

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

In the Matter of)	
)	CG Docket No. 02-278
)	
Petition for Waiver of ACT, Inc.)	CD Docket No. 05-338
)	
)	

**OPPOSITION OF ACT, INC.
TO THE APPLICATION FOR FULL COMMISSION REVIEW
FILED BY BAIS YAAKOV OF SPRING VALLEY *ET AL.* REGARDING
THE AUGUST 28, 2015 ORDER OF THE
CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU**

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INTRODUCTION

In an Order released August 28, 2015, the Commission's Consumer and Governmental Affairs Bureau (the "Bureau") granted "individual retroactive waivers" to 117 parties from the opt-out notice requirement found in Section 64.1200(a)(4)(iv) of the Commission's regulations. *See* August 28 Order at 12, 16-17. The Bureau concluded that each of the parties is similarly situated to parties to whom the Commission had granted such waivers in the October 30, 2014 *Anda Commission Order*. *Id.* at 12. ACT, Inc. ("ACT") is one of the entities to whom the Bureau granted a waiver in the August 28 Order. *See id.* at 16.

On September 25, 2015, an Application for Full Commission Review (the "Application") of the Bureau's August 28 Order was filed by Bais Yaakov of Spring Valley, Roger H. Kaye, and Roger H. Kaye MD PC (the "Applicants"). Claiming to have standing based on their status as plaintiffs in TCPA lawsuits filed against three of the parties "to whom the Bureau has just granted retroactive waivers," the Applicants are asking the Commission to reverse the Bureau "by denying all 117 waiver petitions." Application 2, 20. The Commission should reject that request.

The Applicants clearly do not have standing to contest waivers that the Bureau granted to parties with whom Applicants have no connection (*i.e.*, the 114 parties that are not defendants in the lawsuits referenced by the Applicants). Nor do any of the Applicants have standing to challenge the waiver granted to ACT. The only Applicant with any connection to ACT is Bais Yaakov of Spring Valley. *See* Application at 5-7. Notwithstanding that connection, Bais Yaakov is not "aggrieved" by the waiver granted to ACT, for reasons set forth below, and thus lacks standing to challenge the ACT waiver.

The Applicants' kitchen-sink substantive arguments also fail. The Commission has already held that it has the authority to retroactively waive its opt-out notice regulation, and that such waivers do not violate any separation of power principles (*see* Application at 9-10, and 11-13); 1 U.S.C. § 109 does not apply here (Application at 10-11); the Bureau's Order does not constitute a "legislative rule" (Application at 13-14) or "adjudicatory rule" (Application at 14-15) that has been impermissibly applied retroactively; the Bureau did not fail to articulate the standard it was applying in granting the waivers (Application at 16); and the Bureau did not fail to identify the factors that it applied in finding good cause for the waivers or considering the public interest (Application at 16-19).

PROCEDURAL HISTORY

On November 12, 2014, ACT filed a petition requesting a retroactive waiver from Section 64.1200(a)(4)(iv) of the Commission's regulations. ACT filed this request in light of the Commission's *Anda Order*, which granted waivers from Section 64.1200(a)(4)(iv) to approximately 25 petitioners and stated that "[o]ther, similarly situated entities likewise may request retroactive waivers...." October 30 Order at 2 n.4, 11-15.

In December 2014, comments were submitted on ACT's petition by Bais Yaakov of Spring Valley.¹ Bais Yaakov opposed ACT's waiver request – just as it opposed waiver requests that the Commission granted in the October 30 Order.²

¹ *See* Bais Yaakov of Spring Valley's Comments on ACT, Inc. Petition Seeking 'Retroactive Waiver' of the Commission's Rule Requiring Opt-Out Notices (Dec. 12, 2014). ("Bais Yaakov Comments"). On December 15, 2014, three days after the due date for comments, Bais Yaakov filed a set of "Corrected Comments." *See* Bais Yaakov of Spring Valley's, Roger H. Kaye and Roger H. Kaye, MD PC's Corrected Comments on ACT, Inc.'s, Amicus Mediation and Arbitration Group, Inc.'s and Hillary Earle's Petitions Seeking 'Retroactive Waiver' of the Commission's Rule Requiring Opt-Out Notices on Fax Advertisements Sent with Permission (Dec. 15, 2014).

² *See* Comments Submitted by Bellin & Associates on Feb. 13, 2014 ("Bellin 2/13/14 Comments"); Comments Submitted by Bellin & Associates on April 11, 2014 ("Bellin 4/11/14 Comments"); Notification of Ex Parte Presentation by Bellin & Associates dated April 11, 2014 ("Bellin 4/11/14 Ex Parte Notification"); Notification of Ex Parte Presentations by Bellin & Associates dated July 23, 2014 ("Bellin 7/23/14 Ex Parte Notification").

Bais Yaakov is a serial TCPA plaintiff, and ACT is one of the entities that Bais Yaakov has sued. *See* Application at 5-7. Based upon its receipt of three unsolicited facsimiles from ACT,³ Bais Yaakov filed a putative class action lawsuit against ACT in 2012 that seeks millions of dollars in statutory damages.⁴ The lawsuit remains pending.

In opposing ACT's waiver petition, Bais Yaakov argued (1) that the Commission does not have the authority to grant retroactive waivers in this context (because doing so would purportedly "absolve defendants under a private right of action established by Congress"); and (2) even if the Commission has such authority, it should not grant a waiver to ACT because ACT has not satisfied the "heavy burden" to justify such a waiver. Bais Yaakov Comments at 2.

The same arguments were rejected by the Commission, at least implicitly, in granting retroactive waivers to the petitioners who were the subject of the *Anda Commission Order*. Indeed, in substantial part, Bais Yaakov's arguments in opposition to ACT's waiver petition had been cut and pasted from comments that Bais Yaakov submitted in February and April 2014 in response to waiver petitions then pending before the Commission. *Compare* Bais Yaakov 12/12/14 Comments at 6-12, *with* Bellin 2/13/14 Comments at 9, 32-34, Bellin 4/11/14 Comments at 2-4, *and* Bellin 7/23/14 Ex Parte Notification at 2. The Commission did not find those arguments persuasive in deciding the waiver petitions addressed in the *Anda Order*.

Nor did the Bureau in addressing the waiver petitions of ACT and the other entities whose petitions are addressed in its Order. *See* August 30 Order at 12-13, ¶ 13. The Bureau concluded that waivers are warranted for ACT and each of the other 116 entities covered by its

³ ACT is a non-profit entity that develops and administers the ACT college admission test. The facsimiles sent to Bais Yaakov related to the ACT test. Two of the facsimiles encouraged school staff to remind students about upcoming ACT test registration deadlines, and the third invited Bais Yaakov to apply to serve as an ACT testing site. They did not market goods or services to Bais Yaakov.

⁴ *See Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 4:12-CV-40088-TSH (D. Mass.).

Order for the same reasons that led the Commission to unanimously grant waivers to all 25 petitioners addressed in its *Anda Order*. The Bureau acted properly, and its August 28 Order should be affirmed.

I. BAIS YAAKOV DOES NOT HAVE STANDING TO CHALLENGE THE ACT WAIVER BECAUSE IT IS NOT AGGRIEVED BY THAT WAIVER

In order to have standing to challenge the waiver granted to ACT, Bais Yaakov must show that it is “aggrieved” by the Bureau’s action. 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(a); *see also* Application at 2 (acknowledging standing requirement). “To show that it is ‘aggrieved’ by an action, an applicant for review must demonstrate a direct causal link between the challenged action and the alleged injury to the applicant, and show that the injury would be prevented or redressed by the relief requested.” *In the Matter of Chapin Enters., LLC*, 29 FCC Rcd 4250, 4252, 2014 FCC LEXIS 1350, *8 (2014). The Applicants have not met that burden here, nor can they do so.

The Applicants assert that they have standing to challenge the ACT waiver because Bais Yaakov has a lawsuit pending in which it alleges that ACT violated the TCPA by sending faxes to Bais Yaakov and other putative class members. Application at 2-3. The faxes that are the subject of Bais Yaakov’s putative class action lawsuit include faxes sent with the permission or consent of the recipients, and faxes sent without such permission. *See id.* at 6 (stating that Bais Yaakov has alleged in its lawsuit, “among other things,” that ACT sent “thousands of permission-based” faxes). In Bais Yaakov’s case, however, it is undisputed that the faxes were sent *without* Bais Yaakov’s permission. *See* Complaint, *Bais Yaakov of Spring Valley v. ACT*, *supra* n.4, at ¶ 12 (asserting that the faxes sent by ACT to Bais Yaakov were “wholly unsolicited in that they were sent ... without [Bais Yaakov’s] express invitation or permission”). That means that Bais Yaakov will *not* be affected by the waiver granted to ACT by the Bureau. The waiver

applies only with respect to faxes sent “with [a] recipient’s prior express consent or permission,” August 28 Order, and thus can affect only entities that received permission-based faxes from ACT. Bais Yaakov is not such an entity and thus cannot be “aggrieved” by the waiver. It therefore lacks standing to seek review of that waiver.

The fact that Bais Yaakov participated in the proceedings leading up to the August 28 Order does not change the standing analysis. Informal participation in an FCC proceeding does not automatically confer standing to challenge a Commission or Bureau action. *See In the Matter of Application of Regionet Wireless License, LLC*, 17 FCC Rcd 21269, 21271 n.23, 2002 FCC LEXIS 5357, *8 n.23 (2002) (citation omitted), *aff’d*, *Havens v. FCC*, 424 Fed. Appx. 3 (D.C. Cir. 2011). Bais Yaakov must still show that it will be “aggrieved” by the challenged action if that action is allowed to stand, and it has not made and cannot make that showing.

II. THE APPLICANTS’ SUBSTANTIVE ARGUMENTS FAIL IN ALL EVENTS

A. Standard of Review

“The Commission reviews the Bureau’s orders to determine whether: the action taken conflicts with statute, regulation, case precedent, or established policy; a previously unresolved question of law or policy is involved; the application of existing precedent should be overturned; an erroneous finding as to an important or material question of fact has occurred; or there has been prejudicial error.” *In the Matter of Marcus Cable Associates, LLC*, 25 FCC Rcd 4369, 4372, 2010 FCC LEXIS 2545, *10 (2010) (citing 47 C.F.R. § 1.115(b)(2)).

The Applicants argue that that the waivers granted by the Bureau should be reversed on virtually all of these grounds. *See* Application at 2. They are wrong. The Bureau conscientiously considered the petitions that are the subject of its Order, as well as the numerous comments submitted in response to those petitions. *See* August 28 Order at 1-5, 10, and 18-22.

Applying the same factual and legal analysis that the Commission applied in the *Anda Order*, the Bureau correctly concluded that each of the 117 petitioners addressed in its Order is similarly situated to the parties granted waivers by the full Commission in the *Anda Order* and is therefore entitled to a partial retroactive waiver. *See id.* at 10-15.

B. The Commission Has The Authority To Retroactively Waive Its Opt-Out Notice Regulation

The Applicants argue that, for various reasons, the Commission does not have the authority to retroactively waive the requirements of Section 64.1200(a)(4)(iv) with respect to faxes sent with a recipient’s prior express invitation or permission, and that the Bureau – by extension – likewise lacks such authority. *See* Application at 9-10, 11-13, and 13-15. These arguments were properly rejected by the Commission – and by the Bureau, *see* August 28 Order at 12-13.

The Commission clearly has the authority to grant waivers from its regulations “for good cause shown.” 47 C.F.R. § 1.3. Good cause exists where the particular facts presented make imposition of a rule “inconsistent with the public interest.” *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). The Commission may grant such waivers ““at any time,”” provided it does not act out of ““unbridled discretion or whim”” and “clearly state[s] in the record its reasons for granting the waiver.” *Keller Communications, Inc. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) (citations omitted). “The Commission is charged with administration in the ‘public interest,’” and the waiver mechanism provides an important “safety valve” when the public interest would not be served by applying a rule in an individual case. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Courts “afford ‘substantial judicial deference’ to the FCC’s judgments on the public interest.” *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 412-13 (D.C. Cir. 2011). They also

“afford the FCC deference in interpreting its own regulations.” *Id.* at 412. Here, the Commission has already determined that it has the regulatory authority to grant retroactive waivers from Section 64.1200(a)(4)(iv), and that it is in the public interest to do so in the context presented here. *See* October 30 Order at 8 (“[W]e find good cause exists to grant individual retroactive waivers of section 64.1200(a)(4)(iv)...”), *and* 11-13 (“[W]e find that granting a retroactive waiver would serve the public interest.”). Those determinations were correct.

It is equally clear that the Commission may delegate its authority to grant waivers to the Bureau. *See* 47 U.S.C. § 155(c). Applicants do not suggest otherwise. And any order or decision “made or taken pursuant to any such delegation ... shall have the same force and effect ... as orders, decisions ... or other actions of the Commission,” unless they are set aside by the Commission on review. *Id.* at § 155(c)(3). No basis has been shown for setting aside the Bureau’s decisions here.

Bais Yaakov argues that August 28 Order “conflicts with the TCPA, the regulations thereunder, and the case law construing it,” Application at 10; violates “separation of powers principles,” *id.* at 11-13; and has impermissibly been given retroactive effect, whether viewed as a “legislative rule” or an “adjudicatory rule,” *id.* at 13-15.⁵ But Bais Yaakov made the same basic arguments in opposing the waiver petitions granted by the Commission in October 2014. *See* Bellin 4/11/14 Comments at 2-3. Those arguments were properly rejected by the Commission, and more recently by the Bureau in granting waivers to ACT and other petitioners.

⁵ Applicants assert that, “[a]s a matter of administrative law,” the Bureau’s August 28 Order “is the equivalent of a ‘legislative rule’ that repeals an existing rule, notwithstanding the Bureau’s assertion that it had considered each of the 117 waiver requests individually.” Application at 13. They cite no evidence, however, to support the notion that the Bureau was not being truthful when it stated that it individually considered each of the petitions. *See, e.g.,* August 28 Order at 12 ¶ 11, 13-14 ¶¶ 15, 16. More to the point, it is facially untenable to characterize the Bureau’s Order as tantamount to a repeal of the opt-out notice regulation. The Bureau’s Order provides relief that is temporary in nature to a limited number of parties. There was no repeal of the opt-out notice regulation. The fact that it chose to deal with multiple pending waiver petitions in a single order does not somehow convert its actions into legislative rulemaking.

First, neither the Commission nor the Bureau violates the TCPA when it grants a waiver from a regulation that might serve as a predicate for a statutory cause of action, any more than the Commission or the Bureau violate the TCPA by amending such a regulation or by not enacting the regulation in the first place. Rulemaking authority resides in the Commission. That authority includes the express regulatory authority to grant waivers from Commission rules. Therefore, while the Commission cannot waive a violation of the statute, it clearly retains the discretion to waive “violations of FCC rules.” *Hill v. FCC*, 496 Fed. Appx. 396, 398 (5th Cir. 2012); *Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

Second, and for the same basic reasons, the Commission does not violate the Separation of Powers between Congress and the Executive Branch by exercising longstanding *regulatory* authority to grant waivers from its own rules. In responding to ACT’s waiver petition, Bais Yaakov conceded that “the Commission appears to have rejected” Bais Yaakov’s Separation of Powers argument in its Order of October 30. Bais Yaakov Comments at 7 n.10 (citing October 30 Order at 11, ¶ 21).

Third, granting a waiver does not constitute impermissible “retroactive regulation.” *See* Application at 13-15 (citing, inter alia, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and *Retail, Wholesale & Dep’t Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)). The present situation bears no resemblance to the situations in the *Bowen* or *Retail, Wholesale* cases.

In *Bowen*, the agency adopted cost-reimbursement rules for healthcare providers under the Medicare Act that were retroactive. The rules at issue there would have resulted in retroactive financial consequences for healthcare providers, relative to cost reimbursements by the federal government. In *Retail, Wholesale*, the court considered whether the NLRB had the

authority to apply a new rule adopted in another adjudicatory proceeding to the employer that was before the court in *Retail, Wholesale*, where doing so would subject the employer to remedial actions that could not have been imposed at the time the challenged conduct occurred. *See* 466 F.2d at 387-93. As in *Bowen*, new rules were being applied retroactively.

That is not the situation here, where the agency is granting waivers from the requirements of a regulation, for a limited time period, pursuant to its unquestioned authority to grant such waivers. No regulated party is being subjected to new adverse consequences for actions that took place before the agency issued its ruling, and no legally protected rights are affected by such waivers. While *Bais Yaakov* may have anticipated, in connection with its various lawsuits, that it could point to Section 64.1200(a)(4)(iv) to support an argument that faxes sent with a recipient's permission violate the TCPA, "an agency order that 'alters the future effect, not the past legal consequences,' of an action, or that 'upsets expectations based on prior law,' is not retroactive." *Mobile Relay Associates v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (citing *Bowen* and other cases).

The Commission has granted retroactive waiver in other contexts, *see, e.g., In re United Tel. Co.*, 25 FCC Recd 1648, 1650 nn. 13 & 14 (2010), and it has the authority to do so here – as did the Bureau pursuant to its delegated authority.

C. The August 28 Order Does Not Conflict With 1 U.S.C. § 109

The Applicants also argue that the Bureau's August 28 Order "conflicts with 1 U.S.C. § 109," which, according to the Applicants, "provides in pertinent part that the repeal of any statute does not retroactively extinguish liabilities previously accrued under the statute unless the statute expressly, or by plain import, provides for such extinguishment." Application at 10-11. Again, they are wrong.

As an initial matter, the Applicants made no such legal argument in their response to ACT's waiver petition and thus did not give the Bureau an opportunity to consider that argument in evaluating ACT's petition.⁶ “[T]he Commission’s rules do not permit the Commission to grant an application for review ‘if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.’” *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting 47 C.F.R. § 1.115(c)).

To overcome this problem, Bais Yaakov might contend that the Bureau had an adequate opportunity to pass on the question of law presented by the Applicants’ 1 U.S.C. § 109 argument because Bais Yaakov referenced § 109 in a response that it filed to a *different* waiver petition.⁷ While ACT would disagree with any such contention, the § 109 argument is not viable in any event. Section 109 provides, in relevant part, that the “*repeal* of any *statute* shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such *statute*, unless the *repealing Act* shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining an proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.” 1 U.S.C. § 109 (emphasis added). Here, of course, the challenged action involves a temporary waiver from a regulation, made pursuant to the agency’s express authority to grant such waivers. No statute has been repealed, and no “repealing Act” is involved.

⁶ See Bais Yaakov of Spring Valley’s, Roger H. Kaye and Roger H. Kaye, MD PC’s Corrected Comments on ACT, Inc.’s, Amicus Mediation and Arbitration Group, Inc.’s and Hillary Earle’s Petitions Seeking ‘Retroactive Waiver’ of the Commission’s Rule Requiring Opt-Out Notices on Fax Advertisements Sent with Permission (Dec. 15, 2014).

⁷ See Bais Yaakov of Spring Valley’s Comments on Houghton Mifflin Harcourt Publishers, Inc.s, Houghton Mifflin Harcourt Publishing Company’s, and Laurel Kaczor’s Petition Seeking ‘Retroactive Waiver’ of the Commission’s Rule Requiring Opt-Out Notices on Fax Advertisements Sent with Permission at 4-5 (Feb. 12, 2015).

Section 109 does not apply in the present context for the further reason that the regulation at issue is not intended to implement a criminal statute. Section 109 is a “general savings clause.” The purpose of such clauses is “to abolish the common-law presumption that the repeal of a *criminal statute* result[s] in the abatement of ‘all prosecutions which had not reached final disposition in the highest court authorized to review them.’” *Warden v. Marrero*, 417 U.S. 653, 660 (1974) (emphasis added, citation omitted). Section 109’s “use of the words ‘penalty,’ ‘liability,’ and ‘forfeiture’ require[s] the conclusion that the clause cover[s] criminal statutes.” *Id.* at 662 (citations omitted). The TCPA is not a criminal statute.

D. The Bureau Properly Found “Good Cause” For The Waivers

The Applicants’ final argument is that, even if the Commission (or, by extension, the Bureau) has the authority to grant waivers in this context, the Bureau acted improperly in doing so here because it failed to “articulate a relevant standard” for determining when the Bureau will grant a waiver; failed to make “individualized findings of ‘special circumstances’” for each petitioner; and failed to “cite any evidence” that the waivers are “in the public interest.” Application at 16-18. This argument also fails.

The Bureau articulated the standard it was applying in reviewing the waiver petitions addressed in its Order. It applied the same standard that the Commission applied in the *Anda Commission Order*: the waivers were warranted because “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,” and that ambiguous regulatory environment provided good cause “to grant limited retroactive waivers.” *See* August 28 Order at 7, 13.

As the Bureau correctly noted, “the Commission has established that petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence.” August 28 Order at 13, ¶ 15. Contrary to what Applicants have argued (Application at 17-18), the Commission did not “make actual, specific claims of confusion a requirement to obtain a waiver,” nor did it require petitioners “to plead specific, detailed grounds for individual confusion....” *Id.* at 15, ¶ 19.

The Commission’s approach in this regard reflects an entirely reasonable analysis of the public interest. Applying Section 64.1200(a)(4)(iv) to faxes sent by ACT or other petitioners several years prior to the October 30 Order does not serve the public interest or the TCPA’s statutory purposes, because it subjects ACT and those petitioners to claims for significant statutory damages for sending facsimiles that are not covered by the applicable provision of the TCPA (which applies by its express terms to “unsolicited” faxes). See Bellin 2/13/14 Comments at 24 (acknowledging that the regulatory opt-out notice requirement for solicited faxes “arguably goes beyond the ‘unsolicited fax advertisements’ described in some provisions of the TCPA”). Nor does it serve the Commission’s goal of “preventing unwanted faxes.” Faxes sent with a recipient’s permission are by definition not unwanted. And if a recipient decides it does not want to receive additional faxes, it knows who the sender is and can ask the sender not to send other faxes.

Nor is the public interest served by the misallocation of resources that results from TCPA class action lawsuits. Here, for example, ACT has devoted significant resources to the defense of Bais Yaakov’s lawsuit that would otherwise have gone to the pursuit of ACT’s non-profit mission.

The public interest is instead served by discouraging opportunistic litigation that does nothing to further the purpose of the statute. Bais Yaakov, for example, has acknowledged that it suffered no actual damages as a result of receiving the faxes from ACT, beyond the toner and paper needed to print the three faxes. It is nevertheless seeking millions of dollars in its lawsuit against ACT, just as it is doing in other TCPA lawsuits that it has brought. The public interest is not served by permitting such lawsuits, at least not when they are based, in whole or in part, on faxes sent with a recipient's permission.

The arguments made by the Applicants regarding whether "good cause" exists for the waivers granted by the Bureau and whether the waivers are consistent with the public interest (*see* Application at 16-19) are the same basic arguments that Bais Yaakov made in opposing the 25 waiver petitions that the Commission granted in its October 30 Order. In two sets of comments and multiple *ex parte* meetings with Commission representatives, Bais Yaakov's lawyers argued against any waivers being granted by the Commission. *See* Bellin 2/13/14 Comments at 33-34 ("None of the petitioners have provided concrete evidentiary support for a waiver, much less articulated a public interest that supports granting any waiver of application of the Opt Out Regulation..."); Bellin 4/11/14 Comments at 3-4; Bellin 4/11/14 Ex Parte Notification; Bellin 7/23/14 Ex Parte Notification. These arguments were not deemed persuasive by the Commission in resolving those petitions, and they are not persuasive here. The Bureau correctly concluded that good cause existed for granting each of the waivers provided for in the August 28 Order.

In granting waivers in the October 30 Order, the Commission did not explore the financial situation of each petitioner or require evidence on that subject. While a handful of petitioners filed declarations or affidavits in support of their petitions, ACT is unaware of any

petitioner that submitted “concrete evidence” regarding its financial condition, or any information regarding insurance coverage. Several petitioners noted, however, that they were the subject of putative class actions seeking millions of dollars in damages, and the Commission referenced this in its Order. *See* October 30 Order at 14 n.98. ACT likewise has been sued for millions of dollars in damages in a putative class action brought by Bais Yaakov, and it provided the docket citation in its Petition. *See* ACT Petition at 2-3.

Similarly, in granting waivers in the October 30 Order, the Commission did not require evidence from each petitioner that it was “actually confused” by “a footnote contained in the Junk Fax Order ... regarding the applicability of [the opt-out notice] requirement to faxes sent to those recipients who provided prior express permission,” or because the Commission’s rulemaking notice “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” *See* October 30 Order at 8, 12. Nor did petitioners provide such evidence. Counsel for the petitioners sometimes noted that the Commission’s rulemaking history was confusing regarding the need for an opt-out notice on permission-based faxes, but evidence was not submitted showing that the petitioners themselves were confused, at the time they sent the faxes in question, about the need for an opt-out notice.⁸

⁸ *See, e.g.*, Petition of Crown Mortgage at 17-20 (Feb 21, 2014); Reply Comments of All Granite & Marble Corp. at 7-8 (Feb. 21, 2014); Reply Comments of Forest Pharmaceuticals, Gilead Sciences, and Purdue Pharma at 11-13 (Feb. 21, 2014); Petition of Magna Chek, Inc. at 10–12 (March 28, 2014); Petition of Masimo Corporation at 10–12 (April 1, 2014); Petition of S&S Firestone, Inc., d/b/a S&S Tire at 10–11 (May 7, 2014); Petition of Cannon & Associates LLC d/b/a Polaris Group at 12–13 (May 15, 2014); Petition of American CareSource Holdings, Inc. at 2, 8 (June 30, 2014); Petition of Stericycle, Inc. at 16–18 (June 6, 2014); Petition of UnitedHealth Group Incorporated at 2, 9-10 (July 11, 2014); Petition of Merck & Company, Inc. at 16-17 (July 11, 2014); Petition of CARFAX, Inc. at 11-12 (July 11, 2014); Petition of MedLearning, Inc. and Medica Inc. at 13-14 (July 16, 2014); Petition of Unique Vacations, Inc. at 9-11 (Aug. 20, 2014), and Reply Comments of Unique Vacations, Inc. at 5-8 (Sept. 26, 2014); Petition of Power Liens, LLC at 13-15 (Sept. 18, 2014).

Nor was any such evidence necessary for a waiver to be granted. As the Commission correctly acknowledged, the “inconsistency in the *Junk Fax Order*” in combination with the “lack of explicit notice” in the notice of the proposed rule resulted in a regulatory environment that was, at a minimum, “confusing.” October 30 Order at 13. It is the state of the regulatory environment that the Commission reasonably found to be a “special circumstance” that is appropriately considered in evaluating waiver requests, not whether any given petitioner can prove that it was “confused” when it sent its faxes about the need for an opt-out notice because of the rulemaking history of the regulation.

The Commission further noted in its October 30 Order that there was “nothing in the record ... demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.” *Id.* at 13. The same is true here. Nothing in the record suggests that ACT knew that it was required to include an opt-out notice on permission-based faxes under the agency’s regulation “but nonetheless failed to do so.” Bais Yaakov did not suggest otherwise in responding to ACT’s petition, *see* Bais Yaakov Comments at 9–10, nor do the Applicants here.

Finally, the Commission noted in its Order that some businesses might be subjected to “significant damage awards under the TCPA’s private right of action” for not complying with the rule, and that this risk, while not “by itself” an “adequate ground for waiver,” was appropriately considered by the Commission as one factor in evaluating the public interest. October 30 Order at 14. The Commission reasonably concluded that allowing such damage awards for sending facsimiles that were not “unsolicited” is not consistent with the public interest. Again, the same consideration applies with respect to ACT’s waiver request.

All of the factors referenced above provided “special circumstances” that made “enforcing the rule unjust or inequitable” relative to the petitioners covered by the Commission’s October 30 Order and the petitioners covered by the Bureau’s August 28 Order, thereby justifying waivers for each of these petitioners. The Commission did not act haphazardly or out of whim, and it clearly stated why it was granting the waivers in the *Anda Order*. The same is true of the Bureau. The waivers granted by the Bureau reflected a proper balancing of “legitimate business and consumer interests” relative to the sending of solicited/permission-based faxes, *see* October 30 Order at 14, and they should be affirmed by the full Commission.

CONCLUSION

The Applicants have provided no basis for reversing the waiver granted to ACT (or to any other petitioner) by the Bureau. The considerations that supported the waivers granted in the October 30 Order apply equally to ACT. The Bureau properly concluded that ACT is a “similarly situated party,” equally deserving of a limited retroactive waiver from 47 C.F.R. § 64.1200(a)(4)(iv) for all facsimiles sent subsequent to the regulation’s effective date and prior to six months from the release date of the October 30 Order.

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Respectfully submitted,

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