

**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)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

**Comments by Craftwood II, Inc., and Craftwood Lumber Company on Petition for
Retroactive Waiver of the Commission’s Rule on Opt-Out Notices on Fax
Advertisements Filed by Union Stationers Inc., United Stationers Supply Co. and
Lagasse LLC**

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Executive Summary

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv) to defendants in private TCPA litigation and allowed “similarly situated” persons to seek waivers (“Opt-Out Order”). The Commission ruled that “all future waiver requests will be adjudicated on a case-by-case basis” and did not “prejudge the outcome of future waiver requests.” The Commission specifically refused to grant blanket future waivers and stated that only “some” parties will qualify for waivers. Further, the Commission directed that any other party wishing to petition for a waiver do so no later than April 30, 2015.

On May 18, 2015, United Stationers Inc., United Stationers Supply Co. and Lagasse LLC (collectively, “United”) filed a petition for a waiver of 47 C.F.R. § 64.1200(a)(4)(iv). The Commission should deny the petition for each of the following reasons:

First, United’s petition was filed after the Commission’s April 30, 2015, deadline and is therefore untimely. United offers no legitimate excuse why it failed to file its petition by April 30. The petition should be summarily denied for this reason alone.

Second, the Commission has no authority to “waive” violations of any regulations “prescribed under” the TCPA in a private right of action.¹ Doing so would violate the separation of powers by dictating a “rule of decision” to the courts, which have exclusive

¹ *Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (holding federal agency lacked authority to create affirmative defense to its own regulations in statutory private right of action).

power to determine whether a violation of the regulations has taken place, and by abrogating Congress’s determination that “each such violation” automatically gives rise to \$500 in minimum statutory damages.²

Third, United is not “similarly situated” to the petitioners to whom waivers were granted in the Opt-Out Order, in numerous respects:

(1) United asserts in passing that it sent faxes “after obtaining prior express consent... from...customers.” But United does not even attempt to explain when, how and through what means it purportedly obtained any prior express permission to send any faxes to anyone, including the Craftwood entities, non-customers that sued after receiving repeated unsolicited faxes from United;

(2) United does not contend it was “confused” or had “misplaced confidence” regarding its obligation to comply with § 64.1200(a)(4)(iv). To the contrary, United admits that it was “not aware that opt-out notices were required.” Under the Opt-Out Order, ignorance of the law such as this is an insufficient basis to obtain a waiver; and

(3) United makes no attempt in its petition to show that it is subject to “potentially substantial damages” due to its failure to comply with § 64.1200(a)(4)(iv). United’s liability stems from sending unsolicited faxes.

Fourth, United asserts in its petition that it sent faxes to customers with whom it had established business relationships. United was thereby obligated to provide opt-out

² *United States v. Klein*, 80 U.S. 128, 147–48 (1872); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014).

notices on its faxes regardless of any purported prior express permission given because, as ordered by the Commission in the Opt-Out Order, opt-out notices are mandatory for faxes sent on the basis of established relationships and no waiver can be issued in connection with such faxes. It would be against public interest to waive liability under § 64.1200(a)(4)(iv) with regard to United's failure to provide valid opt-out notices because United was required to provide valid opt-out notices in its faxes as a result of its established business relationships with fax recipients.

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Craftwood II, Inc., and Craftwood Lumber Company (collectively, “Craftwood”) are the named plaintiffs and proposed class representatives in a private TCPA action against Union Stationers Inc., United Stationers Supply Co. and Lagasse LLC (collectively, “United”) in the United States District Court for the Central District of California.¹ Craftwood commenced litigation after being bombarded with 13 United junk faxes—almost twice a week—between March 3, 2015, and April 30, 2015.² Craftwood does not have a business relationship with any United entity, and did not give any United

¹ Case No. 8:15-cv-0704 (filed May 1, 2015).

² Declaration of Diana Brunjes (“Diana Brunjes Decl.”) ¶ 5, Exhs. 1, 2, 4, 5, 8, 9, 10, 11, 12, and 13; Declaration of David Brunjes (“David Brunjes Decl.”) ¶ 7, Exhs. 3, 6, and 7.) These declarations and exhibits are concurrently submitted herewith. These declarations and exhibits were filed in Craftwood’s lawsuit against United.

entity prior express permission to be sent any faxes.³ Craftwood seeks to stanch the tide of junk faxes, which it strongly believe hurts businesses and consumers alike. Craftwood resorted to litigation after making repeated complaints about junk faxing to the Commission (on at least than **355** occasions), without the agency taking any action.⁴

By its own account, United is a large, sophisticated operation with national reach.⁵ United, however, omits to inform the Commission that United Stationers is also publicly traded on the NASDAQ exchange as “USTR.” United filed its petition for retroactive waiver on May 18, 2015.⁶ If successful, United no doubt intends to present the waiver to the California Central District Court, asking it to bar any claims based on its violations of § 64.1200(a)(4)(iv).

On May 29, 2015, the Consumer and Governmental Affairs Bureau sought comments on United’s petition by June 12, 2015.⁷

³ Diana Brunjes Decl. ¶ 5; David Brunjes Decl. ¶7.

⁴ Diana Brunjes Decl. ¶¶ 3, 6; David Brunjes Decl. ¶¶ 5, 8.

⁵ See Petition 5: “United Stationers is a leading national wholesale distributor of workplace essentials and stocks a broad assortment of over 160,000 products, including technology products, traditional office products, office furniture, janitorial and break room supplies, industrial supplies, and automotive aftermarket tools and equipment.”

⁶ See *Petition for Waiver*, CG Docket Nos. 02-278 and 05-338 (filed May 18, 2015).

⁷ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions For Waiver of the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (May 29, 2015).

The Commission's October 30 Opt-Out Order

On October 30, 2014, the Commission issued the “Opt-Out Order”⁸ granting “retroactive waivers” to certain parties for past violations of § 64.1200(a)(4)(iv), which requires opt-out notices on fax ads sent to recipients who provided prior expression permission. The Opt-Out Order does not grant any waiver for or otherwise affect fax ads sent *without* prior express permission. The Commission “emphasize[d] that this waiver does not affect the prohibition against sending unsolicited fax ads, which has remained in effect since its original effective date.”⁹

The Opt-Out Order also allows “similarly situated” parties to petition for similar waivers.¹⁰ The Commission ruled that “all future waiver requests will be adjudicated on a case-by-case basis” and did not “prejudge the outcome of future waiver requests.”¹¹ The Commission specifically refused to grant blanket future waivers¹² and stated that only “some” parties would be granted waivers.¹³ Moreover, the Commission stated that “[h]aving confirmed the Commission’s requirement to provide opt-out notices on fax ads

⁸ *In re Rules & Regulations Implementing the Telephone 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).

⁹ Opt-Out Order ¶ 31.

¹⁰ *E.g.*, Opt-Out Order ¶ 5.

¹¹ *Id.* ¶ 30, n. 102.

¹² *Id.* ¶ 13.

¹³ *Id.* ¶ 1.

sent with the recipient’s prior express permission...we expect all fax senders to be aware of and in compliance with this requirements [and] [w]e expect parties making similar waiver requests to make every effort to file within six months of the release of this Order.”¹⁴

The Commission specifically ruled that its adoption of § 64.1200(a)(4)(iv) was a valid exercise of Congressional authority granted under 47 U.S.C. § 227(b).¹⁵ Further, the Commission found that requiring opt-out notices on fax ads sent to recipients who give prior express permission serves highly useful and important purposes: “absent [such] a requirement...recipients could be confronted with a practical inability to make senders aware that their consent is revoked. At best, this could require such consumers to take, potentially, considerable time and effort to determine how to properly opt out...At worse, it would effectively lock in their consent. Moreover...giving consumers a cost-free, simple way to withdraw previous consent is good policy.”¹⁶

The Commission also ruled that the “similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship” was completely

¹⁴ Opt-Out Order ¶ 27.

¹⁵ Opt-Out Order ¶ 14. Unless as expressly noted, all statutory references herein to ‘§ 227’ are to 47 U.S.C. § 227 and all Commission references herein to “§ 64.1200” are to 47 C.F.R. § 64.1200.

¹⁶ *Id.* ¶ 20.

unaffected by the Opt-Out Order and continues to be mandatory under the TCPA and Commission rules and regulations.¹⁷

After making these rulings, the Commission found that “good cause exists to grant a retroactive waiver” to the petitioners covered by the Opt-Out Order. The Commission observed that “good cause” is shown 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.”¹⁸ With respect to the petitioners covered by the Opt-Out Order, the Commission found that “special circumstances” existed because of the “confusion” caused by footnote 154 in the Commission’s 2006 Junk Fax Order, 21 FCC Rcd. at 3810.¹⁹ The Commission specifically noted that “*all* petitioners make reference to the confusing footnote language in the record.”²⁰ The Commission also found that the original petitioners could have had “misplaced confidence,” because of the manner of rulemaking, that § 64.1200(a)(4)(iv) did not potentially apply to recipients who had given prior express permission.²¹ But the Commission emphasized that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”²²

¹⁷ Opt-Out Order ¶ 2, n.2, ¶ 28, n.99.

¹⁸ Opt-Out Order ¶¶ 22-23.

¹⁹ *Id.* ¶ 24.

²⁰ *Id.* (emphasis supplied).

²¹ Opt-Out Order ¶¶ 26-27.

²² *Id.* ¶ 26.

The Commission also found that “granting a retroactive waiver would serve the public interest, citing the showings made by the original petitioners that they were subject to “potentially substantial damages” for having violated § 64.1200(a)(4)(iv).²³

Craftwood’s Lawsuit

On May 1, 2015, after receiving 13 United junk faxes in less than two months, Craftwood commenced litigation against United for sending faxes in direct violation of the TCPA and the Commission’s regulations. In its petition, United seriously mischaracterizes Craftwood’s lawsuit by suggesting that it is limited to United’s violations of the Commission’s opt-out notice requirements.²⁴ To the contrary, Craftwood asserts claims for three categories of United fax ads: (1) faxes sent without prior express permission or established business relationship, or “pure” unsolicited ads; (2) faxes sent to parties with whom United has an established business relationship, but that fail to contain an opt-out notice (these are effectively unsolicited ads despite the existence of an established business relationship, because the established business relationship defense requires faxes to contain an opt-out notice²⁵); and (3) faxes sent with

²³ Opt-Out Order ¶ 27, citing, among others, the Best Buy petition at 5 stating that “Best Buy is now facing a putative class action lawsuit, alleging millions of damages, a claim for which it has no insurance coverage and no ability to pay.” *See id.* ¶ 28, n.98.

²⁴ Petition 6 stating “[i]n other words, Plaintiffs seek to hold Petitioners liable for violations of the opt-out notice requirements, regardless of whether the advertising faxes at issue were sent with the prior express consent of the recipient.”

²⁵ § 227 (b)(1)(C)(iii); Opt-Out Order ¶ 2, n.2, ¶ 28, n.99.

prior express permission, but that fail to contain an opt-out notice (these are also effectively unsolicited ads despite the existence of prior express permission, as a provided in § 64.1200(a)(4)(iv)).²⁶ Craftwood specifically avers that it did not give prior express permission to United to send any faxes.²⁷

In its Opt-Out Order, the Commission did not change these fax categories, each of which carries liability under the TCPA. The Commission reiterated in its Order that every fax advertisement must include an opt-out notice. This has particular force and effect here because Craftwood received 13 junk faxes after issuance of the Opt-Out Order, defying the Commission's expectation that after the Opt-Out Order "all fax senders ...[will] be aware of and in compliance with" the opt-out notice requirements.

United's Petition for Waiver

United filed its waiver petition on May 18, 2015. United's only excuse for not filing by the April 30, 2015, deadline is that the company was sued by Craftwood after April 30 and filed its petition within 10 days of being served.²⁸

United freely acknowledges that waivers were granted to the original petitioners in the Opt-Out Order because footnote 154 and the notice of rulemaking caused "confusion" and "misplaced confidence" regarding the applicability of the opt-out notice requirement

²⁶ See Craftwood's Complaint ¶¶ 3, 15-16, 30-31, attached to the Declaration of Scott Z. Zimmermann ("Zimmermann Decl.") concurrently submitted with these Comments.

²⁷ *Id.* ¶ 15.

²⁸ Petition 4 n.19 and 7.

for fax ads sent with prior express permission.²⁹ Yet United never asserts in its petition that it was at all confused or had misplaced confidence about footnote 154 or the notice of rulemaking. United merely states at one point that “[p]etitioners did not understand the opt-out requirements to apply to solicited faxes.”³⁰ But United offers no explanation for the statement, nor does it claim that its “understanding” resulted from the sources that led to the giving of waivers to the covered petitioners in the Opt-Out Order, *i.e.*, footnote 154 and the notice of rulemaking.

In any event, later in the petition United admits that it was “not aware that opt-out notices were required on such faxes.”³¹ This admission, acknowledging an ignorance of the opt-out requirements, is fatal to United’s petition as required by the Opt-Out Order.

United makes no attempt to establish that it faces “potentially substantial damages” because of its failure to comply with § 64.1200(a)(4)(iv) on fax ads supposedly sent with prior express permission. It merely recites the cumulative amount of damages sought in Craftwood’s lawsuit.³²

United also does not state whether it intends to comply with § 64.1200(a)(4)(iv) or any other opt-out notice requirement in the future, or whether it has implemented any procedures to ensure compliance going forward.

²⁹ Petition 3.

³⁰ Petition 7.

³¹ Petition 9

³² Petition 7.

Argument

I. United’s petition was filed after April 30 and is untimely

The Commission need only note that the petition was filed after its April 30 deadline in order to deny it. United's excuse for blowing the deadline—that it was served with Craftwood’s lawsuit after April 30—is irrelevant. United is a large, sophisticated umbrella of companies that knowingly sent fax advertisements regulated by the TCPA and the Commission (including faxes sent after the issuance of the Opt-Out Order) and knew or should have known about the need to file by April 30. Moreover, the Commission expected “all fax senders” to be aware of the Opt-Out Order and to file any waiver requests by April 30. Indeed, United does not deny that it was aware of the Opt-Out Order and the need to file by April 30.

Granting a retroactive waiver to United under these circumstances would be grossly unfair to Craftwood. Craftwood commenced substantial litigation against United *after* determining that the company had not sought a waiver of its violation of the regulation by the Commission's deadline. Bestowing a waiver on United, despite its inexcusable delay, would unfairly prejudice Craftwood and the class it seeks to represent.

United is therefore undeserving of any leniency (if any can be extended under the Opt-Out Order) for failing to file by April 30 and its petition should be summarily denied.

II. The Commission does not have the authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers

A. The Commission has no authority to “waive” its regulations 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,”³³ and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.³⁴ The “appropriate court” then determines whether “a violation” has taken place.³⁵ If the court finds “a violation,” the TCPA automatically awards a minimum \$500 in statutory 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 the violations were “willful[] or knowing[].”³⁶

In these private enforcement proceedings, the Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages should be increased, or how much the damages

³³ § 227(b)(3).

³⁴ § 227(b)(2).

³⁵ § 227(b)(3)(A)–(B).

³⁶ § 227(b)(3).

should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.³⁷

The TCPA does not authorize the Commission to “waive” its regulations for purposes of court adjudications in private litigation brought to enforce the Act.³⁸ It does not authorize the Commission to intervene in a private right of action.³⁹ It does not require a private plaintiff to notify the Commission that it has filed a private lawsuit.⁴⁰ Nor does it limit a private plaintiff’s right to sue for violations in situations where the Commission declines to prosecute.⁴¹

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.⁴² Private citizens have no role in that process.⁴³ 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

³⁷ § 227(b)(3).

³⁸ *Id.* 47 C.F.R. § 1.3 does not provide this authority at all, and certainly not on a retroactive basis.

³⁹ *Id.*

⁴⁰ *Id.*; *Cf.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

⁴¹ *Cf.*, *e.g.*, 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain “right-to-sue” letter from Equal Employment Opportunity Commission).

⁴² *Id.* § 503(b).

⁴³ *Id.*

in the private litigation and private citizens play no role in agency enforcement actions.⁴⁴ This is not unusual. The TCPA is similar to several statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards⁴⁵ that are enforceable both in private “citizen suits”⁴⁶ and in administrative actions.⁴⁷

B. A waiver would violate the separation of powers, both with respect to the judiciary and Congress

The seminal separation-of-powers case is *United States v. Klein*,⁴⁸ involving a statute passed by Congress intended to undermine a series of presidential pardons issued during and after the Civil War to former members of the Confederacy. The statute directed the courts to treat the pardons as conclusive evidence of guilt in proceedings brought by such persons seeking compensation for the confiscation of private property by the government during the war, thereby justifying the seizure of their property.⁴⁹

The Supreme Court held the statute violated the separation of powers by forcing a “rule of decision” on the judiciary that impermissibly directed findings and results in particular cases.⁵⁰ The Court held one branch of government cannot “prescribe a rule for

⁴⁴ *Ira Holtzman, C.P.A. & Assocs., Ltd v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA “authorizes private litigation” so consumers “need not depend on the FCC”).

⁴⁵ 42 U.S.C. § 7412(d).

⁴⁶ 42 U.S.C. § 7604(a).

⁴⁷ 42 U.S.C. § 7413(d).

⁴⁸ 80 U.S. 128, 147–48, 13 Wall. 128, 20 L. Ed. 519 (1872).

⁴⁹ *Id.*

⁵⁰ *Id.* at 146.

the decision of a cause in a particular way” to the judicial branch and struck down the law.⁵¹

But dictating a “rule of decision” is precisely what United seeks to accomplish with its requested “waiver.” United’s goal is to prevent the Central District Court from finding “a violation” of § 64.1200(a)(4)(iv). If the waiver is granted, the statute will remain the same. The regulation will remain the same. But the federal district court will be told it cannot find “a violation” of the regulation. That the Commission cannot do.

United might argue that the court could still find a violation of the regulation after a waiver; it simply cannot award damages. That does not save its argument because then the “waiver” would abrogate Congress’s directive that when the “appropriate court” finds “a violation,” the private plaintiff is automatically entitled to a minimum of \$500 in statutory damages.⁵² The Commission has no power to “waive” a statute.⁵³ From any angle, the Commission cannot encroach on the judiciary or Congress in the manner contemplated by United, and it should deny United’s requested waiver.

Indeed, the United States District Court for the Western District of Michigan, in a private TCPA action wherein the defendant sought a waiver, just last December held “[i]t

⁵¹ *Id.*

⁵² § 227(b)(3).

⁵³ *In re Maricopa Community College Dist. Request for Experimental Auth. to Relax Standards for Public Radio Underwriting Announcements on KJZZ(FM) and KBAQ(FM), Phoenix, Arizona*, FID Nos. 40095 & 40096, Mem. Op. & Order (rel. Nov. 24, 2014) (“The Commission’s power to waive its own Rules cannot confer upon it any authority to ignore a statute. While some portions of the Act contain specific language authorizing the Commission to waive provisions thereof, the Act grants no such authority with respect to Section 399B.23.”).

would be a fundamental violation of the separation of powers for [the Commission] to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”⁵⁴ The court held that “nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the regulation itself” and that “[t]he regulation remains in effect just as it was originally promulgated” for purposes of determining whether the defendant violated the “regulation prescribed under” the TCPA.⁵⁵ The court concluded that “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.”⁵⁶

Accordingly, the Commission should decline to issue a “waiver” to shield United from private TCPA liability (as opposed to Commission enforcement). If the Commission decides to grant United a “waiver,” it should expressly state that its effect is limited to Commission enforcement proceedings.

The decision in *Stryker* is fully supported by the D.C. Circuit Court of Appeals’ decision in *Natural Resources Defense Council v. EPA* (“*NRDC*”).⁵⁷ There the D.C. Circuit considered whether the EPA had authority to issue a regulation creating an affirmative defense to a private right of action for violations of emissions standards it

⁵⁴ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 749 F.3d 1055, 1062 (D.C. Cir. 2014).

issued pursuant to the Clean Air Act, in situations where such violations are caused by “unavoidable” malfunctions.⁵⁸ The court held the agency did not have such authority and struck the regulation down for three main reasons.

First, the court noted the statute grants “any person” the right to “commence a civil action” against any person for a “violation of” the EPA standards.⁵⁹ The statute states a federal district court presiding over such a lawsuit has jurisdiction “to enforce such an emission standard” and “to apply any appropriate civil penalties.”⁶⁰ To determine whether civil penalties are appropriate, the statute directs the courts to “take into consideration (in addition to such other factors as justice may require)” a number of factors, including “the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply,” etc.⁶¹

Thus, the D.C. Circuit held, although the statute directs the EPA to issue regulations and “creates a private right of action” for their violation, “the Judiciary” “determines ‘the scope’—*including the available remedies*” of “statutes establishing private rights of action.”⁶² The Clean Air Act was consistent with that principle, the

⁵⁸ *NRDC*, 749 F.3d at 1062.

⁵⁹ *Id.* at 1062–63.

⁶⁰ *Id.* at 1063.

⁶¹ *Id.*

⁶² *Id.*, emphasis in original (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

court held, because it “clearly vests authority over private suits in the *courts*, not EPA.”⁶³ The court held that, by creating an affirmative defense to the statutory private right of action—as opposed to issuing the regulations to be enforced in those actions as directed by the statute—the EPA impermissibly attempted to dictate to the courts the circumstances under which penalties are “appropriate.”⁶⁴ Therefore, the court struck down the regulation.⁶⁵

Second, the D.C. Circuit noted that the EPA has dual enforcement authority over the Clean Air Act, which authorizes both private actions and agency actions to enforce the regulations.⁶⁶ It also noted the EPA has the power to “compromise, modify, or remit, with or without conditions, any administrative penalty” for a violation in those proceedings.⁶⁷ Under this dual-enforcement structure, the court held, “EPA’s ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court.”⁶⁸ The regulation creating an affirmative defense for “unavoidable” violations ran afoul of that principle.⁶⁹

⁶³ *Id.* (emphasis supplied).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Third, the court noted that the Clean Air Act authorizes the EPA to intervene in private litigation.⁷⁰ Thus, the court held that “[t]o the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor” or “as an amicus curiae.”⁷¹ An intervenor or amicus curiae has no power to create an affirmative defense in the actions in which it intervenes or submits its views, the court held.⁷²

The reasoning of *NRDC* directly applies here. First, like the Clean Air Act, the TCPA creates a private right of action for “any person” to sue for violations of the regulations prescribed under the statute and directs the Commission to issue those regulations, but it vests the “appropriate court” with the power to determine whether “a violation” has occurred.⁷³ If the court finds a violation, the TCPA imposes automatic minimum statutory damages of \$500, but allows the court “in its discretion” to increase the damages.⁷⁴ The TCPA creates *no role* for the Commission in determining whether a violation has occurred, whether it was willful, or whether damages should be increased (and if so, in what amount). Instead, the TCPA “clearly vests authority over private suits in the *courts*,” not the Commission.⁷⁵ Issuing a “waiver” to prevent the Central District

⁷⁰ *Id.* The statute also requires the private plaintiff to give notice to the EPA so the agency can decide whether to intervene. 42 U.S.C. § 7604(c)(3).

⁷¹ *Id.*

⁷² *Id.*

⁷³ § 227(b)(3).

⁷⁴ *Id.*

⁷⁵ *NRDC*, 749 F.3d at 1063 (emphasis supplied).

of California from determining that “a violation” occurred is no different than the EPA issuing an affirmative defense to prevent courts from determining that civil penalties are “appropriate” because a defendant’s violations were “unavoidable.”

Second, just as the Clean Air Act grants the EPA authority to enforce the regulations through administrative penalties, the Communications Act grants the Commission authority to determine whether penalties should be assessed for TCPA violations in forfeiture actions brought pursuant to 47 U.S.C. § 503(b). Like the EPA’s attempt to dictate “whether penalties should be assessed” in private litigation, granting a “waiver” for the purpose of extinguishing United’s liability in private litigation would run afoul of the bifurcated dual-enforcement structure Congress has created. The Commission is free to exercise its discretion not to enforce its regulations against United, but it cannot make that choice for Simon or the putative class.

Third, the Commission has even *less* authority to grant a waiver than the EPA did to create an affirmative defense because the Clean Air Act at least allows the EPA to intervene in private actions. The TCPA allows the Commission to intervene only in actions brought by state governments to seek civil penalties for violations of the caller-identification requirements.⁷⁶ It creates no role for the Commission in private TCPA actions. If an agency with express authority to intervene in a private action enforcing its regulations lacks power to create an affirmative defense in that action, then an agency with no authority to intervene cannot grant an outright “waiver” of a defendant’s liability.

⁷⁶ § 227(e)(6)(C).

The Commission is limited to participating in private TCPA actions “as amicus curiae,” as it often does.⁷⁷

In sum, in accordance with *NRDC*, the Commission could not create an affirmative defense of “confusion” or “misplaced confidence” that petitioners could then attempt to establish in court.⁷⁸ If the Commission cannot do that, it cannot take the more radical step of simply “waiving” the violation.

III. United is not “similarly situated” to the original petitioners covered by the Opt-Out Order

A. United does not even try to explain that they obtained prior express permission from any recipients of its fax ads, including from Craftwood

The Opt-Out Order provides that only similarly situated parties may seek waivers and provides that waivers will apply, if at all, only to parties who sent fax ads *with prior express permission*. United merely states in passing, without explanation or evidentiary support, that it “obtain[ed] prior express consent.” Indeed, United does not even try to refute Craftwood’s position clearly known by United that Craftwood did not give any

⁷⁷ See, e.g., *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 771 F.3d 1274, 1284 (11th Cir. 2014) (relying on FCC interpretation of TCPA fax rules in amicus letter submitted at court’s request).

⁷⁸ As we later discuss, United does not even claim that it was “confused” or had “misplaced confidence” in the Junk Fax Order or its rulemaking. Indeed, the company does not claim that it was aware of any of the same or of the requirements of § 64.1200(a)(4)(iv).

prior express permission to United.⁷⁹

Parties seeking something as drastic as a retroactive waiver need to do more than make a completely naked and empty assertion about prior express permission.⁸⁰ Because United does not even try to make a *facial* showing that it obtained prior express permission from anyone, it is not entitled to a waiver of § 64.1200(a)(4)(iv).⁸¹ This alone precludes United from contending that it is “similarly situated” and from obtaining any waiver.

B. United never contends it was confused by footnote 154 or the notice of rulemaking. To the contrary, United admits that it was “unaware” of the opt-out notice requirements under § 64.1200(a)(4)(iv)

United is also dissimilar to the original petitioners covered by the Opt-Out Order because its violations of § 64.1200(a)(4)(iv) did not result from confusion or misplaced confidence about the opt-out notice requirement. The Commission granted waivers because it determined that two specific grounds led to “confusion” or “misplaced

⁷⁹ Craftwood objects on due process grounds to any attempt by United to present any additional or different facts, or any evidence, in any reply to these Comments. Craftwood requests that the Commission disregard any additional or different facts, or evidence that United may offer in its reply.

⁸⁰ Indeed, United does not claim any prior express permission. Instead, it claims something not recognized under the TCPA: “prior express consent.” (*See* Petition 5.)

⁸¹ It is one thing for the Commission to state in the Opt-Out Order, in the context of petitioners who could claim that they obtained prior express permission, that “[n]or should the granting of such waivers be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of recipients to be sent the faxes at issue...” Opt-Out Order ¶ 31. But it is an entirely different matter here, where United does not even try to explain when, how or in what manner it obtained any prior express permission.

confidence” by the petitioners about whether the requirement applied: the notice of rulemaking for, and footnote 154 in, the 2006 Junk Fax Order. The Commission found that these factors taken *together* justified a waiver.⁸² The Commission cautioned, however, that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”⁸³ Thus, a party will only be similarly situated to the covered petitioners if it was confused about the opt-out requirement based on *both* of these grounds.

Here, United never claims it was confused at all, let alone that it was confused on *either* of these two grounds. In fact, United does not even claim that it *knew* about § 64.1200(a)(4)(iv), or the requirement that faxes sent with prior express permission must contain opt-out notices. To the contrary, United admits that it was “unaware.” United was simply ignorant of the law, which the Commission ruled in the Opt-Out Order is insufficient for a waiver from § 64.1200(a)(4)(iv).⁸⁴ This separately bars United’s waiver request.

⁸² Opt-Out Order ¶ 28 (“Taken together, the inconsistent footnote in the *Junk Fax Order* and the lack of explicit notice in the *Junk Fax NPRM* militates in favor of a limited waiver in this instance.”).

⁸³ *Id.* ¶ 26.

⁸⁴ *See* Opt-Out Order ¶ 26. If for any reason the Commission rules that United can contend that it was “confused” or had “misplaced confidence,” Craftwood has a due process right to investigate the same. Craftwood has not had an opportunity to take any discovery. There is a stay on discovery in the case until after counsel’s Rule 26(f) conference and none has been or can be scheduled prior to the filing of these Comments. *See, e.g., Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57; Applications of AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, Dissenting*

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C. United failed to show that it is subject to “potentially substantial damages” because of its failure to comply with § 64.1200(a)(4)(iv)

United makes no attempt to show that it is subject to “potentially substantial damages” in the manner required by the Opt-Out Order. United merely recites the amount of cumulative damages stated in Craftwood’s lawsuit. But this is insufficient to bring United within the Opt-Out Order. Under the Opt-Out Order, United was required to show that it faces potential damages *from the failure to comply with § 64.1200(a)(4)(iv)*. United failed to do this; the company did not even attempt to explain when, how or in what manner it obtained prior express permission from any fax recipient. Accordingly, the exposure United faces in the Craftwood lawsuit arises from sending *unsolicited* fax ads (including fax ads unprotected by any established business relationship because of the failure to provide opt-out notices).

IV. It would be contrary to public interest to grant United a waiver

Although unnecessary to deny United a waiver because United failed to carry its burden to demonstrate that it is “similarly situated,” it would be against the public interest

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Statement of Commissioner Pai (arguing Commission violated petitioners’ “due process rights” by denying “serious arguments that merit the Commission’s thoughtful consideration”). The Commission may hold such “proceedings as it may deem necessary” for such purposes and may “subpoena witnesses and require the production of evidence” as the Commission determines “will best serve the purpose of such proceedings.” *See* 47 C.F.R. § 1.1. In the alternative, Craftwood requests the Commission postpone ruling on United’s petition until Craftwood has completed discovery regarding United’s knowledge (or lack thereof) of the statute and the Commission’s regulations at the time United sent its fax ads.

to grant the waiver. In the Opt-Out Order, the Commission recognized two competing public interests—on one hand, an interest in protecting parties from substantial damages if they violated the opt-out requirement in § 64.1200(a)(4)(iv) due to confusion or misplaced confidence and, on the other hand, “an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads.”⁸⁵ The former interest does not apply here because, as discussed above, United’s violations cannot be attributed to confusion or misplaced confidence about the rulemaking of, or footnote 154 in, the 2006 Junk Fax Order. The interest of consumers like Craftwood in obtaining compensation for United's violations of the regulation, by contrast, is manifest.

In addition, United relies on its established business relationships with customers to justify sending its faxes. This means, however, that United was required to provide opt-out notices on its faxes. In the Opt-Out Order, the Commission reiterated that a “waiver does not extend to the similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship, as there is no confusion regarding the applicability of this requirement to their faxes.”⁸⁶

For example, take any one of the faxes received by Craftwood and let’s assume that it was sent to a 1,000 recipients. Let’s even assume further that 900 of these recipients gave prior express permission (although United makes no showing that *any*

⁸⁵ Opt-Out Order ¶ 27.

⁸⁶ Opt-Out Order ¶ 2, n.2; *see also* ¶ 29.

recipient gave permission) and that the remaining 100 recipients had an established business relationship with United because they were United customers. Under the Opt-Out Order, United was obligated to provide a valid opt-out notice on the fax because of these 100 recipients.

It would therefore be against public policy (especially in light of the highly useful purposes served by opt-out notices as explained in the Opt-Out Order) to give United a waiver of liability for sending any fax without a compliant opt-out notice just because *some* number of the recipients may have given prior express permission, when United was required to provide opt-out notices in the first place.⁸⁷

Conclusion

The Commission should summarily deny United's petition because it was filed after April 30. United is undeserving of any leniency for its late filing (if any leniency is even available under the Opt-Out Order).

Further, the petition should be denied because the Commission has no authority to "waive" a regulation in a private right of action under the TCPA. Doing so would encroach on the judiciary's power to determine whether "a violation" of a regulation has taken place and Congress's power to impose statutory damages for "each such violation."

⁸⁷ Accordingly, at most, a waiver can be given only if *all* recipients of a fax ad had given prior express permission. Nowhere in the petition does United assert that it obtained prior express permission from all persons to whom it sent faxes. (Indeed, United fails to show that *any* prior express permission was given.)

United also is not “similarly situated” to the petitioners covered by the Opt-Out Order including because (1) United does not even try to explain when, how or in what manner it obtained any prior express permission. Indeed, the company does not even try to show that Craftwood gave any prior express permission when Craftwood sued for being sent unsolicited faxes; (2) United claims no “confusion” or “mistaken confidence” about the rulemaking or footnote 154 of the 2006 Junk Fax Order. Indeed, United admits that it was “unaware” of the requirements of § 64.1200(a)(4)(iv). Under the Opt-Out Order, United’s ignorance of the law cannot serve as grounds for a waiver; and (3) United does not even attempt to show that it is subject to “potentially substantial damages” because of its failure to comply with § 64.1200(a)(4)(iv). To the contrary, United’s liability arises from the sending of *unsolicited* faxes.

Moreover, it would be against public policy to waive United’s liability for violating § 64.1200(a)(4)(iv) because it was required to provide complaint opt-out notices on its faxes because they were sent to customers with whom United had established business relationships.

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Respectfully submitted,

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