

**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)	
)	
Petitions for Declaratory Ruling and Retroactive Waiver of 47 Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with The Recipient's Prior Express Permission)	

**OPPOSITION OF AMICUS MEDIATION & ARBITRATION GROUP, INC.
AND HILLARY EARLE TO APPLICATION OF ROGER KAYE, ET AL.
FOR FULL COMMISSION REVIEW**

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I. INTRODUCTION

Amicus Mediation & Arbitration Group, Inc. and Hillary Earle (collectively "Amicus") submitted a Petition for Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv) with respect to faxes sent with prior express permission of the recipient, pursuant to 47 C.F.R. § 1.3, as a "similarly situated party" to those Petitioners who were granted waiver by the Federal Communications Commission's ("Commission" or "FCC") Order dated October 20, 2014. *See* Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (Oct. 30, 2014) ("FCC 14-164" or "Opt-Out Order"), ¶ 1.

By Order dated August 28, 2015, the Commission's Consumer and Governmental Affairs Bureau ("Bureau") granted Amicus an individual retroactive waiver, together with granting the individual retroactive waivers to more than 100 other petitioners. Roger H. Kaye and Roger H. Kaye, MD PC (collectively "Kaye Applicants") have filed an Application for Full Commission Review of the Bureau's determination. That application, however, is supported only by arguments which have previously been rejected by the Commission, and the Kaye Applicants cannot satisfy any of the requirements necessary to permit review by the full Commission. For all the reasons that follow, Kaye's Application should be denied in its entirety.

II. PROCEDURAL HISTORY

On October 30, 2014, the Commission entered the Opt-Out Order which granted waivers from 47 C.F.R. Section 64.1200(a)(4)(iv) to approximately 25 petitioners.¹ In that Order, the Commission invited "similarly situated entities" to "likewise ... request retroactive waivers..." See Opt-Out Order at p. 2, n. 4, 11-15.²

Pursuant to 47 C.F.R. 1.3, on or about November 13, 2014, Amicus filed a petition requesting a retroactive waiver from Section 64.1200(a)(4)(iv), with respect to faxes transmitted by or on behalf of Amicus. Hillary Earle ("Earle") established and incorporated Amicus in 2008 as a family business. Besides Earle, the only other corporate officer is her husband, and Amicus has no regular employees. Amicus never owned a fax machine, and as a small business trying to contain costs, Amicus began using "Rapid Fax" in 2008 to send faxes to its customers. Rapid Fax allows users to send faxes through email or the Rapid Fax website without the need for the sender to use its own fax machine. All of Amicus' fax numbers are maintained in Amicus' Rapid Fax directory, and, when utilizing Rapid Fax, Amicus would manually initiate each fax by selecting the name of the recipient from its directory.

Besides sending faxes relating to its mediation and arbitration services, Amicus used Rapid Fax to fax information regarding free Continuing Legal Education ("CLE") training for attorneys, to notify clients of mediator training, and for general business purposes, such as sending contracts

¹ The Kaye Applicants opposed the initial waiver requests considered by the Commission in October 2014. See Comments submitted by Bellin & Associates LLC on February 13, 2014; on April 11, 2014; Notification of Ex Parte Presentation on April 11, 2014; and Notification of Ex Parte Presentation on July 23, 2014.

² The Kaye Applicants have appealed the Opt-Out Order to the U.S. Court of Appeals for the District of Columbia Circuit. See Case No. 14-1270, Docket Entries BL-6, BL-7, and BL-47.

to clients. Thus, the majority of Amicus' fax usage was to communicate with and send relevant business documents to current clients.

As business progressed and Amicus continued to schedule mediations, Amicus would send faxes to people containing information regarding upcoming mediation sessions. Many of these people had requested this information and provided their fax number to Amicus. Some specified that they wished to receive faxes, with others simply asking for a list of the mediation days or to be "kept in the loop." In 2013, the Kaye Applicants brought a class action lawsuit against Amicus and Earle, alleging violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), for the alleged transmission of "well over 5000" "unsolicited and/or solicited" facsimile advertisements that did not contain proper opt out notices.³ While Kaye interpreted 47 C.F.R. § 64.1200(a)(4)(iv) to mean that the opt-out notice requirements pertained equally to solicited and unsolicited faxes, Amicus reasonably believed that faxes sent with the prior express permission of the recipient were not required to comply with that provision.⁴

Although Amicus did not interpret 47 C.F.R. § 64.1200(a)(4)(iv) to require that such faxes include opt-out notices, such notice was included on each of these informational faxes as a courtesy to its customers. The opt-out notice, while allegedly technically deficient, provided customers with an effective way to discontinue their receipt of such faxes. *See* Exhibit "A" to Kaye's Complaint. Amicus is now faced with a class action lawsuit and is allegedly potentially liable for millions of dollars in damages.

³ *See* Amicus' Petition for Waiver, Exhibit "A."

⁴ Notably, Kaye is a plaintiff in at least six other TCPA class action lawsuits in Connecticut federal court alone. *See, Kaye v. EBIO-Metronics, LLC*, 3:13-cv-00349 (D. Conn.); *Kaye v. Merck & Co., Inc.*, No. 3:10-cv-1546 (D. Conn.); *Kaye v. iHire LLC*, No. 3:10-cv-219 (D. Conn.); *Kaye v. SDI Health LLC*, No. 3:10-cv-1 (D. Conn.); *Kaye v. WebMD LLC*, Not. 3:09-cv-1948 (D. Conn.); *Kaye v. Aesthera Corp.*, No. 3:09-cv-1947 (D. Conn.).

Due to widespread confusion regarding this issue, the FCC considered the issue and found that "parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether [the Commission's] requirement for out-out notices applied to them." FCC 14-164, ¶ 1. Although ultimately deciding that the opt-out requirements pertain equally to solicited and unsolicited faxes, the Commission pointed out that an inconsistent footnote in a previous order, as well as notice procedures that did not make clear that the opt-out notices would apply to solicited faxes, constituted good cause to issue retroactive waivers to the petitioners of the opt-out requirements for solicited faxes. FCC 14-164, ¶¶ 22-28. The FCC stated further that "[o]ther, similarly situated parties, may also seek waivers such as those granted in this Order." FCC 14-164, ¶¶ 2, 30.

Following the filing of Amicus' petition, an Order dated December 8, 2014 was entered in Kaye's private TCPA class action against Amicus administratively closing the case pending, among other things, the outcome of the petition.⁵ On December 12, 2014, the Kaye Applicants submitted comments in opposition to Amicus' petition.⁶

On August 28, 2015, the Bureau granted "individual retroactive waivers" to 117 parties from the opt-out notice requirement found in Section 64.1200(a)(4)(iv). *See* August 28, 2015 Order at pp. 12, 16-17. Amicus is one of the parties to whom the Bureau granted a waiver. *Id.* at p. 16. On September 28, 2015, the Kaye Applicants filed an Application for Full Commission

⁵ *See Roger H. Kaye, et al. v. Amicus Mediation and Arbitration Group, Inc., et al.*, Case No. 3:13-CV-347-JCH (D. Conn.), D.I. 123.

⁶ *See* Bais Yaakov of Spring Valley's Comments on ACT, Inc. Petition Seeking "Retroactive Waiver" of the Commission's Rule Requiring Opt-Out Notices on Fax Advertisements Sent with Permission, CG Docket Nos. 02-278, 05-338 (Dec. 12, 2014) ("Kaye's Comments"). A "corrected" version of these Comments was re-filed on December 15, 2014, on behalf of Roger H. Kaye, Roger H. Kaye, MD, PC, and Yaakov, after the due date for Comments. All cites to Kaye's Comments are to the original filed Comments.

Review of the August 28, 2015 Order granting Amicus' Petition for Waiver. The Bureau acted properly, and its August 28 Order should be affirmed.

III. ARGUMENT

A. **The Standard of Review**

47 C.F.R. § 1.115(a) provides that, "Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission." Subsection (b)(2) of the Rule specifies the factors to be considered when determining whether full Commission review is warranted:

(2) The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error. [47 C.F.R. § 1.115(b)(2).]

Kaye cannot satisfy any of these prerequisites for obtaining review, and the application should therefore be denied.⁷ Moreover, the Bureau's careful analysis of Amicus' petition, following the guidance provided by the Commission in the Opt-Out Order, mandates rejection of the request for review. "Vague statements asserting error are not enough to justify review[.]" *In the Matter of KGAN Licensee, LLC*, 30 FCC Rcd. 7664, 7665 (2015). The FCC's rules "do not allow for a

⁷ We also incorporate by reference and join in the arguments set forth in the Opposition of ACT, Inc. to the Application for Review of Bais Yaakov of Spring Valley, et al., filed on October 9, 2015. These arguments apply with equal force to the submission of the Kaye Applicants here.

'kitchen sink' approach to an application for review," rather, "the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review." *Application of Red Hot Radio, Inc.*, 19 FCC Rcd. 6737, 6745 fn. 63 (2004) (citing 47 C.F.R. § 1.115(b)(2)(i)).

B. Kaye Does Not Have Standing to Challenge the Amicus Waiver Because He Is Not "Aggrieved" By That Waiver

Only parties which are "aggrieved" by the Bureau's action may seek review by the full Commission. 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(a). "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 Urban Radio I, LLC*, 29 FCC Rcd. 6389, 6390 (2014). The Kaye Applicants cannot meet this burden.

The Kaye Applicants believe that they have standing because on March 14, 2013, they filed a "private TCPA class action in the United States District Court for the District of Connecticut" against Amicus. *See* Application at 7. The Applicants assert that "the two Kaye plaintiffs have alleged, among other things, that from March 14, 2009 through March 9, 2013" Amicus "sent thousands of permission-based fax advertisements to the plaintiffs and others without proper opt-out notices in violation of the Opt-Out Regulation, and hence the TCPA." *Id.*

In the District Court Complaint filed by the Kaye Applicants, however, they allege:

10. On or about October 17, 2010, January 14, 2011, January 22, 2011, January 30, 2011, June 6, 2011, and June 25, 2011, Defendants, jointly and severally, without Plaintiffs' express invitation or permission, arranged for and/or caused a telephone facsimile machine, computer, or other device to send unsolicited at least six fax advertisements (the "Fax Advertisements") advertising the commercial availability or quality of any property, goods, or services, to Plaintiffs' fax machine located at 30 Stevens Street, Norwalk, Connecticut 06850. [*See* Amicus' Petition for Waiver, Exhibit "A," p. 3, ¶ 10.]

The Kaye Applicants further allege that:

11. Plaintiffs did not provide Defendants with express invitation or permission to send any of the Fax Advertisements. The fax advertisements were wholly unsolicited. [Id., ¶11.]

The Kaye Applicants, therefore, specifically allege that they were sent *unsolicited* fax advertisements by Amicus. They cannot, then, be affected by the waiver granted to Amicus which applies only to situations where "the fax sender had obtained the prior express invitation or permission of the recipient to receive the fax advertisement." *See* Bureau's August 28, 2015 Order at p. 15, ¶ 21. The waiver "does not affect the prohibition against sending unsolicited fax ads, which has remained in effect since its original effective date." *Id.* The Application must therefore be rejected as the Kaye Applicants cannot "demonstrate a direct causal link between the challenged action and the alleged injury ... and show that the injury would be prevented or redressed by the relief requested." *Urban Radio I*, 29 FCC Rcd. at 6390.

C. The Commission Has the Authority to Grant the Requested Waiver

The Kaye Applicants first argue that the FCC does not have "the power to retroactively waive statutorily created causes of action under the TCPA." *See* Application at p. 9. This is the same argument made by Kaye prior to the Bureau granting Amicus' petition, and it was correctly rejected by the Bureau.

The Commission's rules allow it "at any time" to waive the requirements of its regulations for good cause. *See* 47 C.F.R. § 1.3 (1996). "[A]n agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *Keller Communs. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997), *quoting* *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The Commission may waive its rules if "particular facts would make strict

compliance inconsistent with the public interest." *Keller Communs.*, 130 F.3d at 1076, quoting *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

The FCC's "weighing of the 'public interest' in considering a waiver request is thus similar to the type of 'public interest' or 'reasonableness' determinations that the Supreme Court has emphasized require administrative—rather than judicial—review under the primary jurisdiction doctrine." *Ellis v. Tribune TV Co.*, 443 F.3d 71, 84 (2d Cir. 2006) (Second Circuit Court of Appeals ruled that District Court erred in not granting a stay and allowing the FCC to decide the defendant's pending waiver petition, because the district court's decision involved a substantial danger of establishing inconsistent rulings on an issue within the FCC's expertise and discretion).

Thus, not only is the FCC's consideration of waiver requests permitted, but it is *proper* for the FCC to determine if such waiver serves the public interest. *See id.* That was precisely what the FCC has determined with respect to faxes sent with the recipient's prior express consent.

The grant of a waiver, pursuant to 47 C.F.R. § 1.3, does not abrogate the TCPA clause providing for a private right of action, nor is it a determination of a party's liability under the regulations promulgated by the FCC; rather, such a determination is the lawful consideration of public policy and the interpretation of the FCC's own regulations, which is permitted and granted significant deference. Indeed, nothing in Section 227(b)(3) of the TCPA, which creates a private right of action for violations of Section 227(b) or the accompanying regulations, limits the FCC's well-established authority to interpret or waive its regulations. *See* 47 U.S.C. § 227(b)(3).

The Kaye Applicants rely heavily upon *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), to support their contention that the FCC cannot grant a waiver that would in any way affect pending cases in federal district courts. *See* Application, p. 9. However, the holding in *Adams Fruit* does not support the Kaye Applicants' contentions, and actually stands for a much narrower proposition,

as noted by the U.S. Supreme Court in a later case (which case, inexplicably, the Applicants also purport to rely upon):

Adam's Fruit stands for the modest proposition that the Judiciary, not any executive agency, determines "the scope"—including the available remedies—"of judicial power vested by" statutes establishing private rights of action. *Adams Fruit* **explicitly affirmed** the Department [of Labor]'s authority to promulgate the **substantive standards enforced** through that private right of action. [*City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013) (emphases added) (internal citations omitted), *quoting Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990).]

Thus, while an agency may not determine whether a court has jurisdiction over a matter, or whether a certain remedy is appropriate or available to a private litigant, the agency does have authority to provide substantive interpretation of statutes and accompanying regulations, and such interpretation is offered great deference. *City of Arlington*, 133 S. Ct. at 1871-72.⁸ Simply put, by granting a waiver, the FCC is, in interpreting its regulations accompanying the TCPA and, considering public policy, acknowledging that certain regulations were subject to confusion and misplaced confidence, which constitutes special circumstances meriting waiver.

D. 1 U.S.C. § 109 is Inapplicable to the Instant Proceedings

The Kaye Applicants next argue that 1 U.S.C. § 109 prevents the FCC from "retroactively extinguish[ing] liabilities previously accrued under the statute." *See* Application at pp. 10-11. The Kaye Applicants' reliance on this statute is misplaced.

⁸ The Kaye Applicants also rely upon *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). *See* Application, p. 10. However, *Natural Resources* merely states that the EPA could not establish an affirmative defense by regulation which would limit a court to assessing penalties against a party *only if* violators fail to meet the burden specified by the affirmative defense, where the applicable statute allowed a court to apply "any appropriate" civil remedies. *Nat'l Resources Defense Council*, 749 F.3d at 1062-63. *Natural Resources*, therefore, merely states that it is within the court's purview to determine which civil remedies are appropriate, when the applicable statute expressly gives that right to the court. *Id.* Most importantly, the two statutory schemes compared here are extremely different, and the EPA did not rely upon an authority similar to the broad, well-established waiver authority available to the FCC.

Procedurally, the Kaye Applicants' arguments in this regard are improper. 47 C.F.R. § 1.115(c) states, "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." In its comments in opposition to Amicus' petition, the Kaye Applicants made no arguments regarding the applicability of 1 U.S.C. § 109. Accordingly, their reliance on this statute here is improper, and should be rejected.⁹ See, e.g., *In re Crawford*, 17 FCC Rcd. 2014, 2017-2018 (2002)(consideration of new arguments raised in connection with application for review precluded by Section 1.115(c)).

Even if the Commission was to consider this argument, the statute is unavailing to the Kaye Applicants. 1 U.S.C. § 109 provides:

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 any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. [1 U.S.C. § 109.]

There has been neither the repeal of any relevant statute, nor has any "repealing Act" been passed. On its face, therefore, § 109 is inapplicable. Moreover, § 109 applies to criminal statutes. "Congress enacted 1 U.S.C. § 109, the general saving clause" to "abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition in the highest court authorized to review them.'" *Warden v.*

⁹ The same is also true of the Kaye Applicants' arguments regarding: the Bureau issuing a legislative rule; the waiver acting as an adjudicatory rule; and the applicability of the *Retail/Wholesale* test. Accordingly, none of these arguments can serve as a proper basis for Commission review.

Marrero, 417 U.S. 653, 660 (1974)(citations omitted). There is no criminal statute or prosecution at issue here, and Section 109 therefore does not apply.

E. The Waiver Does Not Violate the Separation of Powers Doctrine

The Kaye Applicants argue that the Bureau's grant of the waiver "plainly implicates separation of powers concerns." *See* Application at p. 12. This argument has already been considered and rejected by the Commission. In the Opt-Out Order, the Commission explained:

Finally, we reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have 'violate[d] the separation of powers vis-à-vis the judiciary,' as one commenter has suggested. By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply. [*See* FCC Opt-Out Order, ¶21.]

An application for review is limited only to those "question[s] of law or policy which [have] not previously been resolved by the Commission." 47 C.F.R. § 1.115(b)(2)(ii). This issue has been squarely determined by the Commission, and is therefore an improper question for review.

The Kaye Applicants attempt to support their contention that the FCC may not grant a waiver in this case with a line of case law disallowing federal agencies from issuing regulations that directly conflict with the provisions of the applicable statute,¹⁰ and from determining the scope

¹⁰ The Kaye Applicants cite *Brown v. Gardner*, 513 U.S. 115 (1994) to support their contention that the FCC cannot take away a plaintiff's private right of action through administrative action. *See* Application, p. 10. First, as explained below, the FCC's grant of a waiver does not "take away" or "abrogate" the private right of action provision in the TCPA. Second, the *Brown* case stood merely for the well-recognized principle that an agency cannot impose requirements by regulation that *directly conflict* with the statute as enacted by Congress. *Brown*, 513 U.S. at 116-121. Thus, in *Brown*, the court held that a regulation requiring proof of fault in order to recover was improper where the statute required *only* that the claimant's injury did not result from willful misconduct. *Id.*

of judicial power vested by statutes establishing private rights of action. *See* Application, pp. 9-10. Not only is this case law inapplicable to the issue at hand, but the FCC has already addressed and rejected this argument.

F. The Waiver Did Not Constitute An Unauthorized Legislative Rule

The Kaye Applicants cite to *Bowen v. Georgetown University Hospital* and *Landgraf v. USI Film Products* in support of their contention that the waiver granted to Amicus "is the equivalent of a 'legislative rule' that repeals an existing rule." *See* Application, p. 13. This contention is also groundless, and similar to an argument previously rejected by the Bureau. *Bowen* stands for the proposition that, without express authorization, an agency cannot make retroactive *regulations*, but specifically states that case-by-case retroactive *adjudications* are permissible. *Bowen*, 488 U.S. 204, 209 (1988). Further, as discussed in *Landgraf*, this line of case law applies to the general proposition that statutes and regulations should ordinarily not be given retroactive effect because of the "unfairness of imposing *new* burdens on persons after the fact." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994) (emphasis added). "Indeed, at common law a contrary rule applied to statutes that merely *removed* a burden" *Id.* Thus, neither case supports the Kaye Applicants' position, which is simply unsupported.

G. The Retail, Wholesale Test is Inapplicable

The Kaye Applicants rely on the *Retail, Wholesale* test to support the proposition that if the waiver "could alternatively be considered an adjudicatory rule," it would not satisfy the requirements for "retroactive applications of adjudicatory rules." *See* Application at p. 14. The Kaye Applicants, however, misconstrue controlling law. The *Retail, Wholesale* test applies *only* when courts consider whether to *depart* from the general rule which permits retroactive application of a rule. "The *Retail, Wholesale* court set forth a non-exhaustive list of five factors to assist courts

in determining whether to grant an exception to the general rule permitting 'retroactive' application of a rule enunciated in an agency adjudication." *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Circuit 1987)(emphasis supplied). See also *National Association of Broadcasters v. FCC*, 554 F.2d 1118, 1130 (D.C. Cir. 1976) ("The general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect."); *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001)("In cases in which there are 'new applications of existing law, clarifications, and additions,' the courts start with a presumption in favor of retroactivity.")

Even assuming, *arguendo*, that the waiver could be considered an "adjudicatory rule," the Kaye Applicants have provided no grounds for departure from the general rule which permits retroactive application of a rule. Review is therefore not appropriate on this basis.

H. Amicus Has Satisfied Their Burden Demonstrating Entitlement to Waiver

The Kaye Applicants next contend that the Bureau "failed to articulate an appropriate standard" and "make the individual factual findings required" prior to Amicus receiving a waiver. See Application at 16. These arguments are without merit. First, the Bureau was simply following the analytical framework provided by the Commission. Second, the Kaye Applicants have conflated the requirements of a request for waiver and the responsibility of the FCC in granting a waiver. Third, Amicus submitted sufficient evidence, similar (if not substantially identical) to the evidence submitted by the petitioners that already been granted waivers by the FCC, to entitle Amicus to waiver of the opt-out requirements.

The Kaye Applicants also cite several cases to define the "burden" which a petitioner must satisfy to be entitled to a waiver. See Application at 16. However, they confuse and place on Amicus both its burden, as well as the FCC's burden, for articulating its reasons for waiver upon

judicial review. *See id.* Here, Amicus has satisfied its burden to show their entitlement to the requested waiver. In reality, the standard is that the FCC is required to give petitions for waiver a "hard look," but is not required to "process in depth" petitions which are only "generalized pleas," or "hollow claims." *WAIT Radio*, 418 F.2d at 1157 n.9. The petitioner seeking a waiver is required to "articulate a specific pleading, and adduce concrete support, preferably documentary." *Id.* ("[A]llegations . . . made by petitioners, stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a 'hard look.'")

The Kaye Applicants' additional case law references point to the FCC's responsibility, upon grant or denial of the waiver petition, to articulate clearly the special circumstances involved, as well as why the waiver would better serve the public interest. *See* Application, p. 16, *citing NetworkIP, LLC v. F.C.C.*, 548, F.3d 116 (D.C. Cir. 2008); *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164 (D.C. Cir. 1990). In essence, the Kaye Applicants seek to recast as a new burden on Amicus the very issues that the FCC carefully explained in its initial decision to grant waivers.

As detailed in the FCC's Opt-Out Order granting waiver, the "specific combination of factors"—that is "the inconsistency between a footnote contained in the *Junk Fax Order* and the rule[,] as well as the fact that "the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient"—"*presumptively* establishes good cause for retroactive waiver of the rule." FCC 14-164, ¶¶ 24-26 (emphasis added). That is, the combination of these two factors may have "contributed to confusion or misplaced confidence" regarding "the applicability of this requirement to faxes sent to those recipients who provided prior express permission." *Id.* at ¶¶ 24-25.

The Kaye Applicants insist that Amicus (along with the other 100 plus petitioners granted waivers by the Bureau) has not demonstrated its entitlement to a waiver because Amicus has not shown "that it actually was confused about the existence and nature of the Opt-Out Regulation." *See* Application at 17. This argument merely invokes the well-established inability to prove a negative, a point recognized by the FCC in its initial ruling: the FCC's Opt-Out Order specifies that special circumstances above may have led to "confusion *or misplaced confidence* regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission." FCC 14-164, ¶ 24. This "confusion or misplaced confidence" inevitably permeated the legal landscape in which Amicus operated, regardless of what they may actually have believed. Had sufficient clarity existed, Amicus' "actual" understanding may have been entirely different, and its actions legally compliant.

Quite clearly, the FCC presumed confusion or misplaced confidence by the "special circumstances" outlined in its Order, circumstances that are independent of what the petitioners may actually have believed at the time. Thus, the "special circumstances" entitling Amicus to a waiver were already presumptively established and articulated in the FCC Opt-Out Order. *See id.*

Similarly, the Kaye Applicants contend that the Bureau did not cite any evidence to support its conclusion that granting Amicus a waiver is "in the public interest." *See* Application at 18. Such proof, however, is simply not required. None of the Petitioners granted waiver by the FCC Opt-Out Order appear to have submitted financial records or similar evidence to the FCC for consideration. Rather, each petitioner pled, as Amicus does, that they are the defendant in a TCPA private action suit, and liable for potentially millions of dollars in damages, which some petitioners (Amicus included) supported with documentary evidence—specifically, the applicable Complaint in the TCPA action. According to the allegations in that complaint, Amicus is being subject to

millions of dollars of potential damages for an alleged violation of a confusing regulation. The FCC, therefore, *has already determined* that because of this consideration, the public interest would be better served by granting retroactive waiver of its requirement.

In sum, the Kaye Applicants' contentions lack support. Although repackaged, these issues have already been decided by the FCC, as described in its Opt-Out Order. Amicus has established the specific circumstances and public interest to be served in granting its Petition for Waiver.

IV. CONCLUSION

For the foregoing reasons, the Kaye Applicants' request for review by the full Commission should be denied.

Dated: October 13, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on October 13, 2015, a copy of OPPOSITION OF AMICUS MEDIATION & ARBITRATION GROUP AND HILLARY EARLE TO APPLICATION FOR FULL COMMISSION REVIEW was served upon counsel of record at the following address via First Class Mail, postage prepaid:

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The undersigned also hereby certifies that on October 13, 2015, the undersigned caused to be filed, by mail and by electronic service, the foregoing OPPOSITION OF AMICUS MEDIATION & ARBITRATION GROUP AND HILLARY EARLE TO APPLICATION FOR FULL COMMISSION REVIEW with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C., 20554.



David P. Skand