

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

In the Matter of)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with Recipient’s Prior Express Permission)	Re: Waiver Request by Medversant Technologies, L.L.C.

OPPOSITION TO APPLICATION FOR REVIEW

Medversant Technologies, L.L.C. (“Medversant”), through counsel, offers this Opposition to the Application for Review of the Commission’s decision in *In the Matter of Rule and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 05-338, 2015 WL 5120879 (F.C.C. August 28, 2015) (the “*August 28, 2015 Order*”)¹ filed by Scott Z. Zimmerman (“Zimmerman”) on behalf of Edward Simon (“Simon”). For the reasons stated below, and in its Petition for Waiver² and Reply Comment³, the Commission should affirm its decision in the *August 28, 2015 Order* granting Medversant a retroactive administrative waiver of the opt-out requirement under Section 64.1200(a)(4)(iv) of Title 47 of the Code of Federal Regulations (the

¹ *Application for Review*, CG Docket Nos. 02-278 and 05-338 (September 28, 2015) (“Application for Review”).

² *Petition of Medversant Technologies, L.L.C. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278 and 05-338 (Jan. 8, 2015) (the “Medversant Petition”).

³ *Reply Comment of Medversant Technologies, L.L.C. To Comments of Edward Simon and Affiliated Health Care Associates, P.C. on Medversant’s Petition for Waiver of the Opt-Out Requirements for Faxes Sent with Prior Express Permission*, CG Docket Nos. 02-278 and 05-338 (Feb. 20, 2015) (“Medversant’s Reply Comments”).

“Regulation”) as to faxes transmitted by Medversant with prior express permission of the recipients or their agents (“Solicited Faxes”) prior to April 30, 2015.

I. Summary.

Through his Application for Review, Simon is attempting to re-litigate an issue already decided by the Commission. Many of Simon’s arguments are lifted directly from the original Comments filed by Zimmerman on behalf of Simon.⁴ In fact, the Commission has not only addressed many of Simon’s arguments once already, in deciding the *August 28, 2015 Order*, but had already addressed, and rejected, most of the arguments initially in the Commission’s October 30, 2014 Order in *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 61 Communications Reg. (P&F) 671 (F.C.C. Oct. 30, 2014) (the “*2014 Anda Commission Order*”).

First, Simon argues that the Commission lacks the authority to grant retroactive waivers of regulations prescribed under the Telephone Consumer Protection Act (“TCPA”). However, Simon relies on irrelevant authority by mischaracterizing the Commission’s actions as the retroactive application of an entirely new rule. The Commission did not grant Medversant a waiver of any violation of the TCPA, but rather a limited-time waiver of the Regulation’s opt-out requirements for Solicited Faxes. In addition, Simon ignores the fact that the Commission is expressly given broad authority to waive its rules in the Code of Federal Regulations. Lastly, Simon attempts to paint the Commission’s actions as a violation of separation of powers, arguing that such a waiver takes away a court’s power to determine that a violation has occurred. However, Simon fails to recognize that the Commission’s waiver does not deprive the court in the civil litigation of its authority to ultimately decide liability.

Next, Simon asserts that Medversant failed to meet the “standard” set forth in the *2014 Anda Commission Order* with respect to evidence of prior express permission given by fax recipients. However, Simon misstates the Commission’s findings in the *2014 Anda Commission*

⁴ *Edward Simon’s Comment on Petition for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278 and 05-338 (Feb. 13, 2015) (the “Simon Comment”).

Order in regard to this issue, as the Commission did not require petitioners to provide evidence of prior express permission at this procedural junction. That being said, Medversant can, and will, provide such evidence of prior express permission before a court of competent jurisdiction.

Similarly, Simon misconstrues the “standard” set forth in the *2014 Anda Commission Order*, and contends that petitioners such as Medversant were required to set forth particular facts demonstrating actual confusion or misplaced confidence with respect to the Commission’s rules. The Commission did not engage in any case-by-case fact finding in the *2014 Anda Commission Order* to determine whether the petitioners were actually confused with respect to the rules, but rather granted a waiver based on the finding that nothing in the record demonstrated that the petitioners understood the rules but nonetheless failed to comply with them. Further, Simon contends that because Medversant was not aware of the TCPA’s requirements, any alleged violations could not have been as a result of the confusion from or misplaced confidence in the Regulation. However, this grossly oversimplifies the issue and fails to take into consideration the countless other ways that the confusion or misplaced confidence resulting from the misleading order⁵ and the lack of adequate notice with respect to the Regulation could arise.

The Commission should affirm its decision to grant Medversant a waiver of the Regulation’s opt-out requirements for Solicited Faxes.

II. The Commission Has Authority To Grant Retroactive Waivers.

A. The Commission Has Not Engaged In Retroactive Rulemaking.

Simon challenges the Commission’s authority to grant retroactive waivers by arguing that the retroactive application of new agency regulations is not permissible absent express authorization by Congress. The Commission is not engaging in rulemaking in granting limited retroactive waivers of the Regulation’s opt-out requirement for Solicited Faxes. To the contrary, in both the *2014 Anda Commission Order* and the *August 28, 2015 Order*, the Commission

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 and 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (the “*Junk Fax Order*”).

reiterated that the rule requiring opt-out notices remains in effect. The Commission merely allowed a waiver of the unaltered rule for a limited period of time. The legal authority on which Simon relies to bolster his argument that the Commission does not have the power to grant retroactive waivers only applies to retroactive application of new rules, something in which the Commission is not engaged in this instance.⁶

Simon cites *Retail, Wholesale, and Department Store Union v. NLRB*⁷ in support of his position that the Commission has overstepped its bounds. That case also addressed retroactive application of *new* rules,⁸ not retroactive waivers. *Retail, Wholesale* considered, among other things, “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.”⁹ As demonstrated by the more than 100 petitions addressed by the *2014 Anda Commission Order* and the *August 28, 2015 Order* there was no “well-established practice” with respect to inclusion of opt-out notices on solicited faxes.

Simon also contends that his purported “right to rely” on the “clear and unambiguous language of section 64.1200(a)(4)” matured prior to the *2015 Anda Commission Order*. That contention lacks merit. The sheer number of petitioners asking for relief due to confusion and misplaced confidence resulting from the *Junk Fax Order* and the lack of adequate notice of the Regulation illustrates that the rule was neither clear nor unambiguous. Further, the legal authority to which Simon cites in support of his contention that his right “matured” when he commenced litigation again speaks to the retroactive application of a *new rule*, and nowhere

⁶ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (finding that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”)

⁷ 466 F.2d 380, 390 (D.C. Cir. 1972).

⁸ *Retail, Wholesale, and Department Store Union v. NLRB*, 466 F.2d 380, 388-390 (D.C. Cir. 1972) (setting forth factors to take into consideration when deciding whether the retroactive application of “newly adopted administrative rules” is appropriate).

⁹ *Id.* at 390.

discusses the authority, or lack thereof, of an administrative agency to grant retroactive waiver, such as the one at issue here.¹⁰

The Commission has not changed the rules of the game. Simon's characterization of the Commission's actions as allowing those in violation of the statute to simply run to the Commission for the promulgation of a new rule whenever facing potential liability is a gross mischaracterization. In reality, the Commission has granted a limited retroactive waiver for a limited time period and has not promulgated any new rule.

B. The Commission Is Authorized To Grant Retroactive Waivers.

Simon asserts that the Commission lacks the authority to waive its rules. Simon is simply wrong. As previously mentioned in Medversant's Reply Comments, the Code of Federal Regulations expressly gives the Commission broad authority to waive its rules:

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.¹¹

Simon goes on to cite to *Natural Res. Def. Council v. E.P.A.*¹² ("NRDC"), in which the D.C. Circuit held that the Environmental Protection Authority ("EPA") exceeded its authority by adopting an affirmative defense to a private right of action under the Clean Air Act. NRDC is inapposite, as it discusses a fundamentally different regulatory scheme. The EPA did not enjoy the express waiver authority that this Commission possesses under Section 1.3 of its rules. The D.C. Circuit itself noted in an unrelated case that where, as here, a requirement is not mandated by statute, this Commission "has authority under [Rule 1.3] to waive requirements...where strict compliance would not be in the public interest."¹³

¹⁰ *Greene v. United States*, 376 U.S. 149, 160 (1964) (finding that the retroactive application of a new agency rule was inappropriate under the circumstances).

¹¹ 47 U.S.C. § 227(b)(2); *See also Northeast Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) ("The FCC has authority to waive its rules if there is 'good cause' to do so"); *see also* 47 C.F.R. §1.3 ("The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.")

¹² 749 F.3d 1055, 1064 (D.C. Cir. 2014).

¹³ *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

C. The Commission’s Grant Of The Retroactive Waiver Of The Opt-Out Notice Requirement To Medversant Did Not Violate Separation Of Powers.

Citing *United States v. Klein*,¹⁴ Simon argues that a statute violates the separation of powers when it forces a “rule of decision” on the judiciary and impermissibly directs findings. *Klein* has no bearing here. As noted above, Medversant did not seek, and the Commission did not grant to Medversant, any waiver of a violation of the TCPA. Rather, Medversant sought and received from the Commission a limited in time and scope waiver of the Regulation’s opt-out requirements for faxes sent with prior express permission. The Commission’s *August 28, 2015 Order* does not foreclose a court from finding liability under the TCPA since that Order specifically did not make a finding as to whether the petitioners, Medversant included, obtained prior express permission before sending the faxes in question. Thus, the Commission has not usurped any court’s power to determine liability with respect to such faxes.

In addition, as previously mentioned in Medversant’s Reply Comments, Simon’s reliance on *Physicians Healthsource, Inc. v. Stryker Sales Corp.*¹⁵ is similarly misplaced. As reiterated above, Medversant is not seeking a waiver of *liability*, but rather a retroactive waiver of the opt-out requirements for Solicited Faxes. Circuit-level case law favors Medversant’s position that courts should defer to the Commission’s decisions on such matters.¹⁶

Simon’s argument that the Commission has violated the separation of powers has already been addressed, and expressly rejected, two separate times by the Commission – initially in the *2015 Anda Commission Order*, and again in the *August 28, 2015 Order*.¹⁷

¹⁴ 80 U.S. 128, 147-48 (1872).

¹⁵ 2014 U.S. Dist. LEXIS 175425 (W.D. Mich. Dec. 12, 2014).

¹⁶ See *Nack v. Walburg*, 715 F.3d 680, 684 (8th Cir. 2013) (finding that Courts presiding over private actions are encouraged to “defer to [the] agency’s interpretations ... unless [courts] find that a ‘regulation is contrary to unambiguous statutory language, that the agency’s interpretations of its own regulation is plainly erroneous or inconsistent with the regulation, or that application of the regulation [is] arbitrary or capricious.’”); see also *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268 (3d Cir. 2013); *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466-67 (6th Cir. 2010).

¹⁷ *2014 Anda Commission Order* at ¶ 21; *August 28 Order* ¶ 13.

III. Medversant Met Its Requirements With Respect To Prior Express Permission.

Simon misreads the “standard” set forth in the *2014 Anda Commission Order* when asserting that Medversant was required to assert particular facts demonstrating that it obtained prior express permission to send the faxes in question. Simon’s insistence that Medversant be required to do so, and that the Commission be responsible for determining whether such prior express permission was in fact obtained, directly contradicts Simon’s contentions that the Commission must not violate the separation of powers. By not determining whether prior express permission was obtained at this stage, the Commission is in fact leaving it up to the courts to decide whether a violation of the TCPA has occurred.

A. Medversant Was Not Required To Show Evidence Of Prior Express Permission As Part Of Its Petition For Retroactive Waiver.

Simon asserts that the Medversant Petition should be rejected on grounds that Medversant was required to present evidence that it had actually obtained prior express permission for Solicited Faxes in order to be properly granted a waiver. However, Simon misstates the standard. The Commission did not intend for petitioners to present evidence pertaining to whether they had in fact obtained prior express permission to send the faxes in question. In both the *2014 Anda Commission Order* and the *August 28, 2015 Order*, the Commission explicitly stated that “the granting of such waivers [shall not] be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of recipients to be sent the faxes at issue...”¹⁸ The Commission also pointed out that the record in several petitions “indicates that whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties,”¹⁹ but yet granted the very same petitioners their requested waivers, notwithstanding such. Medversant should be held to the same standard contemplated by the Commission.

¹⁸ *2014 Anda Commission Order* ¶ 31; *August 28, 2015 Order* ¶ 21.

¹⁹ *2014 Anda Commission Order* ¶ 31, n.104; *August 28, 2015 Order* ¶ 21, n.72.

Further, even assuming *arguendo*, and contrary to fact, that Medversant did not obtain prior express permission from the fax recipients, Simon would not be prejudiced in any way by the Commission's grant of the retroactive waiver because the waiver only applies to the extent that Medversant actually obtained prior express permission to send the faxes in question. The Commission clearly states in the *August 28, 2015 Order* that the waiver shall not "apply to any situation other than where the fax sender had obtained the prior express invitation or permission of the recipient to receive the fax advertisement."²⁰

B. Medversant Had Prior Express Permission To Send The Faxes In Question.

Setting aside that the Commission has already decided that presenting evidence of prior express permission to the Commission is not necessary for the grant of a waiver, and assuming, *arguendo*, that Medversant sent advertising faxes (which Medversant strongly denies),²¹ Medversant can in fact produce evidence of prior express permission, as Medversant previously described in Medversant's Reply Comments. Medversant obtained permission via the Healthways Participating Practitioner Agreements.²² Medversant also obtained permission from certain fax recipients who affirmatively agreed to Medversant's privacy policy for ProviderSource, a service used to credential health care providers. The ProviderSource privacy policy explicitly states that "Medversant uses the ProviderSource online provider application to collect provider data[, including fax numbers], for all provider data-driven processes including credentialing, enrollment, provider and member relations, marketing and sales, claims assessment, etc."²³ In order to obtain health care provider credentialing through ProviderSource,

²⁰ *August 28, 2015 Order* ¶ 21.

²¹ AHC argues that Medversant cannot claim the benefit of a prior express permission defense while also disputing that the faxes it transmitted were advertisements [*see Comment of Affiliated Health Care Associates, P.C. to Petition of Medversant Technologies, LLC*, CG Docket Nos. 02-278 and 05-338 (Feb. 13, 2015) at 5]. However, if the faxes were not in fact advertisements at all, then AHC would have no basis to sue Medversant under the TCPA in the first place. Medversant merely asserts that although the faxes were not advertisements, in the event that a tribunal with authority finds otherwise, Medversant had prior express permission to transmit such faxes.

²² *See* Declaration of Scott Z. Zimmerman ("Zimmerman Decl."), Ex. E, filed concurrently with the Simon Comment.

²³ *See* Declaration of Kathleen Policarpio ("Policarpio Decl."), ¶ 3, Ex. A, filed concurrently with Medversant's Reply Comment.

providers were required to affirmatively agree to such terms when they submitted their ProviderSource online provider application.²⁴

IV. Medversant Met Its Requirements With Respect To Demonstrating Confusion And Misplaced Confidence.

Simon contends that the Commission’s decision to “not require petitioners to plead specific, detailed grounds for individual confusion”²⁵ in its *August 28, 2015 Order* represented a departure from the standard set forth in the *2014 Anda Commission Order*. To the contrary, the Commission followed the standard set forth in the *2014 Anda Commission Order* in granting the Medversant Petition. As previously pointed out in Medversant’s Reply Comments, the Commission granted waivers in the *2014 Anda Commission Order* based on the fact that confusion and misplaced confidence existed in the marketplace, and that nothing in the record demonstrated that the petitioners understood that they had to comply with the opt-out notice requirement for fax ads sent with prior express permission. The Commission did not engage in any case-by-case fact finding in the *2014 Anda Commission Order* to determine whether the petitioners were actually confused with respect to the rules. The Medversant Petition asserted the same arguments as used by other petitioners and Simon presented no evidence indicating otherwise.

Simon next contends that the Commission violated due process, and engaged in arbitrary and capricious behavior by granting the petitions in the *August 28, 2015 Order* based on a new presumption of confusion or misplaced confidence. However, Simon fails to acknowledge this presumption was also found in the *2014 Anda Commission Order*. In the *2014 Anda Commission Order*, the Commission explicitly stated that the combination of the confusion caused by the inconsistency in the *Junk Fax Order* and the lack of explicit notice with respect to the adoption of section 64.1200(a)(4)(iv) “presumptively establishes good cause for retroactive

²⁴ Policarpio Decl. ¶¶ 2-4, Ex. B.

²⁵ *August 28, 2015 Order* ¶ 19.

waiver of the rule.”²⁶ Further, as the Commission noted in the *August 28, 2015 Order*, the *2014 Anda Commission Order* “did not require petitioners to plead specific, detailed grounds for individual confusion and [the Commission] cannot impose those here.”²⁷ To require such a change in requirements for Medversant *would* be arbitrary and capricious.

Simon further contends that Medversant was not confused regarding the TCPA’s requirements as evidenced by the testimony of Medversant’s Rule 30(b)(6) designee (Joseph Beckerman) in the Simon litigation.²⁸ In particular, Simon argues that because Mr. Beckerman testified in his deposition that Medversant was unaware of the TCPA’s requirements at the time the faxes in question were sent, any alleged violations of the TCPA could not have been a result of Medversant’s confusion or misplaced confidence caused by the *Junk Fax Order* and the lack of explicit notice of the Commission intent to adopt the Regulation. Notwithstanding that Medversant was not required to set forth any specific facts to demonstrate its confusion or misplaced confidence, Simon is wrong that Medversant was not confused. Simon fails to consider that, even if Medversant itself may have been unaware of the TCPA’s requirements with respect to the opt-out notices, Medversant acted at least in part based on the confusion and misplaced confidence of others, in particular co-defendants Healthways WholeHealth Networks, Inc. and Healthways, Inc. (the “Co-Defendants”). Medversant specifically relied on discussions with the Co-Defendants, who suffered from the same confusion and misplaced confidence as so many other petitioners.

V. Public Policy Considerations Support Retroactive Waiver.

Simon argues that the Commission’s grant of the retroactive waiver of the opt-out requirements for Solicited Faxes violates public policy. Simon points to the Commission’s comment in the *2014 Anda Commission Order* that the “waiver does not extend to the similar

²⁶ *2014 Anda Commission Order* ¶ 26.

²⁷ *August 28, 2015 Order* at ¶ 19.

²⁸ Although Medversant recognizes that it was procedurally improper for Simon to introduce new evidence in connection with an application for review, namely the deposition testimony of Joseph Beckerman, pursuant to 47 C.F.R. 1.115(j), Medversant responds to Simon’s contentions while refraining from similarly violating said rule.

requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship.”²⁹ Simon’s argument is a red-herring. The issue of established business relationship has no place here. The Commission’s grant of the waiver only applies to faxes sent with prior express permission, not to faxes sent pursuant to an established business relationship. Medversant clarified in Medversant’s Reply Comments that it was not seeking a waiver of the opt-out requirement based on its existing business relationship defense.³⁰

Further, the Commission has “acknowledge[d] that there is 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. On balance, however, we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward...Because we do not waive the rule indefinitely, consumers will not, as a result of our action, be deprived of the rule’s value.”³¹ As previously noted in Medversant’s Reply Comments, this balancing test weighs strongly in favor of Medversant, as it did for the petitioners in the *2014 Anda Commission Order*. Medversant should not be penalized tens of millions of dollars as a result of its confusion or misplaced confidence in the Commission’s rules.

VI. **Conclusion.**

For the reasons stated above, and in Medversant’s Reply Comments, Medversant respectfully requests that the Commission affirm its decision to grant Medversant a retroactive

²⁹ *2014 Anda Commission Order* at ¶ 2.

³⁰ Footnote 4 of Medversant’s Reply Comments.

³¹ *2014 Anda Commission Order* ¶¶ 27-28.

waiver of Section 64.1200(a)(4)(iv) of Title 47 of the Code of Federal Regulations for any Solicited Faxes transmitted by Medversant (or on its behalf) prior to April 30, 2015.

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Respectfully submitted,

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