In the Matter of:  
Petition of Nomax Inc.  
for Waiver of Section 64.1200(a)(4)(iv)  
of the Commission’s Rules  

CG Docket No. 02-278

CG Docket No. 05-338

REPLY IN SUPPORT OF PETITION OF NOMAX INC. FOR WAIVER OF SECTION 64.1200(A)(4)(IV) OF THE COMMISSION’S RULES

Pursuant to the Order issued by the Commission on October 30, 2014¹ and Section 1.3 of the Commission’s rules,² Petitioner Nomax Inc. (“Nomax”) respectfully submits the following reply in support of its petition (“Petition”) for a waiver of 47 C.F.R. § 64.1200(a)(4)(iv) with respect to any faxes transmitted by or on behalf of Nomax pursuant to the recipients’ prior express invitation or permission, and in response to the comments in opposition filed by a group of plaintiffs in private Telephone Consumer Protection Act (“TCPA”) actions (“TCPA Plaintiffs”).³

In the Order, the Commission granted a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) for faxes sent with the recipients’ prior express invitation or permission (“solicited faxes”) to a number of petitioners. The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, a waiver was supported by good cause and was in

2 47 C.F.R. § 1.3.
3 TCPA Plaintiffs’ Comments on Thirty-One Petitions for Retroactive Waiver Filed on or Before April 30, 2015, CG Docket Nos. 05-338 and 02-278 (May 22, 2015) (“TCPA Plaintiff Comments”).
the public interest. The Commission invited “similarly situated parties” to seek the same waiver.

The TCPA Plaintiffs challenge Nomax’s and others’ petitions to obtain such a waiver. As discussed below, the TCPA Plaintiffs’ claims that the Commission cannot lawfully grant this waiver and that Nomax is not similarly situated to the petitioners granted relief in the Order are meritless.

I. **The Commission Can Lawfully Grant A Retroactive Waiver Here.**

To begin with, the Commission has already rejected the argument that it cannot lawfully grant the waiver at issue. As the Commission recognized, it is well-settled that the Commission may suspend, revoke, amend, or waive any of its rules at any time “for good cause shown.” The TCPA Plaintiffs’ assertion that exercising this authority to issue a waiver here would violate constitutional separation of powers has no support whatsoever. For example, the TCPA Plaintiffs rely on *Physicians Healthsource, Inc. v. Stryker Sales Corp.* for the proposition that a Commission waiver is not enforceable in private TCPA litigation. But that decision (which of course is not binding upon the Commission) appears to wrongly assume that the opt-out notice requirement for solicited faxes appears within the TCPA itself rather than Commission rules, provides only a cursory analysis of the separation

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4 See Order ¶¶ 26-28.
5 See id. ¶ 30.
6 47 C.F.R. § 1.3; accord Nat’l Ass’n of Broadcasters v. FCC, 569 F.3d 416, 426 (D.C. Cir. 2009) (“The Commission has authority under its rules to waive requirements not mandated by statute where strict compliance would not be in the public interest.”) (citing 47 C.F.R. § 1.3); Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990); Order ¶ 23 & n.82 (citing 47 C.F.R. § 1.3 and Northeast Cellular, 897 F.2d 1164).
of powers issue, and fails to even address the Commission’s well-established authority to waive its regulations.\(^8\) In short, it is wholly unpersuasive.

The TCPA Plaintiffs’ reliance on *Natural Resources Defense Counsel v. EPA* is likewise misplaced.\(^9\) In that case, the D.C. Circuit held that the EPA could not create an affirmative defense to a particular statutory cause of action.\(^10\) However, that case involved a different agency and a fundamentally different regulatory scheme than at issue here. With respect to the FCC and its regulatory scheme, the D.C. Circuit has confirmed that the Commission has the authority to waive requirements not mandated by statute where strict compliance would not be in the public interest.\(^11\) For all of these reasons, as the Commission concluded in the *Order*, the TCPA Plaintiffs’ authority arguments should be rejected.

**II. Nomax Is Similarly Situated To The Parties Granted Waivers In The Order.**

The TCPA Plaintiffs are wrong that Nomax is not similarly situated to the parties granted waivers in the *Order*. As Nomax explained in its petition, like the parties in the *Order*, Nomax faces a putative class action lawsuit in which plaintiffs seeking statutory damages contend that faxes sent on Nomax’s behalf violated the TCPA.\(^12\) The current suit against Nomax, which was recently amended, seeks relief on behalf of persons who received certain faxes, regardless of consent. Nomax therefore seeks the same protection as other parties to whom the Commission has granted waivers.\(^13\)

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\(^8\) *Physicians Healthsource*, 2014 WL 7109630, at *14.  
\(^9\) TCPA Plaintiff Comments at 6-7 (citing *Natural Resources Defense Counsel v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)).  
\(^10\) *Natural Resources Defense Counsel*, 749 F.3d at 1063-64.  
\(^11\) *Nat’l Ass’n of Broadcasters*, 569 F.3d at 426.  
\(^12\) See Petition at 3-4.  
\(^13\) *Id.*
The TCPA Plaintiffs incorrectly argue that “the standard for a waiver [under the Order] is that the petitioner was actually ‘confused’ about whether opt-out notice was required.” 14 But in granting waivers under the Order, the Commission did not require that petitioners prove that they were confused by the conflicting language in the Commission’s rules and orders before granting a waiver. To the contrary, the Commission recognized that inconsistencies within the Order caused objective “confusion” and “misplaced confidence” regarding the applicability of the opt-out notice requirement to solicited faxes, which “presumptively establishes good cause for retroactive waiver of the rule.” 15 The only specific finding in the Order regarding petitioners’ subjective understanding was the determination that “we find nothing in the record here demonstrating that the 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.” 16

The TCPA Plaintiffs argue in the alternative that “[i]f the standard for a waiver is that a petitioner is considered ‘presumptively’ confused,” petitioners cannot receive a waiver because the TCPA Plaintiffs would be denied “a due-process right to investigate whether petitioners had actual knowledge of the opt-out rules” unless the Commission holds a proceeding to that end. 17 The TCPA Plaintiffs provide no legal support whatsoever for this position, nor do they address the fact that the Commission granted waivers under the Order without providing for further investigation where, “nothing in the record here demonstrat[ed]

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14 TCPA Plaintiff Comments at 8-9.
15 Order ¶¶ 24, 26.
16 Id. ¶ 26.
17 TCPA Plaintiff Comments at 9.
that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement.”18 As such, this argument too has no merit.

Finally, the TCPA Plaintiffs claim that Nomax is ineligible for a waiver because its Petition does not adequately establish that it will be “subject to significant damage awards” or at “risk of substantial liability” relative to its financial resources.19 Although the Commission did note the possibility of “significant damages” and “substantial liability” in its determination that waivers serve the public interest,20 it in no way established an evidentiary requirement for petitioners. But in any case, as Nomax’s Petition explains, the class action complaint currently pending against Nomax alleges multiple violations of the TCPA and seeks treble damages for those violations.21 Those allegations plainly establish a risk of significant liability.

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18 Order ¶ 26.
19 TCPA Plaintiff Comments at 9-10.
21 See Petition at 3 & n.14.
CONCLUSION

For the reasons set forth above and in the Petition, Nomax respectfully requests that the Commission grant to it the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission already has granted to other, similarly situated parties.

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Respectfully submitted,

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