In the Matter of
Junk Fax Prevention Act of 2005
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

TCPA Plaintiffs’ Comments on Thirty-One Petitions for Retroactive Waiver
Filed on or Before April 30, 2015

Commenters are plaintiffs in private TCPA actions relating to 30 of the 61 petitions subject to the Commission’s Public Notice of May 8, 2015.1 Petitioners seek “retroactive

---

waivers” of 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring opt-out notice on fax advertisements sent with “prior express invitation or permission.”


---

2 Id.


4 Id. ¶¶ 22–31.

5 Id. ¶ 30.

6 Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission’s Rule on Opt-out Notices on Fax Advertisements, C.G. Docket No. 02-278, 05-338 (May 8, 2015).
**Procedural History**

On October 30, 2014, the Commission issued the Opt-Out Order, granting “retroactive waivers” intended to relieve the covered TCPA defendants of liability in private TCPA actions for violations of § 64.1200(a)(4)(iv) from its effective date, August 1, 2006, to October 30, 2014, as well as prospective waivers for any future violations through April 30, 2015. The Commission invited “similarly situated” parties to petition for similar waivers by April 30, 2015, stating all future petitions would be “adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.”

Plaintiff’s counsel filed comments on two post-order waiver petitions November 18, 2014, five petitions December 12, 2014, six petitions January 13, 2015, one petition February 13, 2015, one petition March 13, 2015, and two petitions April 10, 2015. In

---

7 Opt-Out Order ¶ 29.
8 Opt-Out Order ¶ 30 & n.102.
each set of comments, Plaintiffs asked the Commission to clarify whether the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required\(^\text{15}\) or whether the Commission created a *presumption* that petitioners are confused in the absence of evidence they were “simp[l[y] ignorant” or knowingly violated the law.\(^\text{16}\)

Plaintiffs’ counsel noted they expected dozens of TCPA fax defendants to petition for waivers before April 30, 2015, and advised the Commission should expect waiver requests from defendants in non-fax TCPA litigation, as well. For example, on December 5, 2014, Wells Fargo cited the Opt-Out Order as authority for a retroactive waiver absolving TCPA defendants of liability for cellular-phone calls where the “called party” is not the “intended recipient.”\(^\text{17}\) Plaintiffs reiterate their request that the Commission clarify the standards it applied in the Opt-Out Order, both for future requests for waivers from the opt-out notice rules and requests for waivers from the Commission’s rules generally.

---


\(^\text{15}\) Opt-Out Order ¶ 26 (stating waiver was justified because footnote 154 of the 2006 Junk Fax Order “led to confusion or misplaced confidence on the part of petitioners”); *id.* ¶ 32 (stating Commission granted waivers “to parties that have been confused by the footnote”).

\(^\text{16}\) *Id.* (stating combination of footnote 154 and lack of notice “presumptively establishes good cause for retroactive waiver,” finding no evidence “that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement,” and “emphasiz[ing]” that “simple ignorance” of the law “is not grounds for a waiver”).

Argument

I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action.

The TCPA creates a private right of action for any person to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,” and directs the Commission to “prescribe regulations” to be enforced in those lawsuits. The “appropriate court” then determines whether “a violation” has taken place. If the court finds “a violation,” the TCPA automatically awards a minimum $500 in damages for “each such violation” and allows the court “in its discretion” to increase the damages up to $1,500 per violation if it finds they were “willful[] or knowing[].”

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action. It does not authorize the Commission to intervene in a private right of action. It does not require a private plaintiff to notify the Commission it has filed a private lawsuit. Nor does it limit a private plaintiff’s right to sue to cases where the Commission declines to prosecute. The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages

---

19 Id. § 227(b)(2).
20 Id. § 227(b)(3)(A)–(B).
21 Id. § 227(b)(3).
22 Id.
23 Id.
24 Id.; C.f., Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).
should be increased, or how much the damages should be increased. These duties belong to
the “appropriate court” presiding over the lawsuit.26

The Communications Act does, however, grant the Commission authority to enforce
the TCPA through administrative forfeiture actions.27 Thus, the TCPA and the
Communications Act create a dual-enforcement scheme in which the Commission
promulgates regulations that both the Commission and private litigants may enforce but
where the Commission plays no role in the private litigation and private citizens play no role
in agency enforcement.28 This scheme is similar to several other statutes, including the Clean
Air Act, which empowers the EPA to issue regulations imposing emissions standards29 that
are enforceable both in private “citizen suits”30 and in administrative actions.31

The D.C. Circuit Court of Appeals recently held the EPA could not issue a regulation
creating an affirmative defense for “unavoidable” violations in private litigation under the
Clean Air Act in Nat. Res. Def. Council v. EPA,32 holding it is “the Judiciary” that “determines
‘the scope’—including the available remedies” of “statutes establishing private rights of action”33
and that, consistent with that principle, the Clean Air Act “vests authority over private suits

27 Id. § 503(b).
28 Ira Holtzman, C.P.A. v. Turza, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA “authorizes private
litigation” and agency enforcement, so consumers “need not depend on the FCC”).
29 42 U.S.C. § 7412(d).
31 42 U.S.C. § 7413(d).
32 749 F.3d 1055, 1062 (D.C. Cir. 2014).
33 Id. (quoting City of Arlington v. FCC, --- U.S. ---, 133 S. Ct. 1863, 1871 n.3 (2013); Adams Fruit Co. v.
Barrett, 494 U.S. 638, 650 (1990)).
in the courts, not EPA." TCPA Plaintiffs discussed NRDC extensively in a letter to the Commission after it was issued April 18, 2014, and in subsequent comments on waiver petitions. The Opt-Out Order does not cite NRDC.

On December 12, 2014, the United States District Court for the Western District of Michigan ruled a Commission “waiver” from § 64.1200(a)(4)(iv) is not enforceable in private TCPA litigation. The court held “[i]t would be a fundamental violation of the separation of powers for the administrative agency to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court,” that “nothing in the waiver . . . invalidates the regulation itself,” and that “[t]he regulation remains in effect just as it was originally promulgated.” The court concluded, “the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.”

The argument that the Commission is merely waiving “its own rules” fails because “[i]nsofar as the statute’s language is concerned, to violate a regulation that lawfully implements [the statute’s] requirements is to violate the statute.” The Commission already

34 Id.
35 Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).
38 Id.
39 Id.
ruled in the Opt-Out Order that the regulation lawfully implements the TCPA, so a violation of the regulation is a violation of the statute.

The argument that a waiver is permissible because “regulations can be applied retroactively” fails because “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” The TCPA does not expressly authorize the Commission to issue retroactive rules. It authorizes it to “implement” the statute. To “implement” is inherently prospective, meaning “to begin to do or use (something, such as a plan): to make (something) active or effective.”

II. The Thirty Post-Order Petitioners are not “similarly situated” to the petitioners covered by the Opt-Out Order.

A. If the standard is actual confusion, the petitions must be denied because Petitioners either do not claim actual confusion or do not claim their confusion was caused by the public notice or footnote 154.

If the standard for a waiver is that the petitioner was actually “confused” about whether opt-out notice was required on faxes sent with permission, then each of the petitions must be denied. Most Petitioners do not claim actual confusion. The Petitioners that do claim confusion do not claim their confusion resulted from reading footnote 154 or

force of law” and the Commission “may therefore treat a violation of the prescription as a per se violation of the requirement of the Communications Act that a common carrier maintain ‘just and reasonable’ rates”).

44 § 227(b)(2).
the 2005 notice of rulemaking, the only sources of “confusion” identified in the Opt-Out Order. Based on the record before the Commission, it is just as likely these Petitioners obtained bad legal advice or, more likely, were simply ignorant of the law, which the Opt-Out Order held was insufficient for a waiver.

B. If the standard is “presumptive” confusion, Plaintiffs have a due-process right to inquire into whether Petitioners had actual knowledge of the rules if that factor is dispositive of their private rights of action.

If the standard for a waiver is that a petitioner is considered “presumptively” confused in the absence of evidence it “understood that [it] did, in fact, have to comply with the opt-out notice requirement,” then Plaintiffs have no evidence of actual knowledge at this time with which to rebut the presumption. Only Petitioners have that information, and their petitions are silent on the issue. Plaintiffs have a due-process right to investigate whether Petitioners had actual knowledge of the opt-out rules if that factor is dispositive of their private rights of action under the TCPA, and the Commission should hold such “proceedings as it may deem necessary” for that purpose.

C. Petitioners have not established their potential liability is “significant” in comparison to their financial resources.

The Opt-Out Order ruled the petitioners were “subject to significant damage awards under the TCPA’s private right of action” and that “the risk of substantial liability,” although

47 Id.
48 Id.
49 47 C.F.R. § 1.1.
not dispositive, was “a factor” in the Commission’s decision.\(^5\) Petitioners claim they are subject to “significant” damages, but do not state how many faxes they sent or estimate their potential liability. Nor do they give any indication of their financial resources or establish their potential risk is “significant” in comparison. On this record, neither Plaintiffs nor the Commission is in a position to determine whether the Petitioners face “significant” risk in their private TCPA lawsuits. To the extent this issue was a factor in the Commission’s Opt-Out Order, it should deny Petitioners’ waiver requests.

**Conclusion**

The Commission should deny the petitions because the Commission has no authority to “waive” a regulation in a private right of action under the TCPA. The Petitioners addressed in these comments are not “similarly situated” to the petitioners covered by the Opt-Out Order, since (1) they either do not claim actual confusion or do not claim they were confused by footnote 154 or the public notice, (2) they were most likely simply ignorant of the law, and (3) they have not shown they face “significant” potential liability.

Dated: May 22, 2015

Respectfully submitted,

By: s/Brian J. Wanca
Brian J. Wanca
Glenn L. Hara
Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501

---