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

In the Matter of Ohio National Mutual, Inc. Petition for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)	CG Docket No. 02-278 CG Docket No. 05-338

Reply Comment In Support of Petition For Reconsideration of December 9, 2015 Order Regarding Retroactive Waiver

Petitioner Ohio National Mutual, Inc., on behalf of itself and its subsidiaries, (collectively "Ohio National" or "Petitioners"), by and through their undersigned counsel, and pursuant to Section 1.106 of the Federal Communications Commission's (the "Commission") Rules,[1] respectfully files this Reply in response to the lone opposition (the "opposition"), filed by JT's Frames, Inc. ("JT's Frames")), to the Petition for Reconsideration of the Order released December 9, 2015 (the "Petition for Reconsideration") by the Consumer and Governmental Affairs Bureau (the "Bureau")[2] insofar as that Order denied Ohio National's Petition for retroactive waiver of Section 64.1200(a)(4)(iv) (the "Regulation") of its Rules[3] with regard to the opt-out notice requirement for solicited facsimiles sent prior to April 30, 2015, to recipients by or purportedly on behalf of, or marketing the products or services of, Ohio National.

Argument

In its Petition for Reconsideration, Ohio National provided several reasons why the Bureau should reconsider its *December 9 Order* insofar as the Bureau determined that Ohio

[1] 47 C.F.R. § 1.106.

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 (rel. Dec. 9, 2015) (the "*December 9 Order*").

[3] 47 C.F.R. § 64.1200(a)(4)(iv).

National was not similarly situated to the original petitioners (and therefore not entitled to a waiver of the Regulation). First, in the *2014 Anda Commission Order*, the Commission granted waiver requests to petitioners who expressly asserted they were unaware of the opt-out notice requirement for solicited faxes, the Bureau applied that same standard in its *August 28 Order*,[4] and Ohio National's petition should have been granted under that precise standard.[5] Second, to the extent that the Bureau created and applied a new standard for granting petitions, Ohio National met that standard because Ohio National's Petition was not intended to be read, and should not have been read, as seeking a waiver based on "simple ignorance" of the law.[6] In fact, the Bureau had not previously read the language used by Ohio National as seeking a waiver based on "simple ignorance" of the law and had no basis to deviate with respect to Ohio National's Petition.[7] This is graphically illustrated by the fact that the Bureau granted petitions in the *December 9 Order* that made the same assertions as were made in the Ohio National Petition.[8]

JT's Frames (the plaintiff in a TCPA suit against Ohio National) opposes the Petition for Reconsideration, but fails to respond to ***any*** of Ohio National's arguments. Rather, the Opposition (i) attempts a bait-and-switch regarding the standard for granting a waiver, attempting to impose an "actual confusion" standard that the Bureau has repeatedly rejected; (ii) sets up a strawman argument made nowhere in the Petition for Reconsideration (that Ohio National is now belatedly trying to prove actual confusion by asserting new facts) and then

---

[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-976 (rel. Aug. 28, 2015) (the "*August 28 Order*").

[5] Petition for Reconsideration at 3-6.

[6] *Id.* at 6-8.

[7] *Id.* at 8-11.

[8] *Id.* at 11-12.

knocks it down as procedurally too late; and (iii) makes general arguments attacking the waiver process that the Commission and the Bureau repeatedly have rejected.

First, JT's Frames argues that Ohio National's Petition for Waiver "did not assert that [Ohio National] was aware of the opt-out notice regulations but was 'confused' about whether those regulations applied to faxes sent with 'prior express invitation or permission.'"[9] But that misstates the standard for obtaining a waiver and also misstates Ohio National's assertions in support of its Petition for a waiver. JT's Frames simply rehashes the same meritless argument the Bureau repeatedly has rejected: that a petitioner must show actual confusion to obtain a waiver.[10] Rather, as the Bureau stated in its *December 9 Order*, the standard for granting a waiver is "where no record evidence demonstrates that [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 and where the petitioners referenced the confusion between the footnote and the rule."[11] That is the case here: Ohio National referenced the confusion between the footnote and the Rule,[12] asserted in its original Petition for Waiver that it "did not have any ***understanding*** that opt-out notices were required on solicited faxes" (the very phrasing repeatedly used by the Commission and the Bureau to characterize the standard under which the agency would find that a petitioner was entitled to a waiver),[13] and there was no record evidence suggesting that Ohio National understood that it did have to comply with the opt-out notice requirement for solicited faxes and nonetheless failed to do so.

---

[9] Opposition at 1.

[10] *See December 9 Order* ¶ 15 (rejecting the argument that petitioners were required to "argue[] actual confusion" to obtain a waiver); *August 28 Order* ¶ 19 ("[T]he Commission found that petitioners who referenced the confusing, contradictory language at issue are entitled to a presumption of confusion.").

[11] *December 9 Order* ¶ 14.

[12] Petition for Waiver at 2-4.

[13] Petition for Reconsideration at 6 & 7 (emphasis added).

Second, building on its false characterizations of both the standard for granting a waiver and Ohio National's argument in its original Petition for Waiver, JT's Frames doubles down by falsely characterizing the argument in Ohio National's Petition for Reconsideration as improperly raising new facts. JT's Frames argues that since Ohio National purportedly did not previously argue in its original Petition it was "aware" of the Regulation but "confused" by it, and is now purportedly arguing in its Petition for Reconsideration that "it did, in fact, have an 'awareness' of the opt-out regulations, but simply did not have an 'understanding' that those rules applied to faxes sent with prior express invitation or permission,"[14] Ohio National's Petition for Reconsideration is procedurally infirm under the Commission's Rules since that so-called "newfound awareness of the rules" is not based on changed circumstances or facts or arguments previously unknown to Ohio National.[15]

As for the assertions mischaracterizing Ohio National's original Petition for Waiver, JT's Frames' assertions are false for the reasons discussed above; that fact alone defeats JT's Frames' argument.

As for JT's Frames' assertions regarding Ohio National's Petition for Reconsideration, those assertions, too, are demonstrably false. The Opposition cites page seven of Ohio National's Petition for Reconsideration for the proposition that "Ohio National argues it did, in fact, have an 'awareness' of the opt-out regulations, but simply did not have an 'understanding' that those rules applied to faxes sent with prior express invitation or permission."[16] But that was not Ohio National's argument. Rather, Ohio National argued that the Bureau mistakenly interpreted Ohio National's Petition as supposedly admitting ignorance of the TCPA and the

[14] Opposition at 2 (citing Petition for Reconsideration at 7).

[15] *Id.* at 3. This argument is so meritless as to implicate Section 1.24 of the Rules. *See* 47 C.F.R. § 1.24.

[16] Opposition at 2 (citing Petition for Reconsideration at 7).

Commission's opt-out notice requirement for solicited fax advertisements (and wrongly denied Ohio National's original Petition for Waiver on that basis) when in fact Ohio National's Petition was not intended to be read, and should not have been read, as seeking a waiver based on ignorance of the law. But in any event, the Bureau had previously granted waivers to petitioners who did expressly assert that they were unaware of the opt-out notice requirement for solicited faxes (and therefore wrongly denied Ohio National's original Petition for Waiver on that basis, too).[17] Consequently, there is no basis for JT's Frames' argument that Ohio National's Petition for Reconsideration asserts a "newfound awareness of the rules" that it failed to raise previously. With each of these predicates proved false, JT's Frames' procedural argument falls flat.

JT's Frames ***further*** misrepresents the substance of Ohio National's Petition for Reconsideration when it argues that Ohio National's Petition for Reconsideration "does not address [the Rule 1.429(b)] factors or argue they are met."[18] To the contrary, Ohio National expressly addressed the Rule 1.429(b) factors[19] and argued they were met, explaining that the Bureau could consider on reconsideration the arguments Ohio National ***did*** make (as opposed to the arguments JT's Frames ***claims*** it made) because to the extent the Bureau chose to read Ohio National as relying on facts or arguments not previously presented to the Commission (which it is not), the Bureau had not previously read language similar to that used by Ohio National in its original Petition for Waiver in the manner it did in the *December 9 Order*, and therefore such facts or arguments related to events which occurred or circumstances which changed since and/or were unknown to Ohio National and could have not been learned through the exercise of ordinary diligence prior to the deadline to file reply comments on Ohio National's original

[17] Petition for Reconsideration at 3-11.

[18] Opposition at 3.

[19] The factors under Rule 1.429(b) governing petitions for reconsideration in rulemaking proceedings are the same as those under Rule 1.106(c) governing petitions for reconsideration in non-rulemaking proceedings.

Petition for Waiver.[20]

Third, and finally, JT's Frames argues that Ohio National's Petition for Reconsideration should be denied for the same reasons asserted in an Application for Review of the *August 28 Order* filed by JT's Frames' counsel,[21] including that "the Commission has no authority to 'waive' liability in a private TCPA" suit and that "the contemporaneous evidence shows the 'industry' immediately understood" the Regulations.[22] But these are the same tired arguments that JT's Frames' counsel repeatedly has made (including in response to Ohio National's original Petition for Waiver)[23] and that the Commission and the Bureau repeatedly have rejected.[24] Ohio National therefore adopts here and incorporates by reference the arguments it previously made in response to these same or similar arguments,[25] as well as the arguments made in the oppositions to the Application for Review.[26]

---

[20] Petition for Reconsideration at 11 n.46.

[21] Application for Review of Beck Simmons LLC, et al. (filed Sept. 28, 2015).

[22] Opposition at 3.

[23] TCPA Plaintiffs' Comments on Petitions for Retroactive Waiver filed by athenahealth, Inc. and Ohio National Mutual, Inc. at 5-9 (filed Sept. 11, 2015).

[24] *See, e.g.*, *December 9 Order* ¶ 12 ("At the outset, we dismiss arguments that by granting waivers while litigation is pending violates the separation of powers, as three commenters have suggested."); *id.* ¶ 15 (rejecting the argument that petitioners were required to "argue[] actual confusion" to obtain a waiver); *id.* ¶ 14 ("[T]he Commission granted waivers to petitioners where no record evidence demonstrates that they 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 and where the petitioners referenced the confusion between the footnote and the rule.").

[25] *See* Reply in Support of Petition for Retroactive Waiver of Ohio National at 2-4 (filed Sept. 18, 2015).

[26] *See* Response of Alma Lasers, Inc. (filed Oct. 13, 2015); Response of Sunwing Airlines Inc., Vacation Express USA Corp., and Sunwing Vacations Inc. (filed Oct. 13, 2015); Response of ASD Specialty Healthcare, Inc. d/b/a Besse Medical, Amerisourcebergen Specialty Group, Inc., and Amerisourcebergen Corporation (filed Oct. 13, 2015); Opposition of Esaote North America, Inc. and Solutions on Hold, LLC d/b/a Dentistry on Hold (filed Oct. 13, 2015); Opposition of McKesson Corporation (filed Oct. 13, 2015); Opposition of Philadelphia Consolidated Holding Corp. (filed Oct. 13, 2015).

Conclusion

Ohio National respectfully requests that the Bureau reconsider its determinations in the *December 9 Order* as applied to its Petition and grant this petition for reconsideration as well as the underlying Waiver Petition and the request for a retroactive waiver from liability under 47 C.F.R. § 64.1200(a)(4)(iv).

January 29, 2016

Respectfully submitted,

*/s/*Laura H. Phillips

Laura H. Phillips
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W.
Washington, DC 20005-1209
Tel: 202-842-8800
Fax: 202-842-8465

Justin O. Kay
Bradley J. Andreozzi
DRINKER BIDDLE & REATH LLP
191 N. Wacker Dr., Ste. 3700
Chicago, IL 60606-1698
Tel: 312-569-1000
Fax: 312-569-3000

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Laura H. Phillips, hereby certify that on this 29th day of January, 2016, a true copy of the foregoing Reply of Ohio National Mutual, Inc. to JT's Frames, Inc.'s Opposition was served upon the below parties via email:

Brian J. Wanca
Anderson + Wanca
3701 Algonquin Rd, Suite 500
Rolling Meadows, IL 60008
BWanca@andersonwanca.com
Tel: (847) 368-1500
Fax: (847) 3681501

Glenn L. Hara
Anderson + Wanca
3701 Algonquin Rd, Suite 500
Rolling Meadows, IL 60008
GHara@andersonwanca.com
Tel: (847) 368-1500
Fax: (847) 3681501

/s/ Laura H. Phillips

Laura H. Phillips
Justin O. Kay
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W.
Washington, DC 20005-1209
Laura.Phillips@dbr.com
Justin.Kay@dbr.com
Tel: 202-842-8800
Fax: 202-842-8465