

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Junk Fax Prevention Act of 2005

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

CG Docket No. 02-278

CG Docket No. 05-338

Re: Waiver Request by United Stationers Inc.

To: Office of the Secretary

Attention: The Commission
Consumer and Governmental Affairs Bureau

APPLICATION FOR REVIEW

Aaron P. Shainis
Shainis & Peltzman, Chartered

C. Darryl Cordero
Payne & Fears LLP

Table of Contents

	<u>Page</u>
Summary	1
Application For Review	1
Craftwood’s Litigation Against United	2
United’s Petition for Waiver	3
The August 28 Order	4
Argument	5
I. The Commission Cannot Retroactively Waive § 64.1200(a)(4)(iv).....	5
II. The Commission Does Not Have the Authority to “Waive” Violations of the Regulations Prescribed Under the TCPA in A Private Right of Action, and Doing so Would Violate the Separation Of Powers	8
A. The Commission Has No Authority to “Waive” Its Regulations for Purposes of a Private Right of Action.....	8
B. A Waiver Would Violate the Separation of Powers, Both With Respect to the Judiciary and Congress	9
III. United’s Petition Was Filed After April 30 and Is Untimely	14
IV. United Provided No Proof of any Kind That It Obtained Prior Express Permission	15
A. United Failed to Demonstrate That It Obtained Prior Express Permission	15
C. United Failed to Show That It Is Subject to “Potentially Substantial Damages” Because of Its Failure to Comply With § 64.1200(A)(4)(iv)	18
V. United Did Not Plead or Attempt to Show That It Was “Confused” or Had “Misplaced Confidence”	18
A. It Is Improper for the Bureau to Excuse United From Pleading Specific, Detail Grounds for Confusion or Misplaced Confidence	18
B. The Bureau’s Finding That There Is a “Presumption” of Confusion or Misplaced Confusion Violates Due Process and Is Arbitrary and Capricious	19
C. It Would Violate Public Policy to Grant United a Waiver When It Was Required in All Events to Provide an Opt-Out Notice on Its Faxes	21
Conclusion	23

Summary

The granting of a retroactive waiver by the Consumer and Governmental Affairs Bureau in its August 28, 2015, Order, DA 15-976, to United Stationers 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.

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of

CG Docket No. 02-278

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 05-338

Junk Fax Prevention Act of 2005

Re: Waiver Request by United Stationers Inc.

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

To: Office of the Secretary

Attention: The Commission
Consumer and Governmental Affairs Bureau

Application For Review

Craftwood II, Inc., dba Bay Hardware, and Craftwood Lumber Company, 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. The order grants a retroactive waiver to United Stationers Inc., United Stationers Supply Co., and Lagasse LLC (collectively, "United") 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.

Craftwood's Litigation Against United

Craftwood II operates "Bay Hardware" in Seal Beach, California. Craftwood Lumber is a hardware and lumber store in Highland Park, Illinois. (For ease of reference, both applicants will be referred to collectively as "Craftwood.") On May 1, 2015, Craftwood commenced an action in the United States District Court for the Central District of California against United for sending fax advertisements in direct violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, and the Commission's regulations. In the course of two months alone, United conducted 13 mass fax advertising broadcasts. These faxes advertise, among other things, "Blitz Deals," Rubbermaid products, "Scotch-Brite" products and other products sold by United.

Craftwood filed litigation to stop junk faxes that regularly interfere with its business and to obtain damages to compensate Craftwood and other junk fax victims and deter future violations. Craftwood avers that United violated the TCPA in two independent ways. First, Craftwood avers that United violated the law and Commission regulations by failing to obtain prior express permission from targeted recipients to send its fax ads. Neither Craftwood II nor Craftwood Lumber gave United permission to send junk faxes; in fact, not even *United* contends that it obtained permission to send junk faxes to either of them. Second, Craftwood contends that United failed to include in its junk faxes the disclosures required by section 227(b)(2)(D) of the Act and the Commission's regulations,¹ advising recipients of their right to stop future fax ads and informing them how to make a valid opt-out request.

Craftwood's action was expressly authorized by 47 U.S.C. § 227(b)(3), which permits any person to "bring in an appropriate court ... (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation [and] (B)...to recover for actual monetary loss from such a violation, or to receive \$500 in damages for

¹ § 227(b)(1)(C)(iii), (b)(2)(D), (b)(2)(E), (d)(2); 47 C.F.R. § 64.1200(a)(4)(iii)-(vi). United's 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.

each such violation, whichever is greater...” Craftwood was well aware of the Commission’s 2014 fax opt-out notice order (the “Anda Commission Order”),² which had waived the Commission’s regulation requiring opt-out disclosures on solicited faxes for certain parties (47 C.F.R. § 64.1200(a)(4)(iv)), and invited other parties to seek similar waivers on a “case-by-case basis” for the next six months, i.e., until April 30, 2015.³ Craftwood filed litigation on May 1, 2015, after determining that United had not requested a waiver during the six-month period prescribed by the Commission.

United’s Petition for Waiver

On May 18, 2015—almost three weeks after the expiration of the six-month period referenced in the Anda Commission Order—United filed a petition for waiver of section 64.1200(a)(4)(iv). United’s only excuse for not filing by April 30 was that the company was sued by Craftwood after April 30 and filed its petition within 10 days of being served.

In its Petition, United ambiguously requests a waiver with respect to “any faxes” it sent with prior express permission “prior to April 30, 2015.”⁴ But United never asserts that it actually *obtained* prior express permission, let alone explains how or in what manner it did so. In other words, United provided no proof of any kind that it actually sent fax advertisements that, absent a waiver, would be subject to section 64.1200(a)(4)(iv).

United asserted in its petition that it “did not believe” that faxes sent with prior express permission “required opt-out notices.” United also contended that it “did not [understand] that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission.”⁵ This passage merely copied the Commission’s language from paragraph 26 of the Anda Commission Order.⁶

But United did not explain its contentions, nor state that its “belief” or “understanding” stemmed from 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

² *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 14–164, 2014 WL 5493425 (F.C.C. Oct. 30, 2014).

³ *Id.* ¶ 30 n.102.

⁴ Petition 1.

⁵ Petition 4.

⁶ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 14–164, 2014 WL 5493425 (F.C.C. Oct. 30, 2014).

Order).⁷ Indeed, United 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.

Craftwood opposed United's petition.⁸

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."⁹ 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."¹⁰ 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.¹¹

Conspicuously absent from the August 28 Order, however, was any discussion of 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."¹² In its place, the Bureau found that United and other petitioners "are entitled to a presumption of confusion or misplaced confidence."¹³ 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

⁷ Anda Commission Order ¶ 24.

⁸ In its petition, United contends that it is "similarly situated to the petitioners who were granted retroactive waivers in the Solicited Fax Order." (United Pet. at 7.) United asserted that it "did not understand the opt-out requirements to apply to solicited faxes."

United also asserted—without proof or factual support of any kind—that "the faxes at issue in this waiver Petition are, by definition, solicited and/or sent pursuant to the recipient's prior express permission." (United Pet. at 9.) United did not identify the "recipient" that supposedly gave prior express permission, let alone the communication by which this alleged permission was expressly granted. Tellingly, United did *not* assert that Craftwood had given its permission to receive junk faxes. On the contrary, United acknowledged Craftwood's allegation that Craftwood had *not* given permission to United to send junk faxes.

⁹ August 28 Order ¶ 7.

¹⁰ Anda Commission Order ¶ 24.

¹¹ Anda Commission Order ¶ 25; August 28 Order ¶¶ 8, 15.

¹² Anda Commission Order ¶ 26.

¹³ August 28 Order ¶ 15.

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

The Bureau granted waivers to petitioners, like United, who merely asserted without explanation or proof that they had sent fax advertisements with prior express permission. The Bureau took the position that a waiver recipient could later prove prior express permission, if any, in a pending court case.¹⁴

The Bureau rejected arguments that by granting waivers while litigation is pending, the Commission violated the separation of powers.¹⁵

The Bureau failed to address Craftwood’s argument that it would be against public interest to waive United’s liability under section 64.1200(a)(4)(iv) in connection with United’s failure to provide opt-out notices because those notices were required on all its faxes independent of that regulation. See 47 C.F.R. § 64.1200(a)(4)(iii).

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.

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

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)(iv).¹⁶ But the Bureau does not even try to justify granting a waiver on a retroactive basis.¹⁷ Indeed, the Bureau’s retroactive waiver of the regulation is impermissible. Retroactive waiver is highly disfavored and agency regulations cannot be applied

¹⁴ August 28 Order ¶ 17.

¹⁵ August 28 Order ¶ 13.

¹⁶ 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).

¹⁷ *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 Craftwood in challenging the August 28 Order.

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:

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.¹⁸

A retroactive waiver is particularly unfair to those, like Craftwood, who commenced litigation in reliance of the clear and unambiguous language of the regulation after the issuance of the Anda Commission Order.¹⁹ Craftwood commenced litigation on May 1, 2015, after

¹⁸ 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.

¹⁹ 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 (footnote continued)

United had failed to seek a waiver during the six-month period set out in the order. 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.²⁰

Craftwood's right to rely on section 64.1200(a)(4)(iv) matured when it commenced litigation on May 1 and cannot be abrogated retroactively by the Bureau. Craftwood 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.²¹ 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" Craftwood is arbitrary and capricious and violates public policy.

would effectively lock in their consent. Moreover...giving consumers a cost-free, simple way to withdraw previous consent is good policy." *Id.* ¶ 20.

²⁰ 376 U.S. 149, 160 (1964).

²¹ See 47 U.S.C.A. § 227(b)(3) (West 2015).

II. The Commission Does Not Have the Authority to “Waive” Violations of the Regulations Prescribed Under the TCPA in A Private Right of Action, and Doing so Would Violate the Separation Of Powers

A. The Commission Has No Authority to “Waive” Its Regulations for Purposes of 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

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 standards³³ that are enforceable both in private “citizen suits”³⁴ and in administrative actions.³⁵

B. A Waiver Would Violate the Separation of Powers, Both With Respect to the Judiciary and Congress

The seminal separation-of-powers case is *United States v. Klein*,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 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 United seeks to accomplish. The goal, as United does not hesitate to admit, is to prevent the District

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.*

³⁸ *Id.* at 146.

³⁹ *Id.*

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.

United might argue that the court could still find a violation of the regulation after a waiver; it simply cannot award damages. That does not save its argument because then the “waiver” would abrogate 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.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 United. 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 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

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).

⁴³ *Id.*

⁴⁴ *Id.*

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 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

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.*

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.*

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 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 of California from determining that “a violation” occurred is no different

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.*

⁶⁰ *Id.*

⁶¹ § 227(b)(3).

⁶² *Id.*

⁶³ *NRDC*, 749 F.3d at 1063 (emphasis added).

than the EPA issuing an affirmative defense to prevent courts from determining that civil penalties are “appropriate” because a defendant’s violations were “unavoidable.”

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

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*, United 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).

[W]e dismiss arguments that by granting waivers while litigation is pending violates the separation of powers as several commenters 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

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.

III. United’s Petition Was Filed After April 30 and Is Untimely

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

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

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

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

IV. United Provided No Proof of any Kind That It Obtained Prior Express Permission

A. United Failed to Demonstrate That It Obtained Prior Express Permission

In its petition, United ambiguously requested a waiver with respect to “any faxes” it sent with prior express permission “prior to April 30, 2015.” But United never asserted that it actually obtained prior express permission at all, let alone explain how or in what manner it did so. This alone required rejection of United’s 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

B. United Cannot Show That It Obtained Prior Express Permission

As noted, United offered no proof of any kind that it actually sent *solicited* faxes. And United does not assert that Craftwood had given permission to receive junk faxes. This alone warrants rejection of the petition.

As the Commission stressed in its October 30, 2014, order, a waiver requires a showing of good cause. In this context, “good cause” cannot exist if the petitioning party offers no proof that it actually sent solicited faxes. Even United concedes the permission issue is relevant to good cause, in asserting that “the faxes at issue in this waiver Petition are, by definition, solicited and/or sent pursuant to the recipient’s prior express invitation or permission.”⁶⁹ But the entire argument assumes the very matter at issue. As the Commission recognized in its order, a “waiver may be granted if: (1) special circumstances warrant a deviation from the general rule *and* (2) the waiver would better serve the public interest than would application of the rule.”⁷⁰ Unless *some* of the junk faxes sent by United were actually solicited, neither condition would be satisfied. If United failed to obtain prior express permission, no “special circumstances” would warrant “deviation from the general rule,” because the general rule wouldn’t apply in the first place. And it is difficult to conceive how a “waiver” issued to a party who, like United, failed to

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 United Pet. at 9.

⁷⁰ Anda Commission Order ¶ 23.

obtain prior express permission from any of its junk fax targets could better serve the public interest than would application of the rule. No “public interest” of any kind could be promoted by granting a waiver to a party not subject to the rule.

Put another way, the premise of the Anda Commission Order was that “confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient)” warranted deviation from the general rule.⁷¹ A fax advertiser that *failed* to obtain prior express permission could not have “misplaced confidence” that the opt-out notice rule would not apply; the rule wouldn’t apply in the first place. As the Commission noted in the order, all advertisers were on notice that faxes sent without the recipient’s permission had to include disclosures of the recipient’s right to stop future faxes, and how to exercise that right.

In its order, the Bureau freely admitted that it was simply assuming that petitioners like United had obtained prior express permission. The Bureau stated “our findings [sic] here is that—assuming that proper consent was obtained—petitioners qualify for limited retroactive waivers if they did not include the requisite opt-out notice.”⁷² The Bureau stressed that whether prior express permission was granted “remains a question for triers of fact in the private litigation.”⁷³

There is no justification, however, for the Bureau’s decision merely to “assume” a fact that is essential to the determination of good cause. First, to the extent the Commission *has* authority to issue a waiver, it is for the Commission to decide whether there are facts to support it. Kicking the issue to courts in private litigation does not discharge this responsibility. Second, there is a risk that courts would not actually reach the issue due to the practical economics of litigation. Courts have stressed that individual actions to enforce the TCPA are not cost-effective. As the Supreme Court put the matter, “How likely is it that a party would bring a \$500 claim in, or remove a \$500 claim to, federal court.”⁷⁴

⁷¹ Anda Commission Order ¶ 24.

⁷² August 28 Order ¶ 17.

⁷³ *Id.*

⁷⁴ *Mims v. Arrow Fin. Servs.*, ___ U.S. ___, 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012); see also *Jay Clogg Realty Group v. Burger King Corp.*, 298 F.R.D. 304, 310 (D. Md. 2014); *Chapman v. Wagener Equities, Inc.*, No. 09 C 07299, 2014 WL 540250, at *16 (N.D. Ill. Feb. 11, 2014) (a \$500 statutory recovery gives “individual plaintiffs...a low incentive to bring a lawsuit on their own behalf”); *Savanna Group, Inc. v. Trynex, Inc.*, No. 10-cv- (footnote continued)

But paradoxically a blanket waiver to United and other petitioners on the naked assumption that they obtained prior express permission to send junk faxes would diminish the likelihood the issue would *ever* be resolved. The failure to comply with the opt-out notice requirements on faxes presents a class-wide issue, which many courts have recognized in certifying a class.⁷⁵ Absent the common opt-out disclosure issue, some fax advertisers have been able to defeat certification by arguing that the issue of prior express permission is an individualized issue.⁷⁶ If parties like United are given blanket “waivers” of the opt-out notice requirements for “solicited” faxes absent proof that the faxes actually were solicited, few if any private enforcement actions would ever be brought, and even if they were, the issue might not ever be adjudicated beyond the individual plaintiff. The net effect is that parties like United that actually failed to obtain permission from recipients will be able to escape legal accountability for widespread violations of the anti-junk fax laws. This is neither in the public interest, nor does it promote the objectives of the TCPA.

Accordingly, because United did not even *attempt* to demonstrate that it obtained prior express permission from anyone, 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 United in the pending 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”;⁷⁷ it is an entirely different matter here, where United cannot maintain consistent with the TCPA and Commission rules that it obtained any prior express permission.

7995, 2013 WL 66181, at *16 (N.D. Ill. Jan. 4, 2013) (noting “the small potential recovery in individual actions”); *G.M. Sign, Inc. v. Group C Comme'ns, Inc.*, No. 08-cv-4521, 2010 WL 744262, at *6 (N.D. Ill. Feb. 25, 2010).

⁷⁵ Numerous courts have certified TCPA classes on the ground that the advertiser’s violation of the opt-out notice requirements presents an issue common to the entire class. *See, e.g., Turza*, 728 F.3d at 684; *C-Mart v. Metropolitan Life Ins. Co.*, No. 13-80561-CIV, 2014 WL 457580, at *5 (S.D. Fla. Feb. 4, 2014); *A Aventura Chiropractic Ctr., Inc. v. Med Waste Mgmt. LLC*, No. 12-21695, 2013 WL 3463489, at *3 (S.D. Fla. July 13, 2013); *Bais Yaakov of Spring Valley v. Alloy, Inc.*, 936 F. Supp. 2d 272, 286-87 (S.D.N.Y. 2013); *Vandervort v. Balboa Cap. Corp.*, 287 F.R.D. 554, 561 (C.D. Cal. 2012). These courts reason that because disclosures are required in *all* cases, irrespective of whether the advertiser obtained consent, a predominant class-wide issue is presented.

⁷⁶ *E.g., Gene & Gene L.L.C. v. BioPay, L.L.C.*, 541 F.3d 318, 327 (5th Cir. 2008); *see also G.M. Sign v. Binks Mfg. Co.*, 2011 WL 248511 (N.D. Ill. Jan 25, 2011); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997).

⁷⁷ August 28 Order ¶ 17.

C. United Failed to Show That It Is Subject to “Potentially Substantial Damages” Because of Its Failure to Comply With § 64.1200(A)(4)(iv)

United makes no attempt to show that it is subject to “potentially substantial damages” in the manner required by the Opt-Out Order. In its petition, United merely recited the amount of cumulative damages stated in Craftwood’s lawsuit. But this is insufficient to bring United within the Opt-Out Order. Under the Opt-Out Order, United was required to show that it faces potential damages not from any violation of the TCPA, but *from its failure to comply with § 64.1200(a)(4)(iv)*. United failed to do this. As shown above, United failed to explain when, how or in what manner it obtained prior express permission from any fax recipient. Nor did United even remotely suggest how many violations of the regulation it committed, and therefore what liability it would sustain if a waiver were not received. United did not even establish that it was subject to the regulation at all, let alone would sustain potentially substantial damages for its violation.

V. United Did Not Plead or Attempt to Show That It Was “Confused” or Had “Misplaced Confidence”

A. It Is Improper for the Bureau to Excuse United 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.”⁷⁸ The Bureau lacked authority to dispense with this the requirement that United, and all other petitioner seekers, plead with “particularity.”⁷⁹ 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

⁷⁸ August 28 Order ¶ 19.

⁷⁹ *Rio Grande, supra*.

waiver.⁸⁰ 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, United never claims it was confused on *either* of these two grounds. Instead, United states without any explanation that it “did not believe” that § 64.1200(a)(4) (iv) “required opt-out notices” and that it “did not understand” that it needed to comply with the regulation.⁸¹ But United did not contend that its “belief” or “understanding” stemmed from the two sources of “confusion” or “misplaced confidence” identified in the 2014 Order (*i.e.*, the rulemaking for, and footnote 154 in, the 2006 Junk Fax Order).⁸² Thus, United failed to provide facts warranting a waiver and this alone required denial of its petition.

B. 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.”⁸³ But in the August 28 Order, the Bureau fails to mention this admonition. It completely disappears. In its place, the Bureau said that petitioners, including United, are “entitled to a presumption of

⁸⁰ 2014 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.”).

⁸¹ Without any explanation, these statements are mere conclusions that the Commission must disregard.

⁸² The proceedings following the 2006 Junk Fax Order were not discussed in any of the petitions covered by the Anda Commission Order, the Anda Commission Order, the petitions covered by the August 28 Order, or the August 28 Order. The record of those proceedings demonstrates that regulated parties immediately understood that the plain language of the 2006 rules required an opt-out notice on faxes sent with permission and that no one was “confused” by footnote 154 or the notice of rulemaking. *See, e.g., In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Petition for Reconsideration or Clarification of Levanthal Senter & Lerman PLLC (June 2, 2006), and public comments to this Petition for Reconsideration, including those by the American Society of Association Executives and the Named State Broadcasters Associations; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Nos. 02-278, 05-338, Comments of American Soc’y of Ass’n Executives (July 12, 2006); National Association Broadcasters Comments (July 13, 2006); Joint Comments of the Named State Broadcasters Associations (July 13, 2006).

Likewise, contemporaneous legal observers immediately understood the rule. *See, e.g., FCC Issues Regulations Implementing Junk Fax Prevention Act*, 60 Consumer Fin. L.Q. Rep. 401 (Fall 2006) (“The opt-out notice must be included in all facsimile advertisements, including those based on an established business relationship or in response to a recipient’s prior express invitation or permission.”). The courts also understood the plain language of the rule. *See, e.g., In re Sandusky Wellness Ctr., LLC*, 570 F. App’x 437 (6th Cir. 2014) (ordering district court to apply the rule); *Nack v. Walburg*, 715 F.3d 680, 687 (8th Cir. 2013) (citing “plain language” of the rule); *Turza*, 728 F.3d at 683 (applying plain language of the rule in affirming class certification and summary judgment).

In sum, there is no evidence in the record of anyone in particular ever actually being “confused” or misled by footnote 154 or the notice of rulemaking.

⁸³ Anda Commission Order ¶ 26.

confusion or misplaced confidence.”⁸⁴ 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 Tel. Co. v. FCC*, 743 F.3d 860, 864 (D.C. Cir. 2014); *Morris Commc’ns, 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., National Cable and Telecommuns. 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 & Telecommuns. 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, United 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. At most, it appears that United was simply ignorant of the law, which the Commission ruled in the Opt-Out Order is insufficient for a waiver from § 64.1200(a)(4)(iv).

Likewise, the shift by the Bureau in its standard is arbitrary and capricious.⁸⁵ 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. If for any reason the Commission finds United might have been “confused” or had “misplaced confidence,” Craftwood has a due process right to investigate and contest the issue. Craftwood has been unable to conduct discovery on this

⁸⁴ August 28 Order ¶ 15.

⁸⁵ Indeed, this conclusion is directly support by the *Northern Cellular* case cited by the Commission in the August 28 Order.

issue.⁸⁶ The Commission may hold such “proceedings as it may deem necessary” for such purposes and may “subpoena witnesses and require the production of evidence” as the Commission determines “will best serve the purpose of such proceedings.” *See* 47 C.F.R. § 1.1. In the alternative, Craftwood requests the Commission order that it will not rule on United’s Petition until Craftwood has completed discovery regarding United’s knowledge (or lack thereof) of the statute and the Commission’s regulations at the time it sent its junk faxes.

C. It Would Violate Public Policy to Grant United a Waiver When It Was Required in All Events to Provide an Opt-Out Notice on Its Faxes

Although unnecessary to deny United a waiver because United failed to carry its burden to demonstrate that it is “similarly situated,” it would be against the public interest to grant United 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.”⁸⁷ The former does not apply here (including because, as discussed above, United’s 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 and businesses like Craftwood in obtaining compensation for United’s violations of the regulation, by contrast, are manifest.

In addition, United was required to provide opt-out notices on all of its faxes. 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.”⁸⁸

⁸⁶ *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”).*

⁸⁷ Anda Commission Order ¶ 27.

⁸⁸ Anda Commission Order ¶ 2, n.2; *see also* ¶ 29.

For example, take any one of the faxes received by Craftwood and let's assume that it was sent to 1,000 recipients. Assume further that 900 recipients gave prior express permission (although United makes no showing that *any* recipient gave permission) and that the remaining 100 recipients had an established business relationship with United or had no relationship with United. Without question, the TCPA and the Anda Commission Order required United 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 United 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 United to provide opt-out notices entirely independent of § 64.1200(a)(4)(iv).⁸⁹

Finally, it must be noted that Craftwood raised this argument in opposition to United's petition but the argument was completely ignored by the Bureau in its August 28 Order.

///

///

///

///

///

///

///

⁸⁹ Accordingly, at most, a waiver can be given only if a petitioner could establish that *all* recipients of a fax had given prior express permission. As we have pointed out, United offers no evidence of any kind that *any* junk fax target gave permission, let alone all of them.

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 as innocent parties. Maintaining such a result would be a violation of public policy. The granting of the retroactive waiver to United must be reversed and its request for waiver rejected.

September 28, 2015


Aaron P. Shainis
Shainis & Peltzman, Chartered
1850 M Street NW, Suite 240
Washington, DC 20036
(202) 293-0011

Special Counsel to the Counsel for
Applicants

Respectfully submitted,


C. Darryl Cordero
Payne & Fears LLP
801 S. Figueroa Street, Suite 1150
Los Angeles, CA 90017
(213) 439-9911
One of its Attorneys for Craftwood II,
Inc., dba Bay Hardware, and Craftwood
Lumber Company

4829-1860-4329.2

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:

Lauri A. Mazzuchetti
KELLEY DRYE & WARREN LLP
One Jefferson Road
2nd Floor
Parsippany, NJ 07054

Steven A. Augustino
KELLEY DRYE & WARREN LLP
3050 K Street, NW
Suite 400
Washington, DC 20007-8451

Alison Kutler
Acting Chief
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554



Michael Nuell