

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

In the Matter of)	
)	
Petition of RadNet Management, Inc.,)	CG Docket No. 02-278
RadNet, Inc.,)	
Beverly Radiology Medical Group III,)	
Pronet Imaging Medical Group, Inc.,)	CG Docket No. 05-338
Breastlink Medical Group, Inc., and)	
Beverly Radiology Medical Group, Inc.)	
)	
For Retroactive Waiver of)	
47 C.F.R. § 64.1200(a)(4)(iv))	

OPPOSITION TO APPLICATION FOR REVIEW FILED BY EDWARD SIMON

RadNet Management Inc. and its affiliates (collectively “RadNet” or “Petitioner”) respectfully submits this Opposition to the Application for Review filed on September 28, 2015 by Scott Z. Zimmerman (the “Application”) on behalf of Edward Simon, a plaintiff in a purported class action lawsuit filed against RadNet in the United States District Court for the Central District of California (*Simon v. RadNet Management, Inc., et al.*, Case No. 2:14-cv-7997 BRO (PJWx)). For reasons stated below and in RadNet’s previous filings in this proceeding, the Federal Communications Commission’s Consumer and Governmental Affairs Bureau’s (the “Bureau”) August 28, 2015 Order (the “*Bureau’s Order*”) properly granted RadNet a waiver from the opt-out requirement of 47 C.F.R. § 64.1200(a)(4)(iv) insofar as it may have sent fax advertisements with the prior express invitation or permission of the recipients.

I. INTRODUCTION

The voluminous Comments filed by Simon evince a misunderstanding of the purpose and scope of the Federal Communication Commission’s (the “FCC” or the “Commission”)

October 30, 2014 *Fax Order* (“2014 *Fax Order*”).¹ Like his previous filings in these proceedings, Simon’s Application fails to distinguish RadNet from the dozens of other “similarly situated” entities that have already received waivers directly from the Commission in the 2014 *Fax Order*. The Comments also constitute a meritless collateral attack on the Commission’s settled authority to grant waivers from its own regulations. The Commission and the Bureau have already rejected similar challenges to the Commission’s waiver authority in their respective 2014 *Fax Order* and in the *Bureau’s Order*, and there is no cause to revisit them for a third time here. Accordingly, the Commission should reject Simon’s Application For Review.

II. DISCUSSION

A. The Commission Has the Authority to Grant Waivers from Its Own Regulations.

The Commission has the authority to grant waivers from its regulations for “good cause.”² In its 2014 *Fax Order*, the Commission specifically addressed and “reject[ed] any implication that by addressing the petition filed in this matter while related litigation is pending, we have ‘violate[d] the separation of powers vis-à-vis the judiciary.’”³ Simon makes similar separation of powers claims in his Application, which the Commission should likewise reject.⁴

In support of his challenge to the Commission’s settled authority to grant waivers from its own regulations, Simon cites and misinterprets a Reconstruction-era case, *United States v. Klein*, involving Congressional legislation prohibiting a presidential pardon from being admitted into

¹ See *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirements for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket No. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) (the “2014 *Fax Order*”).

² See 2014 *Fax Order* at ¶ 21-23; see also 47 C.F.R. 1.3; see also *Northeast Cellular Tele. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). (“The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”).

³ 2014 *Fax Order* at ¶ 21.

⁴ *Application* at 7-14. This petition is not the proper venue for challenging the Commission’s 2014 *Fax Order*. See e.g. *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013) (The Hobbs Act provides that the courts of appeals have exclusive jurisdiction to determine the validity of FCC orders.).

evidence in support of a claim against the federal government.⁵ The Supreme Court invalidated the legislation, ruling that Congress had encroached upon the executive's exclusive power to grant pardons.⁶

By granting a waiver to its regulations, the Commission would not be encroaching on established executive prerogatives (or even those of the judiciary). Rather, under the Supreme Court's modern jurisprudence, courts *defer* to an agency's construction of statutes.⁷ Congress has explicitly delegated the Commission the authority to interpret the TCPA.⁸ Thus, it is Simon, and not RadNet, who is urging the Commission to upset the separation of powers by attempting to strip the Commission of its authority to interpret to TCPA and apply its own regulations. Moreover, by granting a waiver from its regulations, the Commission would not be directing a decision in a particular court case because the granting of such a waiver will not determine whether a violation of the TCPA has, in fact, occurred. The Commission's *2014 Fax Order* explicitly stated that the granting of a waiver should not be "construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action."⁹ As RadNet stated in its Petition for Waiver, such factual determinations "are properly left for the District Court."¹⁰ The *Bureau's*

⁵ See *Application* at 9.

⁶ See *United States v. Klein*, 80 U.S. 128, 147-148 (1872) ("To the executive alone is intrusted [sic] the power of pardon; and it is granted without limit. . . and to deny them their legal effect . . . certainly impairs the executive authority and directs the court to be instrumental to that end.")

⁷ See *e.g.* *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (noting that the executive agency remains the "authoritative interpreter" of the statutes which Congress has delegated it such authority.)

⁸ See 47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to implement the requirements of this subsection.").

⁹ See *2014 Fax Order* at ¶ 31.

¹⁰ See *Petition of RadNet Management, Inc., et al., for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (Jan. 16, 2015) ("RadNet Petition") at 4.

Order reiterated the Commission's position on this issue, noting that such factual determinations are left to the trier of fact in private litigation.¹¹

Simon also cites a recent decision involving the EPA's interpretation of the Clean Air Act¹² in support of his contention that the FCC has no authority to grant waivers from its regulations interpreting the TCPA.¹³ As other commenters in this docket have noted, this decision, *Natural Resources Defense Council v. EPA*, involved a different agency without express authority to waive the effect of its own rules and regulations.¹⁴ Furthermore, the court in *NRDC* held that the EPA exceeded its authority by creating an affirmative defense in a private right of action.¹⁵ In contrast, this petition seeks a waiver from the Commission's own regulation. Such relief would not require the Commission to establish a new affirmative defense or otherwise affect or limit the scope of available statutory remedies in a private right of action. Instead, RadNet requests and was granted a limited waiver from the Commission's own regulations "where strict compliance would not be in the public interest."¹⁶ Accordingly, the D.C. Circuit's ruling in *Natural Resources Defense Council v. EPA* has no bearing on the Commission's authority in this proceeding.¹⁷

¹¹ See *Bureau's Order* at ¶17.

¹² *Nat'l Res. Def. Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).

¹³ See *Simon Comments* at 13-18.

¹⁴ See *Reply Comment of Senco Brands, Inc.*, CG Docket No. 05-338, at 3-4 (Jan. 20, 2015).

¹⁵ See *NRDC*, 749 F.3d at 1057.

¹⁶ See *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009). The case is from the same court that issued the EPA decision to which Simon cites as evidence that the FCC has no authority to issue waivers.

¹⁷ Simon also cites language from a recent District Court decision, *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014), to support its dubious claim that Commission cannot issue a waiver that impacts private rights of action. See *Simon Comments* at 12-13. As other petitioners in this docket have noted, this decision does not bind the Commission, nor is it persuasive. See *Reply Comments of EatStreet, Inc.*, CG Docket Nos. 02-278; 05-338 at 4 n.15 (January 20, 2015).

B. RadNet Is ‘Similarly Situated’ to Petitioners That Have Already Been Granted Waivers by the Commission and Therefore the Bureau Properly Granted it the Same Waiver.

Simon makes numerous, yet unavailing, factual claims about why RadNet fails to meet the Commission’s standards for granting a waiver. Simon’s “kitchen-sink” of factual arguments on this issue displays a fundamental misunderstanding of the Commission’s and the Bureau’s reasons for granting the waivers. Rather than focusing on the factual particularities in individual petitions, the Commission based its decision on the fact that the rule making process “may” have caused confusion among the petitioners, and thus, a limited waiver would best serve the public interest.¹⁸ The Commission did not engage in any fact finding on issues such as consent, and it did not require any specific forms of proof when it granted waivers to the initial petitioners. Likewise the, Bureau properly “decline[d] to conduct a factual analysis” of circumstance underlying individual petitions. It is for the court to determine whether based on the facts, RadNet qualifies for the waiver. Moreover, RadNet should not have to factually justify whether it qualifies for the waiver. As the *Bureau’s Order* recognized, it is improper and unjust for the Commission to impose a higher evidentiary burden on RadNet and other subsequent petitioners than was placed on the initial petitioners who have already been granted waivers.¹⁹

Nevertheless, despite their lack of relevance to this administrative proceeding, RadNet will specifically address some of Simon’s contentions.

¹⁸ *2014 Fax Order* at ¶ 24 (noting that the Commission’s use of “‘unsolicited’ in this one instance *may* have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice[.]”) (emphasis added); *see also id.* at ¶ 25 (“[T]he lack of explicit notice *may* have contributed to confusion or misplaced confidence about this requirement.”) (emphasis added).

¹⁹ *See Bureau’s Order* at ¶ 17-19.

Like in his comments to RadNet’s Petition for Waiver, Simon claims that RadNet has not identified which of its affiliates sent solicited faxes. Simon apparently takes issue with the fact that RadNet is seeking a waiver on behalf of its affiliated entities. The Commission, however, already granted waivers to UnitedHealth Group Inc. and Allscripts, both of which requested waivers on behalf of their “affiliates and subsidiaries.”²⁰ The Commission, when granting those waivers, did not engage in fact-finding on whether the named petitioner or one of its affiliates sent faxes. To subsequently deny RadNet’s Petition for Waiver on this basis would be unjust and arbitrary.

Next, Simon claims that RadNet is not subject to “potentially substantial damages.” This contention is absurd. Simon has sued RadNet in a purported class action in which he demands “not less than \$5,000,000.”²¹ In any event, the *2014 Fax Order* did not require petitioners to quantify their exposure or liability to receive the waiver. Instead, the Commission granted waivers because of the “potentially substantial” consequences of lawsuits filed by TCPA plaintiffs, such as the action filed by Simon against RadNet.²² The *Bureau’s Order* correctly recognized that the Commission did not even require petitioners to “face lawsuits or potential liability to qualify for the waiver.”²³

Simon also claims that RadNet’s Petition for Waiver should not be granted because RadNet did not provide sufficient evidentiary proof of Simon’s consent to receiving faxes. When it granted waivers to similarly situated entities in its *2014 Fax Order*, the Commission did

²⁰ See *Petition of UnitedHealth Group Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278; 05-338 (July 11, 2014); *Petition of Allscripts-Misy’s Healthcare Solutions et al.*, CG Docket Nos. 02-278; 05-338 (Sept. 30, 2014).

²¹ See *RadNet Petition* at 6.

²² See *2014 Fax Order* at ¶ 27.

²³ See *Bureau’s Order* at ¶ 19.

not require those petitioners to provide proof that the faxes were solicited. The Commission did not engage in any fact finding on the issue of consent and did not require any specific forms of proof when it granted waivers to the initial petitioners.²⁴ As stated above, the Commission directly acknowledged that the waiver should *not* be construed as making findings of fact as to whether particular faxes were solicited; that is the role of the District Court.²⁵ Thus, the sort of factual discovery demanded by Simon is irrelevant to this proceeding.

Simon also claims that the waiver should not be granted because RadNet has not submitted sufficient “proof” that it was confused by the rulemaking process.²⁶ Again, the Commission did not require any proof that individual petitioners were confused by the conflicting language in the statutes. Rather, the Commission pointed to the *industry-wide* confusion as the rationale for granting the waiver. As the *Bureau’s Order* reiterated, the Commission’s finding of confusion was based on the confusion surrounding the language of the rulemaking and “rejected arguments that the Commission made actual, specific claims of confusion a requirement to obtain a waiver.”²⁷

In any event, RadNet, like the petitioners already granted waivers, *directly cited* the confusing language from the 2006 rulemaking and explicitly claimed that it was similarly

²⁴ See *2014 Fax Order* at ¶ 31 n.104. (The record indicates that whether *some* of the petitioners had acquired prior express permission of the recipient *remains a source of dispute* between the parties.) (emphasis added). This fact is also disputed in Simon’s lawsuit against RadNet and will be decided by the District Court.

²⁵ See *2014 Fax Order* at ¶ 31.

²⁶ See *Application* at 17-18.

²⁷ *Bureau’s Order* at ¶ 19.

confused.²⁸ Accordingly, the Bureau correctly found that RadNet the contradictory rulemaking language and was thus entitled to a waiver.²⁹

C. RadNet’s Requested Waiver for Solicited Faxes Is in the “Public Interest.”

Simon also claims that RadNet’s Petition for Waiver was based solely on the “established business relationship” (“EBR”) justification for sending the faxes, and therefore, the waiver should not be granted to RadNet. Despite Simon’s attempt to manipulate and parse language from the Petition for Waiver, RadNet specifically asked for a waiver for *solicited* faxes sent with express permission.³⁰ The Commission has already determined that such a waiver for solicited faxes would better serve the “public interest” than strict enforcement of the regulation.³¹ Therefore, the Bureau’s grant of a waiver to RadNet, as a similarly situated party, is also in the public interest.

²⁸ See *RadNet Petition* at 5.

²⁹ See *Bureau’s Order* at ¶ 16.

³⁰ See *RadNet Petition* at 7 (“[R]adNet respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) insofar as RadNet may have sent fax advertisements before April 30, 2105 lacking the required opt-out notice to recipients that had *provided prior express invitation or permission.*”) (emphasis added).

³¹ See *2014 Fax Order* at ¶ 27 (“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.”)

III. CONCLUSION

For the reasons set forth above and in the initial RadNet Petition and Reply Comments, RadNet respectfully requests that the Commission reject Simon's Application for Review.

Dated: October 23, 2015

Respectfully submitted,

RADNET MANAGEMENT, INC.

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CERTIFICATE OF SERVICE

I, John Kozak, do hereby certify that on the 23rd day of October, 2015, a true and correct copy of the foregoing was served by U.S. mail to the following:

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