August 28, 2015.⁶

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

Plaintiffs’ counsel filed comments on 48 post-order waiver petitions from November 18, 2014, to June 12, 2015.⁹ In each set of comments, Plaintiffs asked the Commission to

⁵ *Id.* ¶¶ 22–31.

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 (Aug. 28, 2015).

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); *id.*, 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); *id.*, 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); *id.*, 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.

clarify whether the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required when it sent its faxes¹⁰ 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.¹¹

On August 28, 2015, the Consumer & Governmental Affairs Bureau issued an order on 117 waiver petitions.¹² The Bureau clarified that a petitioner need only “reference” footnote 154 of the 2006 Junk Fax Order to create a “presumption of confusion” justifying a waiver and that plaintiffs may “rebut” that presumption with evidence the petitioner “clearly understood the requirement and thus do[es] not deserve the presumption of confusion or misplaced confidence.”¹³ The Bureau concluded evidence showing the petitioner used non-compliant opt-out notices is insufficient to rebut the presumption.¹⁴ The Bureau also concluded evidence that a petitioner was sued for opt-out notice violations before sending

13, 2015); *id.*, Christopher Lowe Hicklin, DC, PLC’s Comments on National Pen’s Petition for Retroactive Waiver (Mar. 13, 2015); *id.*, TCPA Plaintiffs’ Comments on Petitions for Retroactive Waivers filed by Boehringer Pharmaceuticals and Esaote North America (Apr. 10, 2015); *id.*, TCPA Plaintiffs’ Comments on Thirty-One Petitions for Retroactive Waiver Filed on or Before April 30, 2015 (May 22, 2015); *id.*, TCPA Plaintiffs’ Comments on Petition for Retroactive Waiver filed by Endo Pharmaceuticals Inc. (June 12, 2015).

¹⁰ 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”).

¹¹ *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”).

¹² *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 5120879, at *1 (CGAB Aug. 28, 2015).

¹³ *Id.* ¶ 16.

¹⁴ *Id.* ¶ 18.

the faxes for which it seeks a waiver “does not rebut the presumption unlike, *e.g.*, a judicial finding.”¹⁵ The Bureau order does not mention “simple ignorance” of the law.¹⁶

Factual Background

A. The athenahealth litigation.

On May 21, 2015, St. Louis Heart Center, Inc. filed a putative class action under the TCPA in Missouri state court alleging Athena sent it and a class of other persons unsolicited fax advertisements, including faxes in February and June 2012.¹⁷ Both faxes promote a “private dinner” at a hotel (the Ritz Carlton and the Four Seasons, respectively) to discuss “how athenahealth’s cloud-based service model can help you stay profitable” during changes in health-care regulations.¹⁸

Athena removed to the Eastern District of Missouri on August 11, 2015.¹⁹ Athena has since attempted to “moot” the class action by “picking off” the named plaintiff with a \$2,000 offer of judgment, but Athena has not answered the complaint and no discovery has been conducted.

B. The Ohio National litigation.

On August 5, 2015, JT’s Frames filed a putative TCPA class action against Ohio National in Illinois state court alleging Ohio National sent it and a class of others unsolicited

¹⁵ *Id.*

¹⁶ *Id.* ¶¶ 1–24.

¹⁷ *Athena*, Doc. 4 ¶ 10.

¹⁸ *Id.*, Exs. A & B.

¹⁹ *Id.*, Doc. 1.

fax advertisements, including a fax on May 10, 2013.²⁰ The fax states it is from “Joe Gillings, Sr. Client Specialist” with “Ohio National Life Insurance Company” and “Ohio National Life Assurance Corporation,” and states “I work with my clients to construct ‘safety nets’ to protect their income, assets and retirement plans for their companies, individuals and families.”²¹ Ohio National has not yet answered the complaint, and no discovery has been conducted.

Argument

I. 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.

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,”²² and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.²³ The Commission reaffirmed in the Opt-Out Order that § 64.1200(a)(4)(iv) is one of the “regulations prescribed under” 47 U.S.C. § 227(b)(2).²⁴

The “appropriate court” determines whether “a violation” of the statute or the regulations has taken place.²⁵ 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”

²⁰ *Ohio Nat’l*, Compl. ¶ 14.

²¹ *Id.*, Ex. A.

²² 47 U.S.C. § 227(b)(3).

²³ *Id.* § 227(b)(2).

²⁴ Opt-Out Order ¶¶ 19–20.

²⁵ *Id.* § 227(b)(3)(A)–(B).

to increase the damages up to \$1,500 per violation if it finds they were “willful[] or knowing[].”²⁶

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.²⁷ It does not authorize the Commission to intervene in a private right of action.²⁸ It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.²⁹ Nor does it limit a private plaintiff’s right to sue to cases where the Commission declines to prosecute.³⁰ The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages should be increased, or how much the damages should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.³¹

Similarly, the TCPA empowers state attorneys general to sue for violations of the TCPA or the regulations prescribed thereunder for \$500 per violation, which the court may increase for willful or knowing violations, as in the private right of action.³² Such actions must be brought in a federal district court.³³ The TCPA requires the state to give notice of such an action to the Commission, which “shall have the right (A) to intervene in the action,

²⁶ *Id.* § 227(b)(3).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *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).

³⁰ *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).

³¹ 47 U.S.C. § 227(b)(3).

³² *Id.* § 227(g).

³³ *Id.*

(B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.”³⁴

The Communications Act also grants the Commission authority to enforce the TCPA through administrative forfeiture actions.³⁵ Neither private citizens nor state attorneys general have a role in that process, such as determining whether a violator acted “willfully or repeatedly.”³⁶

Thus, the TCPA and the Communications Act create a tripartite enforcement scheme in which the Commission promulgates regulations that may be enforced by private citizens, the states, and the Commission, and where the Commission plays *some* role in state enforcement activities but plays *no* role in private TCPA litigation.³⁷ This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards³⁸ that are enforceable both in private “citizen suits”³⁹ and in administrative actions.⁴⁰

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*,⁴¹ holding it is “the Judiciary” that “determines

³⁴ *Id.* § 227(g)(3).

³⁵ *Id.* § 503(b).

³⁶ *Id.*

³⁷ *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”).

³⁸ 42 U.S.C. § 7412(d).

³⁹ 42 U.S.C. § 7604(a).

⁴⁰ 42 U.S.C. § 7413(d).

⁴¹ 749 F.3d 1055, 1062 (D.C. Cir. 2014).

‘the scope’—*including the available remedies*’ of “statutes establishing private rights of action”⁴² and that, consistent with that principle, the Clean Air Act “vests authority over private suits in the *courts*, not EPA.”⁴³ TCPA Plaintiffs discussed *NRDC* extensively in a letter to the Commission after it was issued April 18, 2014,⁴⁴ and in subsequent comments on waiver petitions.⁴⁵ Neither the Opt-Out Order nor the Bureau’s August 28, 2015 order cites *NRDC*.

On December 12, 2014, the United States District Court for the Western District of Michigan became the first court in the country to rule on whether a Commission “waiver” from § 64.1200(a)(4)(iv) is enforceable in private TCPA litigation.⁴⁶ The district 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.”⁴⁷ The district court held that “nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the regulation itself” and that “[t]he regulation remains in effect just as it was originally promulgated” for purposes of determining whether a defendant violated the “regulations prescribed under” the TCPA, as directed by § 227(b)(3).⁴⁸ The district court concluded, “the

⁴² *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)).

⁴³ *Id.*

⁴⁴ Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).

⁴⁵ 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).

⁴⁶ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014).

⁴⁷ *Id.*

⁴⁸ *Id.*

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.”⁴⁹

The argument that the Commission is merely waiving “its own rules,” rather than the statutory private right of action 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.”⁵⁰ The Commission already ruled in the Opt-Out Order that the regulation lawfully implements the TCPA,⁵¹ so a violation of the regulation *is* a violation of the statute.

The argument that a waiver of the opt-out regulation in a private right of action 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.”⁵² The TCPA does not expressly authorize the Commission to issue retroactive rules.⁵³ It authorizes it to “implement” the statute.⁵⁴ To “implement” is inherently prospective, meaning “to begin to do or use (something, such as a plan): to make (something) active or effective.”⁵⁵

⁴⁹ *Id.*

⁵⁰ *Global Crossing Telecomm’s, Inc. v. Metrophones Telecomm’s, Inc.*, 550 U.S. 45, 54 (2007) (citing *MCI Telecomm’s Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995) (holding Commission rule “has the 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”)).

⁵¹ Opt-Out Order ¶ 19–20.

⁵² *Bowen*, 488 U.S. at 208.

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

⁵⁴ § 227(b)(2).

⁵⁵ See <http://www.merriam-webster.com/dictionary/implement>.

II. Plaintiffs have a due-process right to inquire into whether Petitioners had actual knowledge of the rules.

If the Bureau's August 28, 2015 order is correct that the standard for a waiver is that a petitioner is considered "presumptively" confused in the absence of evidence it had actual knowledge of the opt-out-notice requirement, then Plaintiffs have no evidence of actual knowledge at this time with which to rebut the presumption with respect to Athena and Ohio National. Only Petitioners have that information, and their petitions are silent on the issue and no discovery has taken place in the private TCPA actions.

Plaintiff has a due-process right to investigate whether Petitioners had actual knowledge of the opt-out rules if that factor is dispositive of their private right of action under the TCPA, and the Commission should hold such "proceedings as it may deem necessary" for that purpose.⁵⁶ In the alternative, the Commission should issue an order stating it will postpone ruling on these petitions until Plaintiffs can complete discovery in the underlying private actions. Plaintiffs cannot reasonably be expected to produce evidence of Petitioners' state of mind without some kind of fact-finding taking place.

Conclusion

The Commission, or the Bureau, should deny the petitions because the Commission has no authority to "waive" a regulation in a private right of action under the TCPA. It would also violate Plaintiffs' due process rights to "waive" their private right of action based on a lack of evidence of Petitioners' state of mind that Plaintiffs have had no opportunity to investigate, either through discovery in the private litigation or before the Commission.

⁵⁶ 47 C.F.R. § 1.1.

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Respectfully submitted,

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