Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
	)	
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	)	Re: Waiver Request by Healthways, Inc. and Healthways WholeHealth Networks, Inc.

To: Office of the Secretary

Attention: The Commission
Consumer and Governmental Affairs Bureau

APPLICATION FOR REVIEW

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Summary

The granting of a retroactive waiver by the Consumer and Governmental Affairs Bureau in its August 28, 2015 Order, DA 15-976, to Healthways, Inc. and Healthways WholeHealth Networks, Inc. is arbitrary and capricious. The Bureau's case support is misplaced. Its action violates the separation of powers. It is also against public policy.

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APPLICATION FOR REVIEW

Edward Simon, DC ("Simon") and Affiliated Health Care Associates, P.C. ("Affiliated"), by their attorneys, and pursuant to Section 1.115 of the Commission's rules, seek review of the August 28, 2015, Order, DA 15-976 ("August 28 Order"), of the Acting Chief, Consumer and Governmental Affairs Bureau ("Bureau"). The order grants a retroactive waiver to Healthways, Inc. ("HWAY") and Healthways WholeHealth Networks, Inc. ("HWHN") (collectively, "Healthways") of the Commission's regulation requiring an opt-out disclosure on fax advertisements sent with the prior express permission of recipients. As will be demonstrated, the August 28 Order is arbitrary and capricious. The Bureau's case support for granting the waiver is misplaced. The Commission's actions violate the separation of powers. Furthermore, the

August 28 Order sets a precedent that is against public policy. In support, Simon and Affiliated submit the following:

Litigation Matters

A. Lawsuit Against Healthways for Sending Junk Faxes

Simon is a chiropractor practicing in North Hollywood, California. Simon commenced an action on September 16, 2014, against HWAY, HWHN, and Medversant Technologies L.L.C. ("Medversant") (collectively, "Defendants") for sending fax ads in direct violation of the TCPA and the Commission's regulations.[1] Simon commenced the action to stop junk faxes that regularly interfere with his practice and to obtain damages to compensate him and other junk fax victims and deter future violations. Simon was later joined in the case by Affiliated, a Chicago professional corporation, also engaged in chiropractic care. Simon and Affiliated allege that Defendants violated the TCPA in two independent ways: (1) by failing to obtain prior express permission from targeted recipients to send its fax ads; and (2) by failing to include an opt-out notice, required by the Act and the Commission's regulations, advising recipients of their right to stop future defendants' fax ads and informing them how to make a valid opt-out request.[2]

Last year Defendants launched an organized fax-blasting program to promote Healthways' wellness network and an email service/product by Medversant called "ProMailSource." Defendants conducted seven fax broadcasts on June 16, June 24, July 7, July 22, August 13 and August 20, 2014. All told, Defendants blasted about 42,000 junk fax transmissions to over 10,000 health care providers nationwide. Healthways selected the intended recipients of the faxes. Healthways supplied the fax lists used to send nearly all the faxes. Plaintiffs each received the same junk faxes from Defendants (on August 13 and August 20). Neither Simon nor Affiliated gave Defendants permission to send these faxes. There is no opt-out notice whatsoever contained on any of the junk faxes.

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[1] The action was later removed to the United States District Court for the Central District of California.

[2] § 227(b)(1)(C)(iii), (b)(2)(D), (b)(2)(E), (d)(2); 47 C.F.R. § 64.1200(a)(4)(iii)-(vi). Defendants' violations of the opt-out notice requirements are not limited to violations of § 64.1200(a)(4)(iv); they also include violations of § 64.1200(a)(4)(iii) with respect to faxes sent on the basis of established business relationships.

On July 31, 2015, Simon/Affiliated's counsel deposed HWHN's designated representative, Ann Kent, under Federal Rule of Civil Procedure 30(b)(6) in the litigation.[3] Ms. Kent is vice president of HWHN (as well as vice president of HWAY) and was designated as HWHN's Rule 30(b)(6) designee. Ms. Kent claimed in your testimony that prior to the commencement of the Simon/Affiliated litigation on September 16, 2014: (1) HWHN did not include opt-out notices on any faxes it sent[4]; (2) no one associated with HWHN had read any FCC rulings, orders or regulations regarding the TCPA[5]; (3) nobody associated with HWHN was even aware of any FCC rulings, orders, or the TCPA[6]; and (4) she could not claim that anyone associated with HWHN was confused or misled by any FCC ruling, orders, or regulations.[7]

B. "Established Business Relationship" and "Prior Express Permission" Claim

HWNN asserts that it has an "established business relationship" with every person to whom the faxes were sent. HWHN also contends that "prior express permission" was given through HWHN's "Participating Practitioner Agreement" because the Participating Practitioner Agreement "requests contact information, including fax number" and the ProMailSource faxes were "sent to the members of HWHN's network of practitioners at the fax numbers that each member voluntarily provided in their Participating Practitioner Agreement."

Simon applied to become a HWHN provider in April 2008. He does not recall treating any HWHN related patients. Because of this and the fact that he filed his lawsuit, he does not consider himself presently to be a HWHN provider. Affiliated was never a HWHN provider. HWHN asserts that one of Affiliated's doctors (Jaroslaw Slusarenko) was one of its providers, but HWHN cannot produce any provider agreement and cannot say when or how Dr. Slusarenko supposedly became a HWHN provider.

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[3] The portions of the deposition referenced herein are attached to this Application as Exhibit A.

[4] *Id.* at 230:8-25.

[5] *Id.* at 231:1 – 232:9.

[6] *Id.* at 232:22-235:13.

[7] *Id.* at 232:11-20.

Healthways' Petition for Waiver

In its Petition, Healthways ambiguously requests a waiver with respect to "any alleged advertising faxes" it sent with prior express permission.[8] Healthways alleges that it obtained prior express permission, but it never explains how or in what manner it did so.

Healthways never alleged in its Petition that it misunderstood the opt-out notice requirement for fax ads sent with prior express permission. Healthways never claimed that the two sources of "confusion" and "misplaced confidence" identified in the *Anda Commission Order* (*i.e.*, the notice of ruling making for, and footnote 154 of, the 2006 Junk Fax Order)[9] influenced it in any way. Indeed, Healthways did not contend that it was even *aware* of the requirements of § 64.1200(a)(4)(iv), let alone of the rulemaking for the 2006 Junk Fax Order or footnote 154 from that order. (In fact, Ms. Kent's testimony in the Simon/Affiliated litigation confirms that Healthways was unaware of these requirements.)

Simon and Affiliated opposed Healthways' Petition.

The August 28 Order

In its August 28 Order, the Bureau summarized the history of fax regulations under the TCPA and recounted the lead-up to the *Anda Commission Order*, namely, "that a footnote contained in the Junk Fax Order caused confusion regarding the applicability of the opt-out notice requirement to faxes sent to recipients who provided prior express permission."[10] The Commission stated in the *Anda Commission Order* that "[t]he use of the word 'unsolicited' in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient." [11] The FCC had also noted a "lack of explicit notice" of the Commission's intent to impose an opt-out requirement on solicited fax advertisements.[12]

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[8] Healthways' Petition For Retroactive Waiver ("Petition"), 1.

[9] *Anda Commission Order* ¶ 24.

[10] August 28 Order ¶ 7.

[11] *Anda Commission Order* ¶ 24.

[12] *Anda Commission Order* ¶ 25; August 28 Order ¶¶ 8, 15.

Conspicuously absent from the August 28 Order, however, was the Commission's admonition in the *Anda Commission Order* that "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."[13] In its place, the Bureau found that petitioners, like Healthways, "are entitled to a presumption of confusion or misplaced confidence."[14] There was no such "presumption" contained in the *Anda Commission Order*. Indeed, this newly-minted presumption is directly contrary to the explicit requirement set forth by the Commission in the *Anda Commission Order* that a petitioner must show more than "simple ignorance" in order to obtain a waiver.

The Bureau granted waivers to petitioners, like Healthways, who merely asserted without explanation that they had sent faxes with prior express permission and/or cannot show that it obtained prior express permission. The Bureau took the position that it was sufficient for a waiver recipient to prove prior express permission, if any, later in their pending court cases.[15]

The Bureau rejected arguments that, by granting waivers while litigation is pending, the Commission violated the separation of powers.[16]

The Bureau failed to address Simon's argument that it would be against public interest to waive Healthways' liability under § 64.1200(a)(4)(iv) in connection with Healthways' failure to provide opt-out notices because those notices were required on all its faxes independent of § 64.1200(a)(4)(iv).

Argument

As will be demonstrated, the August 28 Order is arbitrary and capricious. The Bureau's case support for granting the waiver is misplaced. The Commission's actions violate the separation of powers. Furthermore, the August 28 Order sets a precedent that is against public policy.

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[13] *Anda Commission Order* ¶ 26.

[14] August 28 Order ¶ 15.

[15] August 28 Order ¶ 17.

[16] August 28 Order ¶ 13.

A. The Commission Cannot Retroactively Waive § 64.1200(a)(4)

In its August 28 Order, the Bureau asserts that it has the authority under 47 C.F.R. § 1.3 to waive section 64.1200(a)(4).[17] But the Bureau does not even try to justify granting a waiver on a retroactive basis.[18] Indeed, the Bureau's retroactive waiver of section 64.1200(a)(4) is impermissible. Retroactive waiver is highly disfavored and agency regulations cannot be applied retroactively unless expressly authorized by Congress. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468 (1988). Congress did not authorize retroactive rulemaking in either the TCPA or in its 2005 amendment. *See* 47 U.S.C. § 227(b)(2). This alone precludes the retroactive application of any waiver.

Further, in *Retail, Wholesale, and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), the court noted the following:

> Among the considerations that enter into a resolution of the problem [of retroactivity] are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[19]

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[17] August 28 Order n. 55 and 56, citing *Northern Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir.), *cert. denied,* 409 U.S. 1027 (1972).

[18] *WAIT Radio* provides no support that the Commission can waive section 64.1200(a)(4) retroactively. *WAIT Radio* merely stands for the proposition that the Commission can waive its rules. It does not address a retroactive waiver, let alone of a regulation already at issue in active litigation. In the *Northern Cellular* case, the Commission granted a waiver, but it was not retroactive. Moreover, the case does not support any waiver by the Commission – whether retroactive or otherwise – because the District of Columbia Circuit overturned the Commission's action as arbitrary and capricious. Accordingly, *Northern Cellular* supports those like Simon and Affiliated in challenging the August 28 Order.

[19] In *Retail, Wholesale*, Judge McGowan also noted that "[u]nless the burden of imposing the new standards is de minimis, or the newly discovered statutory design compels its retroactive application, the principles which underlie the very notion of ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect…" *Id.* at 392.

A retroactive waiver is particularly unfair to those, like Simon, who commenced litigation in reliance of the clear and unambiguous language of section 64.1200(a)(4) before the issuance of the *Anda Commission Order*.[20] He commenced litigation on September 16, 2014. It is against public policy to apply a waiver retroactively to someone who in good faith relies on the Commission's regulations. In *Greene v. United States*, the Supreme Court held that, because the petitioner's rights "matured" under the 1955 rule, his claim must be evaluated that provision and disallowed retrospective operation of any new rule. The Court applied the 1960 DOD rule only prospectively—despite the construction by the agency that adopted the regulation. Thus, the Court departed from its usual practice of giving deference to an agency's interpretation of its own regulations.[21]

Simon's right to rely on section 64.1200(a)(4) matured when he commenced this litigation on September 16 and cannot be abrogated retroactively by the Commission. Simon read the Commission's regulation correctly and sued for its violation. In enacting the TCPA, Congress determined that giving junk fax victims the right to sue for violations, in addition to Commission enforcement, was the best way to achieve the statute's objectives. It would undermine the statutory objectives if junk fax victims, after reading and correctly comprehending the Commission's plain and unambiguous regulations, commenced litigation and invested substantial resources to enforce those regulations, only to have the violation evaporate by agency action. This would seriously weaken the incentive to bring such actions in the first place and incentivize junk fax advertisers to run to the Commission whenever a victim seeks to hold them liable for their illegal conduct. "Pulling rug from underneath" Simon (and Affiliated) is arbitrary and capricious and violates public policy.

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[20] Indeed, the Commission ruled in the *Anda Commission Order* that its adoption of section 64.1200(a)(4)(iv) was a valid exercise of Congressional authority granted under 47 U.S.C. § 227(b). *Id.* ¶ 14. 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." *Id.* at ¶ 20.

[21] 376 U.S. 149,160(1964).

B. 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

1. 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,"[22] and directs the Commission to "prescribe regulations" to be enforced in those lawsuits.[23] The "appropriate court" then determines whether "a violation" has taken place.[24] 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[]."[25]

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 should be increased. These duties belong to the "appropriate court" presiding over the lawsuit.[26]

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.[27] It does not even require a private plaintiff to notify the Commission that it has filed a private lawsuit.[28] Nor does it limit a private plaintiff's right to sue for violations in situations where the Commission declines to prosecute.[29]

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[22] § 227(b)(3).

[23] § 227(b)(2).

[24] § 227(b)(3)(A)–(B).

[25] § 227(b)(3).

[26] § 227(b)(3).

[27] *Id.*

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

[29] *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).

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.[30] Private citizens have no role in that process.[31] 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 actions.[32] This is not an unusual scheme. The TCPA is similar to several statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards[33] that are enforceable both in private "citizen suits"[34] and in administrative actions.[35]

2. 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,*[36] 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.[37]

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

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[30] *Id.* § 503(b).

[31] *Id.*

[32] *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").

[33] 42 U.S.C. § 7412(d).

[34] 42 U.S.C. § 7604(a).

[35] 42 U.S.C. § 7413(d).

[36] 80 U.S. 128, 147–48, 13 Wall. 128, 20 L.Ed. 519 (1872).

[37] *Id.*

cases.[38] The Court held one branch of government cannot "prescribe a rule for the decision of a cause in a particular way" to the judicial branch and struck down the law.[39]

But dictating a "rule of decision" is precisely what the "waiver" requested by Healthways seeks to accomplish. The goal, as Healthways does not hesitate to admit, is to prevent the District Court from finding "a violation" of § 64.1200(a)(4)(iv). If the waiver is granted, the statute will remain the same. This regulation will remain the same. But the federal district court will be told it cannot find "a violation" of the regulation. Such a result would be inappropriate and result in manifest injustice.

Healthways 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 Congressional intent. Specifically, when the "appropriate court" finds "a violation," the private plaintiff is automatically entitled to a minimum of $500 in statutory damages.[40] The Commission has no power to "waive" a statute, to take any action inconsistent with statutory mandate, or to take any action inconsistent with statutory mandate.[41] From any angle, the Commission cannot encroach on the judiciary or Congress in the manner contemplated by Healthways. Thus, the waiver should have been denied.

Indeed, the United States District Court for the Western District of Michigan, in a private TCPA action involving a defendant that requested a waiver from the FCC, held "[i]t 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."[42] The court held that "nothing in the waiver—even assuming

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[38] *Id.* at 146.

[39] *Id.*

[40] § 227(b)(3).

[41] *In re Maricopa Comm. College Dist. Request for Experimental Authority 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.").

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

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.[43] 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."[44]

The decision in *Stryker* is fully supported by the District of Columbia Circuit decision in *Natural Resources Defense Council v. EPA* ("*NRDC*").[45] There the circuit court 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 issued pursuant to the Clean Air Act, in situations where such violations are caused by "unavoidable" malfunctions.[46] 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.[47] 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."[48] 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.[49]

Thus, the court 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*

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[43] *Id.*

[44] *Id.*

[45] 749 F.3d 1055, 1062 (D.C. Cir. 2014).

[46] *NRDC*, 749 F.3d at 1062.

[47] *Id.* at 1062–63.

[48] *Id.* at 1063.

[49] *Id.*

the available remedies" of "statutes establishing private rights of action."[50] The Clean Air Act was consistent with that principle, the court held, because it "clearly vests authority over private suits in the *courts*, not EPA."[51] 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."[52] Therefore, the court struck down the regulation.[53]

Second, the court 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.[54] 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.[55] 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."[56] The regulation creating an affirmative defense for "unavoidable" violations ran afoul of that principle.[57]

Third, the court noted that the Clean Air Act authorizes the EPA to intervene in private litigation.[58] 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."[59] An

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[50] *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).

[51] *Id.*, emphasis added.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *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).

[59] *Id.*

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.[60]

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.[61] 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.[62] 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.[63] Issuing a "waiver" to prevent the Central District Court 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 Healthways' liability in private litigation would run afoul of the bifurcated dual-enforcement structure Congress has created. The Commission is free to choose not to enforce its regulations against Healthways, but it cannot make that choice for Simon, Affiliated 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

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[60] *Id.*

[61] § 227(b)(3).

[62] *Id.*

[63] *NRDC*, 749 F.3d at 1063, emphasis added.

governments to seek civil penalties for violations of the caller-identification requirements.[64] 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. The Commission is limited to participating in private TCPA actions "as amicus curiae," as it often does.[65]

In sum, in accordance with *NRDC*, the Commission could not create an affirmative defense of "confusion" or "misplaced confidence" that the parties seeking waiver could then attempt to establish in court.[66] If the Commission cannot do that, it cannot take the more radical step of simply "waiving" the violation.

These arguments were laid out in opposition to Healthways' Petition. But the Bureau ignored them, summarily stating:

> [W]e dismiss arguments that by granting 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 declaration 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 an expert agency, to define the scope of when and how our rules apply.[67]

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[64] § 227(e)(6)(C).

[65] *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).

[66] As discussed in more detail, *supra,* Healthways did not contend that it was "confused" or had "misplaced confidence" in the Junk Fax Order or its rulemaking. Indeed, it did not assert that it was aware of any of this or of the requirements of § 64.1200(a)(4)(iv). To the contrary, Ms. Kent's testimony in the Simon/Affiliated litigation confirmed that it was unaware of these requirements.

[67] August 28 Order ¶ 13 (citing 47 C.F.R. § 1.3, *Northern Cellular and WAIT Radio*).

By merely claiming to be the "expert" and dismissing without any analysis or explanation the argument that granting waivers violates the separation of powers, the Bureau effectively concedes that this is what is exactly happening.

C. Healthways did not properly allege and cannot show that it obtained prior express permission

1. Healthways failed to properly assert that it obtained prior express permission

In its Petition, Healthways ambiguously requested a waiver with respect to "any alleged advertising faxes" it sent with prior express permission. But although Healthways baldly alleged that it had obtained prior express permission, Healthways never explained how or in what manner it did so. Nowhere in the Petition did Healthways claim that anyone provided their fax number after agreeing to receive fax ads. This alone required rejection of Healthways' Petition because "[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such."[68]

2. Healthways cannot show that it obtained prior express permission

Healthways claims in the Simon/Affiliated litigation that it obtained prior express permission when medical practitioners, like Simon, provided their facsimile numbers via "Participating Practitioner Agreements" with HWHN. But the mere act of providing a fax number to another does not constitute prior express permission under the TCPA. The Commission has stressed that prior express permission "requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements."[69] Similarly, the Commission has ruled that providing a fax number on an application gives prior express permission only if the form "include[s] a clear statement indicating that, by providing

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[68] *Rio Grande Fam. Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. 1968), cited in *WAIT Radio*, at 1158. The Commission did not, in the *Anda Commission Order* or in August 28 Order, alter this requirement for petitioners.

[69] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14129, ¶ 193 ("FCC 2003 Order"); *see also Jemiola v. XYZ Corp.*, 802 N.E.2d 745, 748 (Ohio C.P. 2003) ("the recipient must be expressly told that the materials to be sent are advertising materials, and will be sent by fax.")

such fax number, the individual agrees to receive facsimile advertisements from that company or organization."[70]

Here, the Participating Practitioner Agreements do not give prior express permission to *anyone,* not even HWHN. HWHN's agreements do not state that medical practitioners, by providing their fax numbers, thereby consent to receive fax ads. Indeed, the agreements do not even mention what use, if any, will be made of fax numbers provided.[71] Accordingly, in proceedings earlier this year in the Simon litigation, the Central District Court of California squarely rejected the argument that permission to send faxes was given through these agreements: "[T]hat WholeHealth obtained Plaintiff's fax number from an application he submitted does not conclusively demonstrate that the application contains a clear statement of consent to receive facsimile advertisements."[72] And if HWHN cannot claim prior express permission through the Agreements, then certainly HWAY—a nonparty to those Agreements—cannot claim prior express permission. This is true as a matter of Commission rule and established law.[73]

Accordingly, because Healthways cannot even make a prime facie showing that it obtained any prior express permission, it is not entitled to a waiver of section 64.1200(a)(4)(iv). Indeed, granting a waiver under such circumstances would give an unfair and unwarranted advantage to Healthways in the pending litigation and would be arbitrary and capricious. It is one thing for the Bureau to state in the August 28 Order that "the granting of a waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes"[74]; it is an entirely different matter here, where Healthways cannot maintain consistent with the TCPA and Commission rules that it obtained any prior express permission. The statement wholly ignores the coercive effect in the Simon/Affiliated litigation of granting a

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[70] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 21 F.C.C.R. 3781, 3807, ¶ 45 ("2006 Junk Fax Order").

[71] Simon's Participating Practitioner Agreement with HWHN was submitted as part of the opposition to Healthways' Petition. Certain information on the Agreement had been redacted to protect Simon's privacy.

[72] *Simon v. Healthways*, No. CV 14-08022 BRO, 2015 WL 1568230, at *6 (C.D. Cal. April 7, 2015).

[73] 2006 Junk Fax Order ¶ 45 (limiting prior express permission to "receiv[ing] facsimile advertisements from that company or organization" that requested the fax number); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (defendant cannot take advantage of express consent extended to unaffiliated party).

[74] August 28 Order ¶ 17.

waiver to Healthways now and allowing it only later to try to prove that it obtained prior express permission.

D. Healthways did not plead or attempt to show that it was "confused" or had "misplaced confidence"

1. It is improper for the Bureau to excuse Healthways from pleading specific, detail grounds for confusion or misplaced confidence

In the August 28 Order, the Bureau declared that it "did not require petitioners to plead specific, detailed grounds for individual confusion."[75] The Bureau lacked authority to dispense with this the requirement that Healthways, and all other petitioners, plead with "particularity."[76] The Commission granted waivers in the *Anda Commission Order* because it determined that two specific grounds led to "confusion" or "misplaced confidence" by the petitioners about whether the opt-out requirement applied: the rulemaking for, and footnote 154 in, the 2006 Junk Fax Order. The Commission found that these factors taken *together* justified a waiver.[77] Thus, a party would only be similarly situated to the covered petitioners if it was confused about the opt-out requirement based on *both* of these grounds.

Here, Healthways never claims it was confused on *either* of these two grounds. Indeed, Healthways did not contend that it was even *aware* of the requirements of § 64.1200(a)(4)(iv), let alone of the rulemaking for the 2006 Junk Fax Order or footnote 154 from that order. Thus, Healthways failed to provide facts warranting a waiver and this alone required denial of its petition.

In fact, Healthways claimed through its Rule 30(b)(6) designee in the Simon/Affiliated litigation that Healthways *unaware* of the TCPA and its attendant regulations when it blasted the junk faxes at issue. No doubt Healthways takes this position out of concern that knowledge of the TCPA and its attendant regulations would expose it to the potential of an enhancement of up to three times its statutory damages.[78] Consequently, Healthways' Petition should have been

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[75] August 28 Order ¶ 19.

[76] *Rio Grande, supra.*

[77] *Anda Commission 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.").

[78] §227(b)(3).

denied outright because, as the Commission emphasized in the *Anda Commission Order* and as claimed by Healthways, "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."[79]

2. The Bureau's finding that there is a "presumption" of confusion or misplaced confusion violates due process and is arbitrary and capricious

In the *Anda Commission Order*, the Commission clearly said that "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."[80] But the August 28 Order makes no mention of this admonition. It completely disappears. In its place, the Bureau said that petitioners, including Healthways, are "entitled to a presumption of confusion or misplaced confidence." [81] This purported presumption directly conflicts with the requirement in the *Anda Commission Order* that a petitioner must show more than "ignorance of the law." This shift in the standard by which waivers were determined by the Commission violates due process. *See Blanca Telephone Co. v. FCC*, 743 F.3d 860, 864 (D.C. Cir. 2014); *Morris Communications, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009). The courts have made clear that, when the Commission changes its course, it "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute." *See Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1970); *see also, e.g. Nat'l Cable and Telecommunications Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) (citing *Greater Boston Television* and explaining that a change to prior precedent requires the agency to deliberately make note of the change). The D.C. Circuit also requires the Commission to support its decisions with at least "a modicum of reasoned analysis. *See Hispanic Info & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1297 (D.C. Cir. 1989).

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[79] *Anda Commission Order*, ¶ 26.
[80] *Anda Commission Order* ¶ 26.

[81] August 28 Order ¶ 15.

It is also a fundamental tenet of the APA that the Commission is required to treat similarly situated parties the same. This obligation is rooted in the APA's prohibition of "arbitrary and capricious" agency action. *See* U.S.C. § 706(2)(a). Indeed, Healthways does not even contend 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, Healthways testified in the Simon/Affiliated litigation that it was simply ignorant of the law, which the Commission ruled in the *Anda Commission Order* is insufficient for a waiver from § 64.1200(a)(4)(iv).[82]

Likewise, the shift by the Bureau in its standard is arbitrary and capricious.[83] There is no legitimate reason to grant a waiver if a petitioner was not confused and did not have misplaced confidence. At a minimum, a petitioner must show that it was not merely ignorant of the law, as required by the *Anda Commission Order*.

E. It would violate public policy to grant Healthways a waiver when it was required in all events to provide an opt-out notice on its faxes

Although unnecessary to deny Healthways a waiver because Healthways failed to carry its burden to demonstrate that it is "similarly situated," it would be against the public interest to grant Healthways the waiver it seeks. In the *Anda Commission 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 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."[84] The former does not apply here (including because, as discussed above, Healthways' failure to provide opt-out notices did not result from confusion or misplaced confidence about the rulemaking of, or footnote 154). The interests of consumers like Simon and Affiliated in obtaining compensation for Healthways' violations of the regulation, by contrast, are manifest—but they have been completely ignored.

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[82] *See* Exhibit A, at 230:8 – 235:13.

[83] Indeed, this conclusion is directly support by the *Northern Cellular* case cited by the Commission in the August 28 Order.

[84] *Anda Commission Order* ¶ 27.

In addition, Healthways was required to provide opt-out notices on all of its faxes because Healthways relies on the "established business relationship" defense in the Simon/Affiliated litigation. In the *Anda Commission 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."[85]

For example, take any one of the faxes received by Simon or Affiliated and let's assume that it was sent to 1,000 recipients. Assume further that 900 recipients gave prior express permission (although Healthways makes no showing that *any* recipient gave permission) and that the remaining 100 recipients had an established business relationship with Healthways or had no relationship with Healthways. Without question, the TCPA and the *Anda Commission Order* required Healthways to provide a valid opt-out notice on the fax because at least one person (or 100, in the example) did *not* give permission.

It would therefore be against public policy (especially in light of the highly useful purposes served by opt-out notices as explained in the *Anda Commission Order*) to give Healthways a waiver of liability for sending a fax without a compliant opt-out notice just because *some* of the recipients may have given prior express permission, when the statute and FCC regulations required Healthways to provide opt-out notices entirely independent of § 64.1200(a)(4)(iv).[86]

Finally, Simon raised this argument in opposition to Healthways' Petition, but it was completely ignored in the August 28 Order.

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[85] *Anda Commission Order* ¶ 2, n.2; *see also* ¶ 29.

[86] Accordingly, at most, a waiver can be given only if a petitioner can plead and prove that *all* recipients of a fax had given prior express permission.

Conclusion

The August 28 Order does not withstand scrutiny. Granting of blanket retroactive waivers is inconsistent with the Commission's *Anda Commission Order*. The August 28 Order is arbitrary and capricious and should be overturned. Parties must be able to rely on the Commission's regulations and reliance should not result in harm to them. Maintaining such a result would be a violation of public policy. The granting of the retroactive wavier to Healthways must be reversed and their request for waiver rejected.

September 28, 2015

Respectfully submitted,

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4830-9044-0489.1

EXHIBIT A

CERTIFIED COPY

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

EDWARD SIMON, DC, and
AFFILIATED HEALTH CARE
ASSOCIATES, P.C., and for all
others similarly situated,

Plaintiffs,

vs. CASE NO. 2:14-CV-8022-BRO-JCx

HEALTHWAYS, INC., a Delaware
corporation; HEALTHWAYS
WHOLEHEALTH NETWORKS, INC., a
Delaware corporation;
MEDVERSANT TECHNOLOGIES,
L.L.C., inclusive,

Defendants.

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July 31, 2015

Terri Beckham, RPR, RMR, CRR, LCR No. 355
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1 that could be different sort of faxes that they
2 have opt-out notices.
3 MR. LAYDEN: Why don't we talk about
4 that. I need to have that request in mind and see
5 what our objection is and everything else, and
6 then we can deal with that.
7 BY MR. ZIMMERMANN:
8 Q. Prior to this lawsuit, did WholeHealth
9 ever send any faxes that contained a notification
10 on them that the recipient could request not to
11 receive future faxes?
12 A. I don't know. I don't think so, but I
13 don't know.
14 Q. Sitting here now, do you know of any
15 occasion?
16 A. I do not.
17 Q. Did you investigate or seek to educate
18 yourself about that?
19 A. I did.
20 Q. You did?
21 A. I asked.
22 Q. And who did you talk to?
23 A. I talked to Martie, Martie Stabelfeldt.
24 Q. What did she say?
25 A. She said, "I don't believe so." Same.

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1 Q. Did anyone associated with WholeHealth
2 prior to September 16, 2014, ever read any FCC
3 rulings, orders or regulations regarding the TCPA?
4 MR. LAYDEN: I'm going to object to
5 the question on the basis it calls for disclosure
6 of attorney-client privilege communications and
7 work product. I'll instruct you not to answer if
8 it requires you to divulge that. But if you can
9 answer with something short of that, you can --
10 MR. ZIMMERMANN: Nope. No, no, no,
11 no, nope. I don't agree to the admonition. I
12 want to know whether anybody read it. We can go
13 from there.
14 MR. LAYDEN: I don't agree with you
15 not agreeing, so my instruction stands.
16 MR. ZIMMERMANN: I'll agree it's not
17 a waiver.
18 MR. LAYDEN: That's not good enough.
19 MR. ZIMMERMANN: But I don't agree to
20 the admonition. No, really, absolutely not.
21 Because reading is not protected by the
22 attorney-client privilege.
23 MR. LAYDEN: It's work product.
24 MR. ZIMMERMANN: No. Come on.
25 Reread the question, and it's without

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1 the admonition, and then we'll take it from there.
2 (Requested portion was read by the
3 reporter.)
4 MR. LAYDEN: My admonition stands,
5 but if you can answer the question, go ahead.
6 THE WITNESS: I'm not aware that
7 any -- anyone read the specifics around TCPA --
8 I'm not aware of any. I can't recite the question
9 back. I'm not aware.
10 BY MR. ZIMMERMANN:
11 Q. So it's fair to say that no one associated
12 with WholeHealth prior to September 16, 2014, was
13 confused or misled by any FCC ruling, orders or
14 regulations regarding the TCPA, correct?
15 MR. LAYDEN: Objection,
16 mischaracterizes what she said.
17 THE WITNESS: I -- I can't speak to
18 if they were confused or misled. What I'm
19 indicating is, to my knowledge, they did not read
20 the information.
21 BY MR. ZIMMERMANN:
22 Q. Okay. Was anyone associated with
23 WholeHealth knowledgeable or aware of any FCC
24 rulings, orders or regulations regarding the TCPA
25 prior to September 16, 2014?

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1 MR. LAYDEN: Objection, my
2 instruction -- I'll go ahead and reassert it. If
3 you can answer it without disclosing privileged
4 communications, go ahead.
5 BY MR. ZIMMERMANN:
6 Q. I don't agree to the admonition. Answer
7 the question.
8 MR. LAYDEN: Now I would ask you to
9 follow my instructions, despite counsel badgering
10 you and asking you to ignore my instruction. I
11 appreciate Scott, that you disagree with me, and
12 we can argue about it later --
13 MR. ZIMMERMANN: Yeah, but --
14 MR. LAYDEN: -- but I don't want you
15 to instruct my witness to answer a question I've
16 instructed her not to answer.
17 MR. ZIMMERMANN: Then -- but, see --
18 I have to make it clear for the record, because I
19 won't get an accurate record if she follows your
20 admonition because I won't know whether anyone
21 associated would be.
22 She can identify, yes, she can
23 testify about how she knows about it; you can
24 assert the privilege with respect to that,
25 possibly, but not the basic question that I'm

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1 asking her as a designee of WholeHealth, because I
2 won't get an accurate answer.
3 MR. LAYDEN: Okay. Can you read the
4 question back for me, please.
5 (Requested portion was read by the
6 reporter.)
7 MR. LAYDEN: You can answer that
8 "yes," "no," or "I don't know." But nothing
9 beyond that.
10 THE WITNESS: I don't know.
11 BY MR. ZIMMERMANN:
12 Q. Did you look into that or investigate
13 that?
14 A. (Pause.)
15 I did.
16 Q. And what did you do?
17 A. I feel like this question is also -- I
18 thought I had answered this previously when I
19 indicated that I had a conversation with Martie
20 Stabelfeldt and Megan about their -- their
21 familiarity, their awareness of the TCPA Act.
22 I -- I -- I thought you'd asked that question
23 prior.
24 Q. This is more of a refinement, not just the
25 TCPA, but FCC orders, regulations or rulings about

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1 the TCPA. It's sort of --
2 A. So that would be -- sorry. Reread the
3 question again, if you don't mind.
4 (Discussion off the record.)
5 BY MR. ZIMMERMANN:
6 Q. I'll ask the question as foundational, and
7 we'll go from there.
8 Was anyone associated with WholeHealth
9 aware of or read FCC rulings orders or regulations
10 about the TCPA prior to September 16, 2014?
11 MR. LAYDEN: That's a "yes," "no," or
12 "I don't know."
13 THE WITNESS: No.
14 BY MR. ZIMMERMANN:
15 Q. Okay. Okay. It's true, is it not, that
16 WestFax assigned to WholeHealth a removal number
17 to be used as part of WestFax toll-free removal
18 service?
19 A. Can you direct me to something that says
20 that? I'm not doubting you. It sounds like you
21 have that awareness. It wouldn't surprise me,
22 again, that that's part of the process, but I....
23 MR. ZIMMERMANN: I'll mark this one
24 page because it's all I need. I don't have
25 copies. Exhibit next in order.

CERTIFICATE OF SERVICE

I, Michael Nuell, do hereby certify that copies of the foregoing "Application for Review" were sent on this 28th day of September, 2015, via regular mail, to the following:

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