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

In the Matter of	)	
	)	CG Docket No. 02-278
Petition for Waiver of	)	
Papa Murphy's Holdings, Inc. and	)	
Papa Murphy's International LLC	)	
	)	

REPLY COMMENTS

Papa Murphy's Holdings, Inc. and Papa Murphy's International LLC (collectively, "Papa Murphy's"), through their undersigned counsel, respectfully submit their reply comments in the above-captioned proceeding. The lone commenter in response to Papa Murphy's Petition, John Lennartson, the sole plaintiff in the putative class action litigation pending against Papa Murphy's, has not—and cannot—refute Papa Murphy's demonstration that good cause exists to grant it a waiver of Sections 64.1200(a)(2) and 64.1200(f)(8) for text messages it sent to customers who provided their written consent. Accordingly, Papa Murphy's respectfully requests that that Commission grant (1) a retroactive waiver of sections 64.1200(a)(2) and 64.1200(f)(8) of the Commission's rules, 47 C.F.R. §§ 64.1200(a)(2), 64.1200(f)(8), for any text messages Papa Murphy's sent between October 16, 2013, and June 17, 2015, to individuals who had provided written consent to receive text messages from Papa Murphy's prior to October 16, 2013; and (2) a brief prospective waiver of 89 days to allow Papa Murphy's to re-opt in those individuals who had provided written consent to receive text messages prior to October 16, 2013.

I. INTRODUCTION

Papa Murphy's is the franchisor of Papa Murphy's Take N' Bake Pizza shops and advertises on behalf of its stores through various media; it does not—and has not—engaged in purchasing lists of people who have not provided their written consent to receive text messages.[1]

[1] Petition of Papa Murphy's Holdings, Inc. and Papa Murphy's International, LLC, CG Docket No. 02-278 (filed February 22, 2016) ("Petition") at 2–3.

Like the other petitioners to whom the Commission has granted waivers, good cause exists to grant Papa Murphy's Petition, and it is in the public interest to do so.

As an initial matter, the Commission should reject Mr. Lennartson's attempts to litigate his putative class action lawsuit in this forum. The prior ruling by the court in the putative class action was on a separate legal question and—as is surely obvious to the Commission—was wholly unrelated to whether a federal agency should waive one of its rules. Further, Papa Murphy's has satisfied the waiver standard. The Commission has already acknowledged that special circumstances exist due to the ambiguous language in its prior orders. Further, Mr. Lennartson's lawsuit is itself harmful to Papa Murphy's and, in turn, harms the public interest by punishing businesses for taking actions that the Commission itself has recognized were based on a reasonable interpretation of its own guidance.

II. THE PUTATIVE CLASS ACTION SHOULD NOT BE LITIGATED IN THIS FORUM.

The Commission should reject Mr. Lennartson's attempts to litigate its court case before the Commission. First, the order of the federal court Mr. Lennartson prominently highlights in his opposition was on the specific legal question of whether the Commission's July 2015 Order should be applied retroactively.[2] Admittedly, the court found against Papa Murphy's on that question; however, that ruling has no bearing on how the Commission should rule on a different legal question under a different legal standard.[3] Mr. Lennartson's suggestion that Papa Murphy's is attempting to "nullify the Court's order" is accordingly misplaced—the Commission is a federal agency charged with determining when it is appropriate to waive its rules; how a federal court ruled on a separate legal question does not diminish that authority.[4]

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[2] Opposition to Papa Murphy's Holdings, Inc. and Papa Murphy's International, LLC Petition for Waiver, CG Docket No. 02-278 (filed April 21, 2016) ("Opposition"), Ex. B.

[3] Mr. Lennartson's suggestion that Papa Murphy's was in some way required to alert the federal court and/or Mr. Lennartson to its Petition is misplaced. Mr. Lennartson had the opportunity, and has exercised that opportunity, to respond to the Commission's public notice soliciting comments on Papa Murphy's Petition. Mr. Lennartson cites no authority stating Papa Murphy's was required to go beyond the Commission's public notice process.

[4] *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598, 8609 (2015) ("At the outset, we dismiss arguments that by granting

Second, the Commission should not entertain Mr. Lennartson's extraordinary request to conduct discovery in this proceeding. The Commission in its prior ruling has stated that special circumstances exist to grant waivers in this context due to the ambiguous language in its prior orders.[5] Further, it is unclear how discovery would help answer the question of whether the public interest would be served through granting a waiver and plaintiff does not suggest discovery should be taken on this question. Accordingly, discovery in this forum would be misplaced.

III. PAPA MURPHY'S HAS SATISFIED THE WAIVER STANDARD

As Papa Murphy's demonstrated, and the Commission concluded in other petitions, "special circumstances"—the ambiguous statements in the July 2012 order, which the Commission stated led to confusion in the interpretation of the rule—exist, and granting the waiver would be in the public interest.

A. Special Circumstances Exist to Grant Papa Murphy's the Requested Waiver.

In its Petition, Papa Murphy's highlighted the ambiguous statements in the July 2012 order, which stated that "once our written consent rules become effective . . . an entity will no longer be able to rely on non-written forms of express consent to make autodialed . . . telemarketing calls, and thus could be liable for making such calls absent prior written consent."[6] The Commission has acknowledged that this language "could have reasonably been interpreted to mean that written consent obtained prior to the consent rule's effective date would remain

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waivers while litigation is pending violates the separation of powers as several commenter have suggested. 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. Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.") (international footnotes omitted).

[5] *See In re Rules & Reg's Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8013–15 (July 10, 2015) ("July 2015 Order").

[6] *In re Rules & Reg's Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1857 (2012).

valid even if it does not satisfy the current rule"[7] and found—based on the ambiguous language from the 2012 order—that special circumstances existed to grant a retroactive waiver.

Despite Papa Murphy's reference to these statements, Mr. Lennartson claims that Papa Murphy's has not demonstrated special circumstances exist because it did not make a detailed factual showing that it was "confused." Mr. Lennartson misreads the July 2015 Order. In that order, the Commission stated: "We nevertheless acknowledge evidence of confusion on the part of Petitioners, and believe it is reasonable to recognize a limited period within which they could be expected to obtain the prior express written consent required by our recently effective rule. Specifically, the Commission stated in the 2012 TCPA Order that '[o]nce our written consent rules become effective ... an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior written consent.'"[8] Based on the plain language of the order, the "evidence of confusion" to which the Commission was referring was the language in the 2012 Order, not a detailed factual finding that the petitioners were "confused." Accordingly, requiring such a finding here would not be equitable and would run counter to the logic of the Commission's prior order.[9]

Further, as Papa Murphy's explained in its petition, it only sent text messages to persons who affirmatively opted into the receipt of such messages. It did not condition receipt of promotions on the consent to receive messages, and every text message Papa Murphy's sent informed customers they could stop receiving text messages by replying "stop."[10] Plainly, Papa

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[7] July 2015 Order at 8014.

[8] *Id.*

[9] Moreover, the Commission rejected this exact argument—*i.e.*, that petitioning entities must show actual confusion—when it granted waivers of the TCPA's fax provisions to entities that were similarly situated to those entities that had previously received a waiver of the same provisions due to ambiguous guidance from the Commission. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598, 8611 (2015) ("we reject arguments that the Commission made actual, specific claims of confusion a requirement to obtain the waiver.).

[10] Petition at 2–3.

Murphy's was in no way trying to send text messages to people who did not wish to receive them, and, as such, complied with the spirit and purpose of the rules.

B. It is in the Public Interest to Grant Papa Murphy's Petition.

Papa Murphy's has demonstrated that it is in the public interest to grant its Petition, and Mr. Lennartson's comments do not diminish Papa Murphy's argument. Mr. Lennartson gives no weight to the substantial costs that Papa Murphy's has incurred, in terms of both financial and personnel resources, and likely will continue to incur to defend itself in the litigation.[11] In the putative class action, substantial briefing has already occurred and Mr. Lennartson has propounded extensive discovery, not only on Papa Murphy's, but also on third parties with which Papa Murphy's does business. Papa Murphy's has had to expend considerable resources, simply because it did not seek additional consents in 2013 from people who 1) had already provided their written consent to receive text messages, and 2) could have opted out of receiving messages at any time (and were provided with information on how to do so). These resources have been taken away from Papa Murphy's day-to-day operations. The public interest is better served by granting Papa Murphy's petition, thus enabling Papa Murphy's to return to focusing on its line of business, not on an opportunistic lawsuit. The net effect of substantial financial punishment for businesses that reasonably interpret the Commission's rules and cause no injury to any customer of that business is to chill businesses from engaging in any form of promotion

[11] Mr. Lennartson also misstates the Commission's findings on this legal point. Citing the Commission's October 30, 2014 Order, which itself granted limited waivers under the TCPA, Mr. Lennartson states "[t]he 'risk of substantial liability in private rights of actions is, by itself, [not] an inherently adequate ground for waiver." Opposition at 6. Mr. Lennartson takes the quotation out of context. The quotation in full reads: "Confusion or misplaced confidence about the rule, however, warrants some relief from its potentially substantial consequences. Thus, to be clear, our finding is not that the risk of substantial liability in private rights of action is, by itself, an inherently adequate ground for waiver, as some commenters note. But we disagree that it cannot be a factor for our consideration, in conjunction with other considerations, like the potential for Commission enforcement, as well." *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998, 14011 (2014) (internal footnote omitted). Accordingly, the full quotation makes clear that the punitive nature of a specific rule can be considered in the present analysis.

that "might conceivably" be one day regarded as a violation of the rules. That is harmful to businesses, their customers, the people they would employ, the goods and services they would purchase and, as a result, to the public at large.

Further, granting Papa Murphy's a waiver does not undermine the policy objectives of either the TCPA or Section 64.1200(a)(2). As stated, Papa Murphy's only sent text messages to people who sought to receive them and provided their written consent. Accordingly, Papa Murphy's satisfied the rule's objective of ensuring individuals' privacy was protected by not receiving unsolicited text messages. Finally, Papa Murphy's suspended its text program in the summer of 2015 and began the opt-in process anew in strict conformity with the new rules regarding express written consent.

IV. CONCLUSION

The record in this proceeding supports Papa Murphy's Petition for a waiver of the express written consent requirement and Mr. Lennartson has not adequately refuted that good cause exists to grant the requested waiver. Accordingly, for all of the reasons stated above, Papa Murphy's respectfully requests that the Commission grant (1) a retroactive waiver of Section 64.1200(a)(2) and (f)(8) of the Commission's rules for any text messages Papa Murphy's sent between October 16, 2013, and June 17, 2015, to individuals who had provided written consent to receive text messages from Papa Murphy's prior to October 16, 2013, and (2) a short prospective waiver, of 89 days, to re-opt in those individuals who signed up for its text message program prior to October 16, 2013, without the threat of incurring liability.

Respectfully submitted this 6th day of May, 2016.

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