

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

In the Matter of

Petition of Educational Testing Service
For Retroactive Waiver of 47 C.F.R.
§ 64.1200(a)(4)(iv)

CG Docket No. 02-278

CG Docket No. 05-338

REPLY COMMENTS OF EDUCATIONAL TESTING SERVICE
IN SUPPORT OF ITS PETITION FOR RETROACTIVE WAIVER

I. INTRODUCTION

Educational Testing Service (“ETS”) submits these reply comments in response to comments submitted by Bais Yaakov of Spring Valley (“Bais Yaakov”) on April 8, 2016 (“Comments”) and in further support of ETS’s Petition for Retroactive Waiver filed March 16, 2016 (“Petition”). The Commission has previously granted a waiver to another petitioner with respect to the very same facsimile allegedly at issue in Bais Yaakov’s class action filed against ETS, and ETS is merely asking for the same waiver (to the extent necessary). *See* Petition at 1, 9.

The bulk of Bais Yaakov’s arguments are not new. The Commission has already considered and rejected very similar, and in some cases nearly identical, arguments Bais Yaakov and its counsel have previously advanced in connection with other waiver petitions. *See generally* Bais Yaakov Comments on Petition of Houghton Mifflin Harcourt Publishers, Inc., CG Docket Nos. 07-278, 05-338 (Feb. 13, 2015) (“HMH Comments”); Bais Yaakov Corrected Comments on ACT, Inc.’s Petition, CG Docket Nos. 02-278, 05-338 (Dec. 15, 2014) (“ACT Comments”); Bais Yaakov Comments on Crown Mortgage Co.’s Petition (Apr. 11, 2014) (Crown Comments); Bellin & Assocs. Comments at 32-34, CG Docket Nos. 02-278, 05-338 (Feb. 14, 2014) (“Bellin Comments”). The Commission has also rejected Bais Yaakov’s argument that a petition filed after April 30, 2015 should be rejected as untimely. *See Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket Nos. 02-278, 05-338, Order ¶ 20 (Aug. 28, 2015) (“August 2015 Order”); *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket Nos. 02-278, 05-338, Order ¶ 30, n. 102 (Oct. 30, 2014) (“October 2014 Order”). The Commission should once again reject these arguments. Because ETS is similarly situated to previous waiver recipients, its Petition should be granted.

II. ARGUMENT

A. ETS's Petition Is Timely And, Like The Other Meritorious Petitions Submitted After The Commission's Tentative April 30, 2015 Deadline, Should Be Granted

The Commission has already refused to reject waiver petitions solely on the basis that they were submitted after its original, tentative deadline of April 30, 2015. October 2014 Order ¶ 30, n. 102. While the Commission has expressed its expectation that parties similarly situated to the original waiver recipients would “make every effort to file within six months of the release of this Order,” the Commission also indicated “that future waiver requests will be adjudicated on a case-by-case basis” and refused to “prejudge the outcome of future waiver requests.” *Id.*

The Commission made good on that promise in August, 2015 when it granted several petitions for retroactive waiver that were submitted after the April 30, 2015 deadline. The Commission again reiterated that it would “examine[] . . . each petition filed, independently.” August 2015 Order ¶ 20. It reasoned that “granting [delayed] waivers . . . does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients.” *Id.*

Last December, the Commission granted an additional five petitions for retroactive waivers that were submitted after April 30, 2015, including: (a) the Petition of Megadent, Inc. and Kim Martinez, who were served with a federal class action lawsuit on May 13, 2015 and filed for a retroactive waiver June 24, 2015 (nearly two months after the April 30, 2015 deadline), *See* Petition of Megadent, Inc., et al. for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 (June 24, 2015) (“Megadent Petition”); (b) the Petition of Costco Wholesale Corporation filed July 20, 2015 (nearly three months after the April 30, 2015 deadline), after Costco became the subject of two federal class action lawsuits filed May 15, 2015 and April 2, 2015, *see* Petition of Costco Wholesale Corp. for Retroactive Waiver, CG Docket Nos. 02-278, 05-338 (July 20, 2015)

(“Costco Petition”); and (c) the Petition of Scrip, Inc. filed September 17, 2015 (nearly six months after the April 30, 2015 deadline), after Scrip was named in a federal class action lawsuit filed June 30, 2015 and served on Scrip on July 9, 2015. *See* Petition for Retroactive Waiver By Scrip, Inc., CD Docket Nos. 02-278, 05-338 (Sep. 17, 2015) (“Scrip Petition”). *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket Nos. 02-278, 05-338, Order ¶ 1 (Dec. 9, 2015) (“December 2015 Order”).

Like the entities whose petitions were granted in August and December, ETS is similarly situated to the original waiver recipients and seeks a waiver with respect to faxes sent prior to the April 30, 2015 deadline. Furthermore, contrary to Bais Yaakov’s unsubstantiated assertions,¹ ETS acted diligently and filed its Petition within a reasonable time. ETS was not served with the Complaint in Bais Yaakov’s class action lawsuit until August 2015, well after the April 30, 2015 deadline tentatively set by the Commission. *See* Affidavit of Service, Ex. C to Comments. Like other petitioners, ETS needed time to hire outside counsel and conduct its initial investigation into the facts alleged in the Complaint and was not aware of the need to seek a retroactive waiver until it had done so. *Cf.* Costco Petition at 3.

While ETS’s Petition for Retroactive Waiver was not filed until March 16, 2016, its delay was not due to a lack of diligence. Rather, as ETS explained in its Petition, the federal class action lawsuit against ETS was *stayed* for several months after ETS was added to the lawsuit pending the outcome of the Supreme Court’s decision in *Campbell-Ewald Co. v. Gomez*, 136 S.

¹ Bais Yaakov’s argument that “ETS was no doubt aware of th[e] lawsuit” at the time it was originally filed in July 2013 because Bais Yaakov sued Houghton Mifflin, a distributor of ETS, is unsubstantiated. Comments at 4. In fact, Bais Yaakov has requested discovery on this very issue in connection with opposing ETS’s motion to dismiss the lawsuit. *See* Bais Yaakov’s Corrected Mem. of Law in Opp. to ETS’s Mot. to Dismiss at 14, Docket No. 121, *Bais Yaakov of Spring Valley v. Educational Testing Serv.*, Case No. 7:13-cv-4577 (S.D.N.Y. Mar. 1, 2016). Notably, Bais Yaakov never claims to have notified ETS of the lawsuit prior to serving ETS with a summons.

Ct. 663 (Jan. 20, 2016). *See* ETS Petition at 4.² The issues on appeal in *Campbell-Ewald* had the potential to dispose completely of the class action lawsuit, rendering a waiver unnecessary. *See id.* Rather than wasting the Commission’s time and resources adjudicating a petition that ETS may not need, ETS waited until the stay was lifted to seek a waiver. ETS filed its Petition for Retroactive Waiver on March 16, 2016, less than two months after the Supreme Court’s decision in *Campbell-Ewald* was delivered on January 20, 2016 and the stay was lifted. This delay of less than two months is similar to the time other waiver recipients have taken to file their petitions. *Cf., e.g.,* Scrip Petition (filed over two months after Scrip was served with a federal class action lawsuit); Costco Petition (filed over two months after the first of two federal class action lawsuits was filed against Costco); Megadent Petition (filed one month and nine days after Megadent was served with a federal class action lawsuit). Like other waiver recipients, ETS’s petition seeks “waiver for faxes sent prior to the April 30, 2015 deadline,” and “[a]s such, granting [ETS’s] waiver[] . . . does not contradict the purpose or intent of the initial waiver order as [ETS is] similarly situated to the initial waiver recipients.” August 2015 Order ¶ 20. Furthermore, ETS acted diligently in pursuing a waiver and filed its Petition within a reasonable time. ETS’s Petition should be granted.

B. Bais Yaakov’s Arguments About The Commission’s Lack Of Authority To Grant Waivers To Private Litigants Lack Merit And Have Already Been Rejected By the Commission

In its Petition, ETS asks the Commission to waive the requirements of Section 64.1200(a)(4)(iv) with respect to faxes sent with the recipients’ prior express invitation or

² The formal request to stay the class action was filed in the District Court on October 2, 2015, about one and one half months after ETS was served with the Complaint. Pre-Motion Letter from Jones Day to Judge Karas, Docket No. 96, *Bais Yaakov*, No. 7:13-cv-4577 (S.D.N.Y. Oct. 2, 2015).

permission. The Commission clearly has the authority to do that, and Bais Yaakov's contrary arguments, which the Commission has already largely rejected, are unpersuasive.

The Commission may waive its rules "for good cause shown." 47 C.F.R. § 1.3. "Good cause" exists and "[a] waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule." October 2014 Order ¶ 23. The Commission's discretion to grant retroactive waivers acts as an important "safety valve" to the regulatory system for scenarios where the public interest would not be served by strict application of a rule. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Furthermore, courts "afford 'substantial judicial deference' to the FCC's judgments on the public interest." *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 412-13 (D.C. Cir. 2011). They also "afford the FCC deference in interpreting its own regulations." *Id.* at 412.

The Commission has already determined that "good cause" exists to grant retroactive waivers from Section 64.1200(a)(4)(iv). October 2014 Order ¶¶ 22-28. Those findings were correct and apply equally to ETS, who is similarly situated to the previous waiver recipients.

Bais Yaakov's contrary arguments conflate the Commission's *regulations* with the private right of action created in a *statute*, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Bais Yaakov argues (1) that the Commission cannot "waive" or "impair" a "congressionally created private right of action," Comments at 6-8; (2) that the "repeal of a statute" cannot retroactively extinguish liabilities created under the statute, Comments at 8 (citing 1 U.S.C. § 109); and (3) that the Commission's waiver violates separation of powers principles by "effectively nullif[ying] a statute creating a private right of action," Comments at 9-10. Very similar arguments were made by Bais Yaakov in opposing previously granted waiver

petitions and were rejected by the Commission in ruling on those petitions. *See* HMH Comments at 3-7; ACT Comments at 6-8; Crown Comments at 2-4. For the same reasons that they were previously rejected, those argument should be rejected here.

First, Bais Yaakov’s arguments about the Commission’s inability to “waive” or “impair” a “congressionally created private right of action” miss the mark. *See* Comments at 6-8. ETS is not asking the Commission to abrogate the private right of action created by 47 U.S.C. § 227 or any other *statutory* provision. ETS is seeking a waiver of Section 64.1200(a)(4)(iv) of the Commission’s *regulations*. The Commission clearly has the discretion and authority to waive “violations of FCC rules,” as it has repeatedly done in granting prior waivers of Section 64.1200(a)(4)(iv). *See Hill v. FCC*, 496 F. App’x 396, 398 (5th Cir. 2012); *Nat’l Ass’n of Broad. v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009). The Commission does not “impair” the TCPA when it grants a waiver from a regulation that might serve as a predicate for a statutory cause of action anymore than the Commission impairs the TCPA by amending its regulations.

Second, the Commission’s grant of a retroactive waiver of its *regulation* is not a “repeal of a *statute*,” as Bais Yaakov argues, *see* Comments at 8 (citing 1 U.S.C. § 109). By its express terms, 1 U.S.C. § 109 applies only to “[t]he repeal of any statute.” By granting a waiver of its regulations, the Commission obviously does not repeal a statute.

Third, and for the same reasons, the Commission does not violate the separation of powers by exercising its longstanding *regulatory* authority to grant waivers from its *own rules*. Specifically, the Commission’s waiver of Section 64.1200(a)(4)(iv), which speaks to opt-out requirements for solicited facsimiles, is not inconsistent with the statutory text of the TCPA, which is silent on that issue. The Commission’s waivers also have nothing to do with curtailing

the private right of action created by the TCPA. *Cf.* Comments at 9-10.³ As the Commission has already recognized in responding to similar arguments, “the mere fact that the TCPA allows for private rights of action based on violations of [the Commission’s] rules implementing the statute in certain circumstances does not undercut [the Commission’s] authority, as the expert agency, to define the scope of when and how [its] rules apply.” October 2014 Order ¶ 21.

The Commission should reject these meritless arguments and grant ETS’s Petition, as it has already done in numerous instances with respect to similarly situated organizations.

C. ETS Is Not Requesting That The Commission Pass A Retroactive Rule

Bais Yaakov argues—with absolutely no supporting citations to any statute, regulation, or case law—that the Commission’s grant of a retroactive waiver is equivalent to a formal rulemaking process to enact a new, retroactive rule. *See* Comments at 10-12.⁴ To the extent that Bais Yaakov is arguing that a retroactive waiver is a formal rulemaking that requires the Commission to follow notice and comment procedures, it is not well taken. “Courts, agencies, and commentators generally make a distinction between ‘orders’ and ‘rules’ that have been issued by administrative agencies. . . . ‘[O]rders’ are usually adjudicative in nature and apply to a particular group, whereas ‘rules’ are more legislative in nature and have general applicability.”

N. Am. Aviation Properties, Inc. v. Nat’l Transp. Safety Bd., 94 F.3d 1029, 1030 (6th Cir. 1996).

ETS seeks an Order from the Commission granting a retroactive waiver to *ETS only* pursuant to

³ The two cases Bais Yaakov cites are inapposite because they both involved regulations that directly contradicted and essentially “rewr[ote] clear provisions of [a] statute.” *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (holding that the Department of Labor could not abrogate other remedies created by the Migrant and Seasonal Agricultural Worker Protection Act by enacting a regulation providing that, under certain circumstances, “state workers’ compensation benefits are the exclusive remedy for loss under the Act in the case of bodily injury or death”).

⁴ Bais Yaakov has advanced a similar, albeit less detailed, argument in its comments in opposition to previous waiver petitions, which were both granted over Bais Yaakov’s objections. *See* HMH Comments at 5-6 (citing *Bowen*, 488 U.S. at 208); ACT Comments at 7-8 (same).

the Commission’s existing rules, *see* 47 C.F.R. § 1.3, not a new regulation with general applicability. *See also* *WAIT Radio*, 418 F.2d at 1157 (discussing the important “safety valve” function that retroactive waivers from rules of general applicability fulfill without reference to “legislative” or “adjudicatory” rules, as discussed in Bais Yaakov’s Comments).

Bais Yaakov’s reasoning is also flawed because the waiver of an existing regulatory requirement is not equivalent to enacting a new regulation imposing new obligations that apply retroactively. In other words, a retroactive waiver does not raise the same concerns as “a decision branding as ‘unfair’ conduct stamped ‘fair’ at the time a party acted.” *See Retail, Wholesale v. NLRB*, 466 F.2d 380, 389 (D.C. Cir. 1972) (quoting *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.)). The cases Bais Yaakov cites—which both involved the enactment of new regulatory obligations that applied retroactively, not the repeal or waiver of existing requirements—are inapplicable. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 206 (1988) (agency adopted retroactive cost-reimbursement rules for healthcare providers under the Medicare Act); *Retail, Wholesale*, 466 F.2d 380 (NLRB enacted new rule, applicable retroactively, that entitled former strikers to either back pay or reinstatement).

And, unlike the scenarios in the cases Bais Yaakov cites, no legally protected rights are affected by the Commission’s waivers of Section 64.1200(a)(4)(iv). While Bais Yaakov references its expectation that it could rely on the regulation in its pursuit of its serial class actions lawsuits against various entities, including ETS, “an agency order that ‘alters the future effect, not the past legal consequences,’ of an action, . . . or that ‘upsets expectations based on prior law,’ is not retroactive.” *Mobile Relay Assoc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (citing *Bowen*, 488 U.S. at 219) (internal citations omitted). To the extent Bais Yaakov’s own allegations in its Complaint are to be believed, moreover, the Commission’s waiver will not

affect Bais Yaakov’s legal claims against ETS at all, since Bais Yaakov claims that the facsimile ETS allegedly sent or caused to be sent to Bais Yaakov was *unsolicited*, not solicited. *See* Compl. ¶ 12-13, Docket No. 89, *Bais Yaakov v. Educational Testing Service*, No. 7:13-cv-4577 (S.D.N.Y. filed Aug. 5, 2015).

D. ETS Has Shown Good Cause For A Retroactive Waiver

Bais Yaakov’s final argument, that ETS has not demonstrated “good cause” for a waiver, rehashes nearly identical arguments Bais Yaakov and its counsel have submitted to this Commission on numerous occasions. *See, e.g.*, HMH Comments at 7-10; ACT Comments at 8-12; Bellin Comments at 32-34. Like the vast majority of Bais Yaakov’s other arguments, the Commission has already squarely rejected Bais Yaakov’s meritless positions on these issues and should, once more, do the same here.

First, both ETS in its Petition and the Commission in its Orders have articulated a “‘relevant standard’ for determining when the Commission should or should not grant a waiver.” *Cf.* Comments at 13. As set forth at some length in ETS’s Petition, as well as the Commission’s prior orders, “[t]he Commission found ‘good cause’ for waiving the opt-out notice requirement because ‘(1) special circumstances warrant[ed] deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.’” ETS Petition at 4-5 (discussing October 2014 Order ¶¶ 22-29).

Second, ETS is not required to “adduce concrete support” of “special circumstances” warranting a waiver. *Cf.* Comments at 13. The Commission has already acknowledged that it was the confusing and potentially misleading state of the regulatory environment that existed prior to its October 2014 Order that constituted “special circumstances” justifying the waiver—not whether any individual petitioner can prove that it was “confused” about the need for an opt-out notice. *See* October 2014 Order ¶¶ 23-29; August 2015 Order ¶ 14.

The Commission has expressly rejected arguments, like the one Bais Yaakov makes again here, that petitioners must demonstrate actual reliance on the Commission’s prior notices or orders or “actual[] . . . confus[ion] about the existence and nature of the Opt-Out Regulation.” *Compare* Comments at 14-15 & n. 8 with August 2015 Order ¶ 19. Instead, “the Commission has established that petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence.” August 2015 Order ¶ 15. ETS referenced those issues in its Petition and is entitled to that presumption. Petition at 4-5, 7.

Third, ETS is not required to submit individualized proof of the “ruinous liability” Bais Yaakov’s class action threatens to impose on ETS—a non-profit organization—in order to establish that a waiver is in the public interest. *Cf.* Comments at 15. The Commission has already acknowledged that it has not required such proof in the past. *See, e.g.*, August 2015 Order ¶ 19 ([T]he Commission did not require that faxers currently face lawsuits or potential liability to qualify for the waiver.”). Moreover, as ACT, Inc. aptly argued in responding to similar arguments Bais Yaakov made in opposition to ACT’s petition, it is readily apparent that granting a waiver is in the public interest without such record evidence, because the public interest is not served by permitting opportunistic “gotcha” class litigation by parties like Bais Yaakov for faxes that were sent with the recipients’ permission. *See* Response of Petitioner ACT, Inc. to Bais Yaakov Comments at 6-10, CG Docket Nos. 02-278, 05-338 (Dec. 19, 2014).

III. CONCLUSION

ETS is similarly situated to the petitioners who previously received waivers of Section 64.1200(a)(4)(iv) in the October 2014 Order, August 2015 Order, and December 2015 Order. For the same reasons articulated in those Orders, ETS’s Petition should be granted.

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Respectfully submitted,

JONES DAY



J. Todd Kennard
Brandy H. Ranjan
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
jtkennard@jonesday.com
branjan@jonesday.com

Robert W. Gaffey
Andrew S. Kleinfeld
222 East 41st Street
New York, New York 10017
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
rwgaffey@jonesday.com
askleinfeld@jonesday.com

*Attorneys for Petitioner Educational Testing
Service*