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 the "RadNet Entities"

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 the "RadNet Entities"[1] is arbitrary and capricious. The Bureau's case support is misplaced. Its action violates the separation of powers. It is also against public policy.

[1] The "RadNet Entities" are 22 entities listed on Exhibit A to their Petition. Only three of the RadNet Entities are defendants in litigation under the TCPA brought by Edward Simon.

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APPLICATION FOR REVIEW

Edward Simon, DC ("Simon"), by his 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 22 "RadNet Entities"[2] 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 submits the following:

[2] The RadNet Entities are listed in Exhibit A to their Petition.

Simon's Junk Fax Litigation

Simon is a chiropractor practicing in North Hollywood, California. Simon commenced a class action lawsuit on September 4, 2014, against three of the 22 RadNet Entities for sending fax ads in direct violation of the TCPA and the Commission's regulations.[3] The action was triggered by Simon's receipt of an August 14, 2014 fax advertisement.

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 alleges that the RadNet Defendants violated the TCPA in two independent ways: (1) by failing to obtain prior express permission from targeted recipients to send their 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.[4] None of the faxes produced thus far in the litigation have any opt-out notices whatsoever.

In response to Simon's Request for Admission No. 2 propounded in the litigation, Defendant RadNet Management, Inc. admitted that "Plaintiff [Simon] did not give prior express consent to be sent the facsimile identified as Exhibit 1 in Plaintiff's Complaint."[5] In its sworn answer to Simon's Interrogatory No. 4, which asked RadNet Management to identify each person it contends gave prior express permission, it identified only "Pacific Coast Sports Medicine"—it did not identify Simon or any other class member.[6]

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[3] Case No. 2:14-cv-7997 BRO, pending in the United States District Court for the Central District of California. The action was commenced in Los Angeles Superior Court and later removed to the Central District of California. The three "RadNet Defendants" are: RadNet Management, Inc., Beverly Radiology Medical Group and Breastlink Medical group, Inc.

[4] § 227(b)(1)(C)(iii), (b)(2)(D), (b)(2)(E), (d)(2); 47 C.F.R. § 64.1200(a)(4)(iii)-(vi). RadNet 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.

[5] Declaration of Scott Z. Zimmermann ("Zimmermann Decl."), Exh. A (RadNet Management's Response to Simon's Request for Admissions), submitted with Simon's supplemental comment.

[6] Zimmermann Decl., Exh. B (RadNet Management's Responses to Simon's Interrogatories) submitted with Simon's supplemental comment.

Accordingly, the RadNet Defendants cannot maintain, consistent with the TCPA and Commission rules, that they sent fax ads to Simon or any other recipient with their prior express permission, except for the possibility of one company. This alone precludes the waiver they request or should limit any waiver to "Pacific Coast Sports Medicine."

The RadNet Entities' Petition for Waiver

The RadNet Entities' Petition did not identify which of them, if any, sent any faxes that are the subject of their request for waiver.

The RadNet Entities do not claim that they obtained any "prior express permission," as used in the TCPA and Commission rules, to send fax advertisements. At most, the RadNet Entities state, without support, that "[m]any of these health care professionals have specifically requested to receive such information in this manner [via fax]."[7] Notably absent is any statement that "such information" means advertisements, such as the August 14 fax received by Simon. Likewise, the RadNet Entities claim only that Simon sent some unspecified RadNet Entity a "prescription form" on which Simon "requested that the [MRI] scans results be sent to him by fax."[8]

At most, the RadNet Entities claim the "established business relationship" exemption: "From time to time, RadNet provides information about its services via fax to health care providers with whom it has done and is doing business....All fax numbers used by RadNet were provided by the healthcare provider who received the fax."[9]

The RadNet Entities baldly claim that "RadNet did not believe that these solicited fax transmissions required opt-out notices."[10] The RadNet Entities later claim without support that "RadNet was confused by conflicting language from the *2006 Junk* Order" and that "RadNet reasonably believed that its transmission of solicited faxes was in compliance with the TCPA and

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[7] Petition 3.

[8] *Id.* 3. Simon disputes these allegations. Neither he nor anyone under his employ completed or sent the prescription form.

[9] *Id.* 3. *See also* the RadNet Defendants' Answer in the Simon litigation asserting that "any person receiving a fax from any of them had an established business relationship." Zimmermann Decl., Ex. B (Answer), 4:2-3, submitted in connection with Simon's initial comment.

[10] *Id.* 3.

Commission regulations."[11] But the RadNet Entities do not claim that they, or any of them, were 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.

Simon opposed the RadNet Entities' petition, filing initial and supplemental comments.

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*[12], 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."[13] 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." [14] 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.[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."[16] In its place, the Bureau found that petitioners, like the RadNet Entities, "are entitled to a presumption of confusion or misplaced confidence."[17] There was no such "presumption" contained in the *Anda Commission Order*. Indeed, this newly-minted presumption is directly contrary to the explicit requirement set

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[11] Petition 5.

[12] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 14–164, 2014 WL 5493425 (F.C.C. Oct.30, 2014).

[13] August 28 Order ¶ 7.

[14] *Anda Commission Order* ¶ 24.

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

[16] *Anda Commission Order* ¶ 26.

[17] August 28 Order ¶ 15.

forth by the Commission in the *Anda Commission Order* that a petitioner needed to show more than "simple ignorance" in order to obtain a waiver.

Further, the Bureau granted waivers to petitioners, like the RadNet Entities, who merely asserted without explanation that they had sent faxes with prior express permission and/or cannot show that they 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.[18]

The Bureau summarily rejected arguments that, by granting waivers while litigation is pending, the Commission violated the separation of powers.[19]

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

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

In its August 28 Order, the Bureau only asserts that it has the authority under 47 C.F.R. § 1.3 to waive section 64.1200(a)(4).[20] But the Bureau does not even try to justify granting a waiver on a retroactive basis.[21] Indeed, the Bureau's retroactive waiver of section 64.1200(a)(4)

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[18] August 28 Order ¶ 17. This is a particularly deficient response as 19 of the RadNet Entities are not defendants in the Simon litigation. Accordingly, they may never be called upon to show that they ever obtained prior express permission.

[19] August 28 Order ¶ 13.

[20] 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).

[21] *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 a retroactive waiver 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

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.[22]

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*.[23] He commenced litigation on September 4, 2014. It

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by the Commission – whether retroactive or otherwise – because the D.C. Circuit overturned the Commission's action as arbitrary and capricious. Accordingly, *Northern Cellular* supports those like Simon in challenging the August 28 Order.

[22] 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.

[23] 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.

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 had to be evaluated that rule 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.[24]

Simon's right to rely on section 64.1200(a)(4) matured when he commenced this litigation on September 4 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, 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 is arbitrary and capricious and violates public policy. The August 28 Order entirely ignores Simon's reliance on section 64.1200(a)(4).

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,"[25] and

[24] 376 U.S. 149,160(1964).

[25] § 227(b)(3).

directs the Commission to "prescribe regulations" to be enforced in those lawsuits.[26] The "appropriate court" then determines whether "a violation" has taken place.[27] 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[]."[28]

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.[29]

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.[30] It does not even require a private plaintiff to notify the Commission that it has filed a private lawsuit.[31] Nor does it limit a private plaintiff's right to sue for violations in situations where the Commission declines to prosecute.[32]

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.[33] Private citizens have no role in that process.[34] 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

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[26] § 227(b)(2).

[27] § 227(b)(3)(A)–(B).

[28] § 227(b)(3).

[29] § 227(b)(3).

[30] *Id.*

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

[32] *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).

[33] *Id.* § 503(b).

[34] *Id.*

play no role in agency enforcement actions.[35] 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[36] that are enforceable both in private "citizen suits"[37] and in administrative actions.[38]

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,*[39] 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.[40]

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.[41] 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.[42]

But dictating a "rule of decision" is precisely what the "waiver" requested by the RadNet Entities seek to accomplish. The goal, as the RadNet Defendants do not hesitate to admit, is to prevent the California 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

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[35] *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").

[36] 42 U.S.C. § 7412(d).

[37] 42 U.S.C. § 7604(a).

[38] 42 U.S.C. § 7413(d).

[39] 80 U.S. 128, 147–48, 13 Wall. 128, 20 L.Ed. 519 (1872).

[40] *Id.*

[41] *Id.* at 146.

[42] *Id.*

the District Court will be told it cannot find "a violation" of the regulation. Such a result would be inappropriate and result in manifest injustice.

The RadNet Entities/Defendants might argue that the District 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, that when the "appropriate court" finds "a violation," the private plaintiff is automatically entitled to a minimum of $500 in statutory damages.[43] 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.[44] From any angle, the Commission cannot encroach on the judiciary or Congress in the manner contemplated by the RadNet Entities. 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."[45] 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.[46] 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."[47]

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[43] § 227(b)(3).

[44] *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.").

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

[46] *Id.*

[47] *Id.*

The decision in *Stryker* is fully supported by the District of Columbia Circuit decision in *Natural Resources Defense Council v. EPA* ("*NRDC*").[48] 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.[49] 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.[50] 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."[51] 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.[52]

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 the available remedies*" of "statutes establishing private rights of action."[53] 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."[54] 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

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[48] 749 F.3d 1055, 1062 (D.C. Cir. 2014).

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

[50] *Id.* at 1062–63.

[51] *Id.* at 1063.
[52] *Id.*

[53] *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).

[54] *Id.*, emphasis added.

circumstances under which penalties are "appropriate."[55] Therefore, the court struck down the regulation.[56]

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.[57] 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.[58] 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."[59] The regulation creating an affirmative defense for "unavoidable" violations ran afoul of that principle.[60]

Third, the court noted that the Clean Air Act authorizes the EPA to intervene in private litigation.[61] 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."[62] 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.[63]

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

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *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).

[62] *Id.*

[63] *Id.*

the "appropriate court" with the power to determine whether "a violation" has occurred.[64] 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.[65] 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.[66] Issuing a "waiver" to prevent the California District Court 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 the RadNet Entities' 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 the RadNet Entities, 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.[67] 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

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[64] § 227(b)(3).

[65] *Id.*

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

[67] § 227(e)(6)(C).

"waiver" of a defendant's liability. The Commission is limited to participating in private TCPA actions "as amicus curiae," as it often does.[68]

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. 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 the RadNet Entities' 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.[69]

By merely claiming to be the "expert" agency 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. The Petition does not identify which of the RadNet Entities, if any, sent faxes that are subject to the request for waiver

The RadNet Entities are not entitled to a waiver because they are not "similarly situated" to the petitioners covered by the *Anda Commission Order*. The *Anda Commission Order* provides that only similarly situated parties may seek waivers. For a party to be similarly situated, it must have sent fax ads. Here, the RadNet Entities do not even identify which of

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[68] *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).

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

them, if any, sent faxes that are subject to their request for waiver. Instead, they merely present a list of 22 entities, wrap them up in the collective term "RadNet,"[70] and seek a blanket waiver. As such, they fail to meet their burden to show that they are "similarly situated." Simon argument on this issue was completely ignored in the August 28 Order. The granting of a waiver in the RadNet Entities' favor was arbitrary and capricious for this reason alone.

D. The RadNet Entities did not properly allege and cannot show that they, or any of them, obtained prior express permission

1. The RadNet Entities failed to properly assert that they, or any of them, obtained prior express permission

The RadNet Entities' Petition did not even claim that any of them obtained any prior express permission (as that term is used in the TCPA and interpreted by the Commission) to send any faxes. Instead, they merely claim that "[m]any…health care professionals have specifically requested to receive...information" via fax and faxes have been sent to fax numbers that the professionals have provided. Nowhere in their Petition did the RadNet Entities claim that anyone provided their fax number after agreeing to receive fax ads.

But none of this possibly constitutes prior express permission. The Commission stresses that prior express permission "requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements."[71] This alone required rejection of the RadNet Entities' petition because "[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such."[72]

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[70] The RadNet Entities use the collective "RadNet" throughout the Petition, but at the same time use the singular "it." This underscores their failure to identify who sent faxes that are subject of the request for waiver.

[71] 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.")

[72] *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.

2. The RadNet Entities cannot show that they, or any of them, obtained prior express permission

In response to Simon's Request for Admission No. 2, RadNet Management admitted that "Plaintiff [Simon] did not give prior express consent to be sent the facsimile identified as Exhibit 1 in Plaintiff's Complaint." In its sworn answer to Simon's Interrogatory No. 4, which asked RadNet to identify each person it contends gave prior express permission, it identified only "Pacific Coast Sports Medicine"—it did not identify Simon or any other class member.

Accordingly , the RadNet Entities cannot maintain, consistent with the TCPA and Commission rules, that they sent fax ads to Simon or any other recipient with their prior express permission, except for the possibility of one company. This alone precludes the waiver they request or should limit the waiver to "Pacific Coast Sports Medicine."

Accordingly, because RadNet Entities cannot even make a showing that they, or any of them, obtained any prior express permission, none of them are 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 the RadNet Entities the Simon litigation and is 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"[73]; it is an entirely different matter, where, as here, the RadNet Entities cannot maintain consistent with the TCPA and Commission rules that they, or any of them, obtained any prior express permission, including from Simon. The statement wholly ignores the coercive effect in the Simon litigation of granting a waiver to the RadNet Entities now and allowing them only later to try to prove that they obtained prior express permission.

[73] August 28 Order ¶ 17.

E. The RadNet Entities did not plead or attempt to show that they, or any of them, were "confused" or had "misplaced confidence"

1. It is improper for the Bureau to excuse the RadNet Entities 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."[74] The Bureau lacked authority to dispense with this the requirement that the RadNet Entities, and all other petitioner seekers, plead with "particularity."[75] 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.[76] 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, the RadNet Entities never claimed that they were confused on *either* of these two grounds. Moreover, they offered only empty conclusions in a vain attempt to show that they were similarly situated to the petitioners in the *Anda Commission Order*.

The RadNet Entities first claim that "RadNet did not believe that these solicited fax transmissions required opt-out notices." This claim is facially ridiculous as it purports to cover *all 22 entities* in one fell swoop. Moreover, the RadNet Entities do not claim that their "belief" stemmed from the two sources of "confusion" or "misplaced confidence" identified in the *Anda Commission Order* (*i.e.*, the notice of rulemaking for, and footnote 154 of, the 2006 Junk Fax Order). In fact, they offer no explanation at all; they fail to state why they "did not believe" that faxes sent with prior express permission "required opt-out notices," or how or when they arrived at this belief.

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[74] August 28 Order ¶ 19.

[75] *Rio Grande, supra.*

[76] *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.").

Later in the Petition, the RadNet Entities claimed that they "reasonably believed that its transmission of solicited faxes was in compliance with the TCPA and Commission regulations." But this statement suffers from the same failings as their earlier claim about their "belief."

The RadNet Entities also state that they were "confused by conflicting language from the 2006 Junk Order." This across-the-broad statement covering 22 entities is likewise ridiculous. They fail to identify either the particular RadNet Entity, or the individual(s) within any entity, that were "confused," when they became "confused," or how they became "confused." They do not even identify the "conflicting language" that supposedly caused the "confusion." Further, they do not claim this alleged "confusion" actually led them to omit opt-out notices in their faxes.

At most, the RadNet Entities appear to be 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).[77] This separately bars their waiver request.

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."[78] But in the August 28 Order, there is no mention of this admonition. It completely disappears. In its place, the Bureau said that petitioners, like the RadNet Entities, are "entitled to a presumption of

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[77] *See Anda Commission Order* ¶ 26. If for any reason the Commission finds the RadNet Entities were "confused" or had "misplaced confidence," Simon has a due process right to investigate the same. It has been denied discovery on this issue to date. *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 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, Simon requests the Commission order that it will not rule on RadNet Entities' Petition until Simon has completed discovery regarding their knowledge (or lack thereof) of the statute and the Commission's regulations at the time it sent its fax ads. Discovery in the Simon litigation is still in its early stages.

[78] *Anda Commission Order* ¶ 26.

confusion or misplaced confidence."[79] 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). 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, RadNet Entities do not even contend that they, or any of them, knew about § 64.1200(a)(4)(iv), or the requirement that faxes sent with prior express permission must contain opt-out notices. At most, it appears that RadNet Entities were 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).

Likewise, the shift by the Bureau in its standard is arbitrary and capricious.[80] 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*.

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[79] August 28 Order ¶ 15.

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

E. It would violate public policy to grant the RadNet Entities a waiver when they were required in all events to provide an opt-out notice on its faxes

Although unnecessary to deny the RadNet Entities a waiver because the RadNet Entities failed to carry their burden to demonstrate that they are "similarly situated," it would be against the public interest to grant the RadNet Entities the waiver they seek. 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."[81] The former does not apply here (including because, as discussed above, the RadNet Entities' 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 in obtaining compensation for the RadNet Entities' violations of the regulation, by contrast, are manifest. But these interests were ignored by the Bureau in the August 28 Order.

In addition, the RadNet Entities claim that they sent faxes to "health care providers with whom [they have] done and [are] doing business," and they invoke the established business relationship exemption.[82] This means, however, that the RadNet Entities were required to provide opt-out notices on their faxes independent of section 64.1200(a)(4). 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."[83]

For example, take any one of the faxes received by Simon and let's assume that it was sent to 1,000 recipients. Assume further that 900 recipients gave prior express permission (although the RadNet Entities make no showing that *any* recipient gave permission) and that the

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[81] *Anda Commission Order* ¶ 27.

[82] Indeed, the RadNet Defendants specifically invoke the established business relationship exemption in the Simon litigation. *See* the RadNet Defendants' Answer in the Simon litigation that "any person receiving a fax from any of them had an established business relationship." Zimmermann Decl., Ex. B (Answer), 4:2-3, submitted in connection with Simon's initial comment.

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

remaining 100 recipients had an established business relationship with the RadNet Entities or had no relationship with them. Indeed, these are not farfetched assumptions. RadNet Management admitted that Simon did not give prior express permission and at most had an established business relationship with Simon. Without question, the TCPA and the *Anda Commission Order* required the RadNet Entities to provide a valid opt-out notice on the fax because at least Simon (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 the RadNet Entities a waiver of liability for sending faxes 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 the RadNet Entities to provide opt-out notices on them entirely independent of § 64.1200(a)(4)(iv).[84]

Finally, it must be noted that Simon raised this argument in opposition to the RadNet Entities' Petition but the argument was completely ignored by the Bureau in its August 28 Order.

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, like Simon, 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 the RadNet Entities must be reversed and their request for waiver rejected.

[84] Accordingly, at most, a waiver can be given only if a petitioner can plead and prove that *all* recipients to any particular fax had given prior express permission. Nowhere in their Petition do the RadNet Entities assert that they, or any of them, obtained prior express permission from all persons who were sent faxes. (Indeed, the RadNet Entities fail to show that *any* prior express permission was given.)

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Respectfully submitted,

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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 US mail, to the following:

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