

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

In the Matter of)	CG Docket No. 02-278
)	
Petition for Waiver)	CG Docket No. 05-338
of Virbac Corporation)	

**RESPONSE OF VIRBAC TO SHAUN FAULEY’S COMMENTS
TO VIRBAC’S PETITION FOR WAIVER**

Rather than address the substance of the Petition for Waiver filed by Virbac Corporation (“Virbac”), Shaun Fauley (“Fauley”) submits well-worn and previously rejected arguments concerning the Federal Communication Commission’s (“FCC” or “Commission”) authority to waive application of its *own* regulations. The FCC’s authority, however, is not a one-way ratchet. As this Commission has held on numerous occasions—and as controlling case law supports—the FCC can retroactively waive its own regulations, including the Opt-Out Rule, 47 C.F.R. § 64.1200(a)(4)(iv).

Similarly, Fauley’s claimed “due process right” to investigate whether Virbac in fact had knowledge of and was actually confused by the opt out notice requirement is without basis. As a predicate matter, Fauley cites no authority that such a due process right exists (it does not). Further, the Commission has rejected efforts to require “detailed grounds” for actual confusion. And in any event, Virbac asserted such confusion in its Petition and reiterates so here. The faxes that form the basis of Fauley’s lawsuit were *solicited*, and, given the regulatory uncertainty over the Opt-Out Rule, Virbac did not believe opt out language was required on those faxes.

Accordingly, Virbac respectfully requests that the Commission reject the Comments of Shaun Fauley and expeditiously grant its Petition for Waiver.

I. THE FCC HAS THE AUTHORITY TO GRANT RETROACTIVE WAIVER OF ITS OWN REGULATIONS.

Fauley devotes half of his Comment to challenging the FCC’s authority to waive its own regulations.¹ As the Commission has held on multiple occasions—and as controlling case law confirms—the Commission has the authority to grant retroactive waiver petitions, like Virbac’s.

The Commission has held multiple times now—in the face of similar comments filed by Fauley’s counsel, Anderson + Wanca—that it “may waive any of its rules for good cause shown.”² Indeed, the Commission has specifically rejected the nearly identical argument Fauley makes here, “dismiss[ing] arguments that by granting waivers while litigation is pending violates the separation of powers”³ Furthermore, the fact that a private action is ongoing is irrelevant—“the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut [the FCC’s] authority, as the expert agency, to define the scope of when and how [the FCC’s] rules apply.”⁴ In so holding, the Commission has clearly avoided invading the territory of Article III courts by declining to “confirm or deny whether . . . petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.”⁵ In other words, the Commission has not mandated rulings by

¹ See Shaun Fauley’s Comments on Petitions for Retroactive Waiver Filed by Virbac Corp. and Petplan [hereinafter “Fauley Comments”] at 4-8.

² See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598 ¶ 14 (2015) [hereinafter “August 28 Order”]; see also 47 C.F.R. § 1.3

³ See August 28 Order ¶ 13.

⁴ *Id.*; see also *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998, 14008 (2014) [hereinafter “Waiver Order”].

⁵ Waiver Order at 14012; see also *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 05-338, 2015 WL 8543949, at ¶¶ 11-12 (OHMSV Dec. 9, 2015) [hereinafter “2015 Order”] (“We reiterate the Commission’s previous rejection of requests seeking a declaratory ruling that the Commission lacked the statutory authority to require opt-out information on fax ads sent with recipient consent As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency”).

any courts, but instead has left the outcome of private actions with the triers of fact.⁶

Controlling case law supports the Commission’s findings in this regard. As a preliminary matter, the FCC does have authority to waive any of its regulations—even as they impact private litigants—for good cause.⁷ To the extent Fauley asserts *Natural Resources Defense Council v. E.P.A.*, 749 F.3d 1055 (D.C. Cir. 2014) mandates the opposite conclusion, that case is plainly distinguishable. *Natural Resources* involved the EPA’s creation of an affirmative defense to a *statutorily* created private right of action.⁸ Here, the FCC is merely curtailing and construing its *own* regulation that is the basis for Fauley’s purported private right of action. Further, and contrary to Fauley’s Comments,⁹ Supreme Court precedent is clear that a regulation that has the ancillary effect of impacting ongoing private rights of action does not implicate separation of powers concerns. The Supreme Court recently reiterated administrative agencies have “authority to promulgate the substantive standards enforced through [a] private right of action.”¹⁰

Similarly, it has long been held that legislation and regulations can be applied retroactively, even if they impact pending cases.¹¹ For example, in *Robertson v. Seattle Audubon Soc.*, the Supreme Court held an act of Congress was constitutional despite having the practical

⁶ See August 28 Order ¶ 17; see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (noting the separation of powers forbids Congress from compelling judges to make certain decisions in pending cases)

⁷ See, e.g., *Nat’l Ass’n of Broadcasters v. F.C.C.*, 569 F.3d 416, 426 (D.C. Cir. 2009) (permitting the FCC “to waive requirements not mandated by statute where strict compliance would not be in the public interest, so long as it articulates identifiable standards for exercising that authority”).

⁸ *Id.* at 1063.

⁹ Fauley Comments at 4-8.

¹⁰ *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1871 n.3 (2013).

¹¹ See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 267 (1994) (holding Congress can apply its civil legislation retroactively so long as it makes its intent clear); *Plaut*, 514 U.S. at 218 (noting Congress is free to impact pending cases so long as it “amends applicable law”); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (noting that administrative rules can have retroactive effect if their language requires that result).

effect of impacting the results in two pending cases, stating that Congress is free to “affect the adjudication of . . . cases . . . by effectively modifying the provisions at issue in those cases.”¹² More recently, in 2007 Congress retroactively waived compliance with certain requirements of the Fair and Accurate Credit Transactions Act.¹³ This waiver was consistently upheld, despite its impact on pending cases.¹⁴

There is thus no concern here that a retroactive waiver is outside the Commission’s authority or in any manner implicates the separation of powers. As established above, and as consistently held by the Commission itself, the Commission has the authority to grant retroactive waiver petitions, like Virbac’s.¹⁵

II. Fauley Has No “Due Process Right” to Investigate Virbac’s “Actual Knowledge” of the Opt-Out Requirement.

As a preliminary matter, there can be no question that the faxes Fauley alleges to have received from Virbac were *solicited*.¹⁶ Fauley does not challenge that fact in his comments, nor could he. Substantial evidence of Fauley’s consent has been provided to both his counsel and the Court in which Fauley filed his action against Virbac.¹⁷ Indeed, Virbac’s evidence of consent led Judge Darrah to subsequently stay Fauley’s lawsuit, in part based on the instant waiver petition.¹⁸

¹² 503 U.S. 429, 440 (1992).

¹³ See 15 U.S.C. § 1681n(d) (waiving compliance from December 4, 2004 until June 3, 2008).

¹⁴ See, e.g., *Sieber v. Havana Harry’s II, Inc.*, 604 F. Supp. 2d 1368, 1371 (S.D. Fla. 2009) (dismissing FACTA case with prejudice despite being filed before Congress’s waiver went into effect).

¹⁵ The appropriate venue through which to challenge the Commission’s authority—which the Commission has now properly reiterated in the retroactive waiver context three separate times—would be through the D.C. Circuit *Bais Yaakov* appeal, through which Fauley’s counsel is appealing this very issue. See *Bais Yaakov of Spring Valley, et al v. FCC*, No. 14-1234 (D.C. Circ.).

¹⁶ Virbac provides this detail solely for the purposes of background. As Virbac stated in its Petition, it does not ask the Commission to resolve factual and legal issues raised in the pending litigation. See Virbac Petition at 2.

¹⁷ See *Fauley v. Virbac Corporation*, No. 15-cv-9125, DE 19-4 (N.D. Ill. Dec. 4, 2015).

¹⁸ *Id.*, DE 21 (N.D. Ill. Dec. 8, 2015).

Recognizing that he expressly solicited the faxes he subsequently sued over, Fauley makes a last-ditch argument that he has a due process right to investigate whether Virbac was in fact confused regarding the opt out requirement.¹⁹ Fauley’s argument fails for two reasons. First, there is no such due process right, nor should the Commission create one here. Second, contrary to Fauley’s Comments, Virbac has consistently represented it was confused by the regulatory uncertainty over whether opt out language was required on solicited faxes.

First, Fauley provides absolutely no support, authority or citation for his “due-process right to investigate.”²⁰ Fauley does not even indicate whether the due process right he seeks is procedural or substantive, or how such a right to investigate arises to the level of a constitutional concern. In any event, Fauley’s desire to investigate Virbac’s actual knowledge because it will be “dispositive of his private right of action under the TCPA” misses the mark entirely.²¹ The Commission has reiterated time and again that its retroactive waivers still leave issues on the table for triers of fact in private litigation (*i.e.*, prior express invitation or permission).²² A retroactive waiver is thus not tantamount to “waiving [Fauley’s] private right of action.”²³ Furthermore, the Commission has routinely granted retroactive waiver petitions on the basis of “the contradictory language in the Commission’s fax opt-out decision,” which qualifies petitioners “for the presumption of confusion or misplaced confidence articulated by the Commission.”²⁴ In so doing, the Commission has rejected the notion that petitioning parties had

¹⁹ Fauley Comments at 9-10.

²⁰ *Id.*

²¹ *Id.* at 9-10.

²² *See* August 28 Order ¶¶ 17, 21.

²³ Fauley Comments at 10.

²⁴ August 28 Order ¶ 19; *see* Decembe 9 Order ¶ 17 (“[W]e reject arguments the Commission made actual,

to “plead specific, detailed grounds for individual confusion” because such requirements were not part of the original October 30, 2014 Waiver Order.²⁵ The Commission should thus reject Fauley’s invitation to invent a due process right to investigate the detail of Virbac’s knowledge.²⁶

Second, and in any event, Virbac specifically stated in its Petition that “Virbac did not believe that that any of its solicited facsimiles required opt-out notices. However, as a consequence of this regulatory uncertainty, Virbac . . . now finds itself a defendant in a putative class action lawsuit filed in federal court which alleges violations of the TCPA.”²⁷ Virbac further stated that “the ‘inconsistency’ between a footnote in the Junk Fax Order and the Opt-Out Rule . . . contributed to substantial uncertainty surrounding the opt-out notice requirements for *solicited* fax advertisements.”²⁸ Contrary to Fauley’s representation that Virbac’s “petition is silent on the issue” of confusion,²⁹ it is abundantly clear from its Petition that Virbac was in fact confused by the regulatory inconsistency.³⁰ The Commission should again decline Fauley’s counsel’s invitation to adopt a standard requiring “specific, detailed grounds for individual confusion.”³¹

specific claims of confusion a requirement to obtain a waiver. The Commission did not require petitioners to plead specific, detailed grounds for individual confusion, and we therefore cannot impose that requirement now. The petitioners asserted their general confusion regarding the opt-out notice requirement for solicited faxes and there is no evidence in the record demonstrating petitioners understood they were required to comply but failed to do so.”).

²⁵ August 28 Order ¶ 19.

²⁶ Indeed, permitting such an investigation would work an end-around of Judge Darrah’s Order staying the *Fauley v. Virbac* litigation. *Fauley v. Virbac Corporation*, No. 15-cv-9125, DE 21 (N.D. Ill. Dec. 8, 2015). And because the *Fauley* litigation is presently stayed, there is no basis on which to—as Fauley argues—to stay this proceeding until discovery in the underlying proceeding is completed. *See* Fauley Comments at 10.

²⁷ Virbac Petition at 2.

²⁸ *Id.* at 3.

²⁹ *See* Fauley Comments at 9.

³⁰ Unlike the Petitioners whose petitions were recently denied, Virbac *does not* admit a lack of awareness of the TCPA and/or Commission rules regarding opt out notices, but to the contrary was legitimately confused due to the regulatory inconsistency. *See, e.g.*, December 9 Order ¶ 20.

³¹ *See Id.* ¶ 17

Accordingly, there can be little doubt that Virbac is a “similarly situated” entity, as described in the Commission’s Waiver Order.³² The FCC’s rationale in granting retroactive waivers applies equally to Virbac because the uncertainty surrounding the Opt-Out Rule could potentially expose it to frivolous lawsuits and monetary damage awards. The Commission has acknowledged that substantial confusion previously existed with respect to the opt-out requirements for solicited fax advertisements. Thus, not only does good cause exist to grant Virbac a waiver of the Opt-Out Rule, but such a grant would be in the public interest.

³² Waiver Order at 14008 (inviting “similarly situated entities” to “request retroactive waivers”).

III. CONCLUSION

For the reasons set forth in this Reply Comment as well as those set forth in Virbac's Petition for Waiver, Virbac respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) effective through April 30, 2015.

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Respectfully Submitted,

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