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

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission	)	

APPLICATION FOR REVIEW

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December 14, 2018

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APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules, the TCPA Plaintiffs[1] seek review by the full Commission of the Order issued by the Consumer & Governmental Affairs Bureau on November 14, 2018, denying as "moot" 10 petitions and two petitions for reconsideration seeking "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"—on the basis that the D.C. Circuit's decision in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), *cert.* denied, 138 S. Ct. 1043 (2018), "vacated the 2006 Solicited Fax Rule" and was a "non-discretionary mandate" to the Commission to "eliminate" that regulation.[2]

[1] The "TCPA Plaintiffs" filing this Application are Gorss Motels, Inc., Compressor Engineering Corporation, Swetlic Chiropractic & Rehabilitation Center, Inc., Shaun Fauley, and JT's Frames, Inc., each of whom is the plaintiff in a pending private TCPA action against one or more of the waiver petitioners and who filed comments in opposition to those waiver petitions.

[2] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2018 WL 6017682 (CGAB Nov. 14, 2018) ("November 14, 2018 Bureau Order") ¶¶ 9–10.

Executive Summary

The November 14, 2018 Bureau Order is based on two assumptions: (1) that the D.C. Circuit's decision in *Bais Yaakov* contains a "non-discretionary mandate" to the Commission to "eliminate" Rule 64.1200(a)(4)(iv); and (2) that the D.C. Circuit "vacated the 2006 Solicited Fax Rule." Both assumptions are incorrect, and the Bureau Order should be vacated.

Contrary to the assertion in the Bureau Order, the D.C. Circuit's split decision did not "mandate" that the Commission do anything in particular, and the Commission is not required to "acquiesce" to the "expressio unius" rationale upon which the majority's opinion is based, and is free to adopt the reasoning of Judge Pillard's dissent, concluding that the Commission had statutory authority to issue Rule 64.1200(a)(4)(iv) in the 2006 Order.

Also contrary to the Bureau Order, the *Bais Yaakov* majority did not vacate any portion of the 2006 Order. It vacated "[t]he FCC's Order in this case"—*i.e.*, the 2014 Order—and "remand[ed] for further proceedings." The D.C. Circuit could not have vacated the 2006 Order, given the 60-day limit to petition for review of a "final order" like the 2006 Order under 28 U.S.C. § 2344.

Because the November 14, 2018 Bureau Order is based on the erroneous notion that the Commission has no choice in this matter, it should be vacated.

Questions Presented

Pursuant to Section 1.115(b), this Application identifies two questions for review:

(1) Whether the Bureau erred in finding that the D.C. Circuit's decision is *Bais Yaakov* is a "non-discretionary mandate" to eliminate Rule 64.1200(a)(4)(iv), where the opinion does not mandate that the Commission do anything, and where the doctrine of agency "nonacquiescence" allows the Commission to disagree with the D.C. Circuit majority's opinion and adopt the reasoning of Judge Pillard's dissent

(2) Whether the Bureau erred in finding that the D.C. Circuit's decision in *Bais Yaakov* "vacated the 2006 Solicited Fax Rule," where that decision reviewed the 2014 Order, not the 2006 Order.

Procedural Background

On October 30, 2014, the Commission issued the 2014 Order, denying 24 petitions challenging the validity of 47 C.F.R. § 64.1200(a)(4)(iv),[3] but granting retroactive "waivers" purporting to relieve the covered petitioners from liability for violations of that regulation in private lawsuits filed under the TCPA's private right of action, 47 U.S.C. § 227(b)(3).[4] The Commission allowed "similarly situated" parties to petition for waivers, but stressed that "in light of our confirmation here that a fax ad sent with the recipient's prior express permission must include an opt-out notice, we expect that parties will make every effort to file within six months of the release of this Order."[5]

In the ten days following the 2014 Order, TCPA defendants/petitioners filed three petitions for judicial review of the Commission's denial of declaratory ruling or rulemaking: two petitions in the D.C. Circuit and one petition in the Eighth Circuit. Several plaintiffs in TCPA actions—not the "TCPA Plaintiffs" filing this Application—filed petitions for review in the D.C. Circuit from the portion of the 2014 Order granting "waivers" of the regulation. On November 13, 2014, the petition filed in the Eighth Circuit was transferred to the D.C. Circuit by the MDL Panel, choosing randomly among the two circuits in which appeals had been filed, pursuant to the venue provisions in 28 U.S.C. § 2112(a).[6] All petitions were consolidated in *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir.).

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[3] *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014), ¶¶ 19–20, 32 & n.70 ("2014 Order").

[4] *Id.* ¶¶ 22–31.

[5] *Id.* ¶ 2.

[6] Ex. A, Consolidation Order, Case MCP No. 124 (Nov. 13, 2014).

As the *Bais Yaakov* litigation progressed, by April 30, 2015, over 100 waiver petitions had been filed with the Commission.[7] On August 28, 2015, the Bureau issued an order granting 117 waiver petitions.[8] Numerous parties filed applications for review of the August 28, 2015 Bureau Order, which remain pending before the Commission.[9]

On December 9, 2015, the Bureau granted an additional five waiver petitions, and denied seven petitions.[10] Applications for review were filed with respect to the December 9, 2015 Bureau Order, which remain pending before the Commission.[11]

On November 2, 2016, the Bureau granted an additional 22 waiver requests, denied three petitions, and granted in part and denied in part one petition.[12] Applications for review were filed with respect to the November 2, 2016 Bureau Order, which remain pending before the

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[7] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 5120879, at *1 (CGAB Aug. 28, 2015) ("August 28, 2015 Bureau Order").

[8] August 28, 2015 Bureau Order ¶ 24.

[9] *E.g.*, Application for Review filed by Beck Simmons, LLC; Physicians Healthsource, Inc.; Radha Geismann, M.D., P.C.; Sandusky Wellness, LLC; Alan L. Laub, DDS, Inc.; North Branch Pizza & Burger Co.; True Health Chiropractic, Inc.; Alan Presswood, D.C., P.C.; Carradine Chiropractic Center, Inc.; Christopher Lowe Hicklin, DC, PLC; J. Barrett Company, Central Alarm Signal, Inc.; St. Louis Heart Center, Inc.; Eric B. Fromer Chiropractic, Inc.; Arnold Chapman; Shaun Fauley; Keith Bunch Associates, LCC; Michael C. Zimmer, D.C., P.C.; Wilder Chiropractic, Inc.; Law Office of Stuart R. Berkowitz; Proex Janitorial, Inc.; Italia Foods, Inc., CG Docket Nos. 02-278, 05-338 (Sept. 28, 2015).

[10] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 8543949, at *1 (CGAB Dec. 9, 2015) ("December 9, 2015 Bureau Order").

[11] *E.g.*, Application for Review filed by Wilder Chiropractic, Inc., CG Docket Nos. 02-278, 05-338 (Jan. 8, 2016).

[12] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 11943, 11947 ¶ 8, n.70 (Nov. 2, 2016) ("November 2, 2016 Bureau Order").

Commission.[13] Two petitioners who were denied waivers by the Bureau filed petitions for Bureau reconsideration.[14]

Meanwhile, in the briefing in *Bais Yaakov*, the Commission maintained its position that "the various petitions for declaratory ruling that challenged the Commission's authority to promulgate the opt-out notice rule—filed years after Federal Register publication of the rule—were time-barred," but stated the appeal need not be dismissed "because petitioner Staples filed a petition for rulemaking raising the issue, which the Commission denied on the merits."[15]

On November 8, 2016, the D.C. Circuit heard oral argument.[16] The court asked counsel for the TCPA defendants "do we have exclusive jurisdiction to review FCC regulations under this statute?"[17] Counsel answered, "I don't think so, Your Honor."[18] The court asked whether its decision would be "binding on all of the District Courts where these cases are pending," noting

[13] *E.g.*, Application for Review filed by Lawrence S. Brodsky; JT's Frames, Inc.; Career Counseling, Inc. d/b/a Snelling Staffing Services; Big Thyme Enterprises, Inc.; Whiteamire Clinic, P.A., Inc.; Cin-Q Automobiles, Inc.; Medical & Chiropractic Clinic, Inc.; Shaun Fauley; St. Louis Heart Center, Inc.; JWD Automotive, Inc.; Russell M. Holstein, PhD, LLC.; Carradine Chiropractic Center, Inc., CG Docket Nos. 02-278, 05-338 (Dec. 2, 2016).

[14] *Petition of Fetch, Inc., d/b/a Petplan Petition for Reconsideration*, CG Docket Nos. 02-278, 05-338 (filed Nov. 29, 2016); *Petition of Ohio National Mutual, Inc., for Reconsideration*, CG Docket Nos. 02-278, 05-338 (filed Jan. 8, 2016).

[15] Ex. B, Final Brief for Respondents FCC & United States at 21, n.3 (Mar. 9, 2016).

[16] Ex. C, *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234, Tr. of Proceedings (Nov. 8, 2016 D.C. Cir.).

[17] *Id.* at 76.

[18] *Id.* This response was correct because venue for an appeal from a "final order" of the Commission, such as the 2014 Order, lies in any "judicial circuit in which the petitioner resides or has its principal office" *or* the D.C. Circuit. 28 U.S.C. § 2343. The petition must be filed within 60 days of the order, 28 U.S.C. § 2344, a deadline that "is jurisdictional and cannot be judicially altered or expanded." *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 237 (5th Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 1863, 1867 (2013).

that "[a] district judge in Connecticut could say I don't agree, right?," and stating, "I don't know that we can . . . instruct all District Courts all over the country" outside the D.C. Circuit.[19]

On March 31, 2017, the D.C. Circuit issued a split decision on the petitions for review of the 2014 Order.[20] The majority held § 64.1200(a)(4)(iv) exceeded the Commission's statutory authority because the statute requires opt-out notice only on "unsolicited" fax advertisements, not "solicited" fax advertisements,[21] vacated "[t]he FCC's Order in this case"—*i.e.*, the 2014 Order—and "remand[ed] for further proceedings."[22]

Judge Pillard dissented, stating that the majority's rationale was essentially an "*expressio unius*" argument, "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved."[23] Judge Pillard rejected the majority's conclusion that "by banning unsolicited ads, Congress implicitly forbade regulation of ostensibly solicited ads," pointing out that "the very purpose and effect of" § 64.1200(a)(4)(iv) is "to refine the definition of which ads count as solicited (and so permitted), and which are banned as unsolicited."[24]

Judge Pillard concluded the Commission had the power to issue § 64.1200(a)(4)(iv) pursuant to its broad authority "to implement the requirements of [the TCPA]" in 47 U.S.C.

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[19] *Id.* at 74–75.

[20] *See Bais Yaakov*, 852 F.3d 1078.

[21] The terms "solicited fax" or "Solicited Fax Rule" are not mentioned in the statute, 47 U.S.C. § 227, the regulations, 47 C.F.R. § 64.1200, or the 2006 Order issuing the regulations, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, 3811-12 ¶¶ 45 (rel. Apr. 6, 2006) ("2006 Order").

[22] *Bais Yaakov*, 852 F.3d at 1083.

[23] *Id.* at 1085 (Pillard, J., dissenting).

[24] *Id.*

§ 227(b)(2).[25] In promulgating § 64.1200(a)(4)(iv), Judge Pillard reasoned, the Commission sought "to 'implement'—to make meaningful and effective—its unchallenged view that 'prior express invitation or permission' encompasses past permission that has not been delimited *despite a reasonable opportunity to do so*."[26] And, the dissent reasoned, "[t]he fact that Congress required an opt-out notice as a condition of treating unsolicited ads faxed to an established business partner as if they were solicited does not detract from the FCC's preexisting authority to require opt-out notices on other faxed advertisements."[27]

Judge Pillard stated the majority misunderstood the basis of the Commission's authority, framing the question as "whether the Act's requirement that businesses include an opt-out notice on *unsolicited* fax advertisements authorizes the FCC to also require businesses to include an opt-out notice on *solicited* fax advertisements."[28] Judge Pillard emphasized that the Commission did *not* base its authority on the section of the statute requiring opt-out notice on faxes sent pursuant to an "established business relationship," 47 U.S.C. § 227(b)(2)(D), but on the TCPA's general conferral of authority in § 227(b)(2) "to implement the requirements" of the prohibition against sending fax advertisements without "prior express invitation or permission," by specifying rules governing whether (and how) such permission may be revoked.[29]

Judge Pillard observed that the majority's focus on whether the opt-out notice requirement for the EBR exception creates authority for § 64.1200(a)(4)(iv) "makes pivotal what is peripheral," where the so-called "Solicited Fax Rule" is one part of a set of interlocking rules

[25] *Id.* at 1084.

[26] *Id.* (emphasis added).

[27] *Id.*

[28] *Id.* at 1081.

[29] *Id.* at 1084 (Pillard, J., dissenting).

answering questions left open by the statute, including (1) whether prior express permission, once given, may be revoked (yes, *see* 47 C.F.R. § 64.1200(a)(4)(vi)); (2) how it may be revoked (only by using the means designated by the sender in the opt-out notice, *see* § 64.1200(a)(4)(v)); and (3) whether the fax sender must inform fax recipients of the procedures they must follow to effectively revoke their permission (yes, *see* § 64.1200(a)(4)(iv)).[30]

Judge Pillard also reasoned that the Commission had authority to fill a "gap" in the TCPA, observing that "[b]eyond clarifying that the permission need not be in writing, Congress had said nothing about how 'prior express invitation or permission' might be elicited, or when it might lapse or be withdrawn."[31] Judge Pillard concluded that, in order to make meaningful a consumer's right to revoke permission to send fax advertisements—a right the entire panel agreed the Commission had the power to create—the Commission reasonably required that "advertisers need to make clear how that may be done . . . ."[32] Otherwise, Judge Pillard reasoned, "the failure to provide opt-out notices could confront fax recipients 'with a practical inability to make senders aware that their consent is revoked.'"[33]

Finally, the dissent opined that the Commission had authority to require opt-out notice on fax ads sent with permission because it was reasonably concerned that Congress's 2005 amendment to the TCPA—which permitted prior express invitation or permission to be obtained "in writing *or otherwise*"—would result in some in fax senders erroneously or fraudulently claiming they had the recipient's permission to send facsimile advertisements.[34] Judge Pillard

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[30] *Id.*

[31] *Id.* at 1083.

[32] *Id.* at 1084.

[33] *Id.*

[34] *Id.*

reasoned that "[t]he opt-out notice was one response to that concern; it would give recipients an easy way to make clear their consent *vel non*."[35]

The TCPA plaintiff/petitioners filed a petition for writ of certiorari with the Supreme Court, which was denied February 20, 2018. *See* 138 S. Ct. 1043.

Nine months after the denial of certiorari, without issuing public notice or calling for comments, the Consumer & Governmental Affairs Bureau issued the November 14, 2018 Bureau Order, denying as "moot" the 10 pending waiver petitions and the two petitions for reconsideration on the basis that the D.C. Circuit's decision in *Bais Yaakov* "vacated the 2006 Solicited Fax Rule" and was a "non-discretionary mandate" to the Commission to "eliminate" that regulation.[36] This application for review was timely filed within 30 days of the Bureau Order pursuant to Commission Rule 1.115.

Argument

I. The Commission should vacate the November 14, 2018 Bureau Order because it erroneously assumes that the D.C. Circuit's decision in *Bais Yaakov* was a "non-discretionary mandate" to eliminate § 64.1200(a)(4)(iv) of the Commission's rules, when the D.C. Circuit did not "mandate" that the Commission do anything, and the Commission is not required to "acquiesce" in the majority's reasoning.

The Bureau's Order hinges on the notion that the D.C. Circuit's decision in *Bais Yaakov* is a "non-discretionary mandate" to the Commission to "eliminate" Rule 64.1200(a)(4)(iv). The Bureau Order cites no authority for this proposition, and it is erroneous for two reasons. First, the D.C. Circuit's opinion did not direct the Commission to do anything in particular. It simply vacated the 2014 Order and "remand[ed] for further proceedings."[37]

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[35] *Id.*

[36] November 14, 2018 Bureau Order ¶¶ 9–10.

[37] *Bais Yaakov*, 852 F.3d at 1079.

Second, the Bureau's reasoning contradicts the doctrine of agency "nonacquiescence."[38] As one often-cited law review article explains:

> [T]he acceptance of intercircuit nonacquiescence should properly be seen as a corollary to the rejection of intercircuit stare decisis. To make the ruling of the first court of appeals that considers an issue directly binding on all other courts of appeals through the operation of stare decisis is undesirable because it eliminates the possibility of intercircuit dialogue. For the same reason, it is undesirable to make the ruling of the first court of appeals rejecting an agency's policy indirectly binding on other courts by insisting on compliance with that ruling in the agency's internal proceedings, a requirement which would have the practical effect of precluding the agency from litigating the issue again in other courts of appeals.[39]

For example, shortly after it decided *Bais Yaakov*, the D.C. Circuit decided *Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. Envtl. Prot. Agency* ("*NEDACAP*"), which involved the EPA's rules implementing the Clean Air Act.[40] The petitioners warned of "a potentially national thicket of inconsistent decisions" if the first circuit to decide the validity of a rule did not control nationwide.[41] The D.C. Circuit disagreed, holding the suggestion that "intercircuit conflicts are inherently bad" is "shortsighted."[42] The D.C. Circuit held "intercircuit conflicts" were "inevitable" under the statute, which provides for review of "regionally applicable" actions "in the United States Court of Appeals for the appropriate circuit," while actions "of nationwide scope or effect" are reviewed in the D.C. Circuit.[43] The court noted that if the petitioners were

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[38] S. Estreicher & R. L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 741 (1989).

[39] *Id.*; *see also Ruppert v. Bowen*, 871 F.2d 1172, 1177 (2d Cir. 1989) (rejecting argument that Social Security Administration should be required to "apply circuit court decisions nationally").

[40] 891 F.3d 1041, 1049 (D.C. Cir. 2018).

[41] *Id.* at 1051.

[42] *Id.* at 1049 (citing Estreicher & Revesz, 98 Yale L.J. at 735–36).

[43] *Id.* at 1051.

correct, "then the first court of appeals to address an issue would determine EPA's policy nationwide," which "would make no sense" under the statute.[44]

Like the statutory structure governing review of the EPA's Clean Air Act rules, the structure of the Hobbs Act provides venue for an appeal of a "final order" of the Commission in multiple circuits, specifically "the judicial circuit in which the petitioner resides or has its principal office" *or* in the D.C. Circuit.[45] Each "final order" of the Commission is, of course, subject to the venue provisions requiring consolidation in one circuit of petitions from a single "final order" filed in more than one circuit, which is what happened in *Bais Yaakov* in reviewing the 2014 Order.[46] But the consolidation of all petitions filed from a single "final order" in a single circuit does not somehow mean that a ruling on "an issue"[47] in that consolidated appeal—such as the issue of whether the Commission has statutory authority to require opt-out notice on fax advertisements sent with "prior express invitation or permission"—is something the Commission is required to acquiesce to as nationwide policy, even though two circuit courts of appeal have erroneously held as much.[48] Rather, the Hobbs Act's structure "'creates the possibility of geographically inconsistent judicial decisions'" because "different circuits may

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[44] *Id.*

[45] 28 U.S.C. § 2343.

[46] 28 U.S.C. § 2112(a).

[47] *NEDACAP*, 891 F.3d at 1051; Estreicher & Revesz, 98 Yale L.J. at 741.

[48] *See Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017) (holding *Bais Yaakov* is binding nationwide precedent because one of the petitions from the 2014 Order was filed in the Eighth Circuit and then transferred to the D.C. Circuit pursuant to § 2112(a)); *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 933 (9th Cir. 2018) (same); *but see Brodsky v. HumanaDental Ins. Co.*, --- F.3d ---, No. 17-3067, 2018 WL 6295126, at *4 (7th Cir. Dec. 3, 2018) (holding "we need not decide" this issue, while simultaneously refusing to apply Rule 64.1200(a)(4)(iv)).

reach different results on the same question."[49] And the Commission maintains its "right to refuse to acquiesce in one (or more) court of appeals' interpretation" of its statutes.[50]

In sum, *Bais Yaakov* does not "mandate" that the Commission eliminate Rule 64.1200(a)(4)(iv), and the Commission has the discretion to "decline[] to acquiesce" in the majority's reasoning and "fight like a tiger" if it so chooses.[51] And even if the Commission considered whether to "revoke" Rule 64.1200(a)(4)(iv) on the merits, that would require notice and comment.[52] Because the November 14, 2018 Bureau Order hinges on the erroneous notion that the Commission has no choice in the matter, it should be vacated.

II. The Commission should vacate the November 14, 2018 Bureau Order because it erroneously assumes that the D.C. Circuit's decision "vacated the 2006 Solicited Fax Rule," when the D.C. Circuit vacated the 2014 Order.

The November 14, 2018 Bureau Order reasons that the D.C. Circuit "vacated the 2006 Solicited Fax Rule," which is incorrect. The time period to seek judicial review of the 2006 Order expired years before Anda, Inc. filed its petition in 2010, and the D.C. Circuit stated clearly that it was reviewing the 2014 Order. After concluding that Rule 64.1200(a)(4)(iv) exceeded the Commission's authority, the D.C. Circuit held that "[t]he FCC's Order in this case," *i.e.*, the 2014 Order, "interpreted and applied that 2006 Rule," and so "[w]e vacate that Order," *i.e.*, the 2014 Order, "and remand for further proceedings." Because the November 14,

[49] *Id.* at 1045–46.

[50] *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1992).

[51] *Atchison, Topeka & Santa Fe Rwy. Co. v. Peña*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring), *aff'd* 516 U.S. 152 (1996).

[52] *See, e.g.*, *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 445–46 (D.C. Cir.1982), *aff'd* 463 U.S. 1216 (1983); *Wis. Electric Power Co. v. Costle*, 715 F.2d 323, 328 n.3 (7th Cir. 1983); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012 (9th Cir. 1987).

2018 Bureau Order is based on an erroneous understanding of the nature and procedural posture of the *Bais Yaakov* appeal, the Commission should vacate it.

Conclusion

For the foregoing reasons, the Commission should vacate the November 14, 2018 Bureau Order.

Dated: December 14, 2018

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CERTIFICATE OF SERVICE

I, Brian J. Wanca, do hereby certify that on December 14, 2018, I caused the foregoing Application for Review to be served on the parties listed on the attached service list via U.S. first-class mail, postage prepaid.

s/Brian J. Wanca

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