

**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 Healthways, Inc. and Healthways WholeHealth Networks, Inc.

OPPOSITION TO APPLICATION FOR REVIEW

Healthways, Inc. (“Healthways”) and Healthways WholeHealth Networks, Inc. (“HWHN”), through counsel, respectfully submits 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*”) filed by Edward Simon (“Simon”). *Application for Review*, CG Docket Nos. 02-278 and 05-338 (September 28, 2015) (“*Application for Review*”). For the reasons set forth below, the Commission should affirm its decision in the *August 28, 2015 Order* granting Healthways and HWHN a retroactive waiver of the opt-out requirement under Section 64.1200(a)(4)(iv) of Title 47 of the Code of Federal Regulations (the “*Regulation*”) with respect to faxes transmitted by Healthways and/or HWHN with the prior express invitation or permission of the recipients or their agents (“*Solicited Faxes*”) prior to April 30, 2015.

I. Introduction.

Simon's Application for Review reasserts arguments that have already been made by Simon, by other opponents of the Commission's waivers, or both. The Commission should reject all of those arguments.

Simon attacks the granting of waivers to Healthways and HWHN on three grounds: (1) that the Commission purportedly lacks the authority to grant the waivers; (2) that granting the waivers allegedly violated the separation of powers; and (3) that granting the waivers allegedly was against public policy. (Application for Review at 5-15.) The first two arguments constitute an improper attempt to assert a late-filed challenge to 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*"), rather than a proper challenge to the *August 28, 2015 Order*. Moreover, all of these arguments already have been addressed and rejected – in most cases, twice: once by the Commission in its *2014 Anda Commission Order*, and once by the Bureau in its *August 28, 2015 Order*.

Simon also attacks the granting of waivers to Healthways and HWHN on two other grounds: (a) that HWHN purportedly has not shown prior express consent for sending the faxes, and (b) that HWHN has not shown that it was actually confused about the opt-out requirement for solicited faxes. These arguments also are without merit, because HWHN was not required to make either showing at this stage, and because Simon cannot show that HWHN did not have prior express consent or that HWHN was not confused.

For all of these reasons, the Commission should deny Simon's Application for Review.

II. The Commission Had The Authority To Grant A Retroactive Waiver Of The Opt-Out Requirement.

A. Simon's Arguments Regarding Retroactivity Is A Thinly-Veiled Late-Filed Challenge To The Commission's *2014 Anda Commission Order*.

In his Application for Review, Simon argues that “The Commission Cannot Retroactively Waive § 64.1200(a)(4).” (Application for Review at 6.) The substance of Simon’s argument is not that the Bureau acted beyond the scope of its authority in its *August 28, 2015 Order*.¹ Rather, Simon claims that the Commission did not initially have the authority to issue waivers to the opt-out notice in 2014. (Application for Review at 6, 8.) The Commission, however, issued the *2014 Anda Commission Order* in October 2014, and any petition to reconsider that order is long past due. 47 C.F.R. § 1.106(f) (requiring petitions for reconsideration to be filed within 30 days from the date of public notice of the final Commission action). Simon’s attempt to collaterally attack the *2014 Anda Commission Order* is procedurally improper, and should be rejected.

B. Simon's Argument that the Commission Does Not Have Authority To Grant Retroactive Waivers Has Twice Been Considered and Rejected.

Even if one were to construe Simon’s Application for Review as a properly asserted challenge to the Bureau’s 2015 Order – not the Commission’s 2014 Order – his arguments already have been considered and rejected twice. Both the Commission and the Bureau found that the Commission has the authority to waive the opt-out notice requirement of Section 64.1200(a)(4)(iv). *2014 Anda Commission Order* at 11; *August 28, 2015 Order* at 12-13. Simon tries to skirt this by emphasizing that the waiver is retroactive, and asserting that “the Bureau does not even try to justify granting a waiver on a retroactive basis.” (Application for Review at 6.) To the contrary, however, both the Commission’s and the Bureau’s decisions cite 47 C.F.R. § 1.3, which states that the Commission may waive its rules “at any time.” *2014 Anda*

¹ For good reason: It would be erroneous to so argue, since the Commission directly stated that “other similarly situated entities likewise may request retroactive waivers.” *2014 Anda Commission Order* at 11.

Commission Order at 11; *August 28, 2015 Order* at 13. In addition, the use of the term “retroactive” throughout the analyses make perfectly clear that both the Commission and the Bureau found that it was permissible and appropriate to issue a retroactive waiver. *E.g.*, *2014 Anda Commission Order* at 13 (“We find that this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.”); *August 28, 2015 Order* at 12 (“We find that good cause exists to grant a retroactive waiver to the petitioners.”)

C. The Cases Simon Cites Regarding Retroactive Rulemaking Do Not Apply Here.

Moreover, the case law that Simon cites in support of his argument against a retroactive waiver is inapposite because it actually relates to retroactive *rulemaking* – not waiver. Simon cites *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), but *Bowen* is readily distinguishable. There, the Secretary of Health and Human Services sought to retroactively apply a new wage-index rule used to calculate caps on hospitals’ reimbursable wage costs. In this case, the Commission and the Bureau are both clear that the opt-out notice requirement is not changing – thus, they are not engaging in rulemaking. *2014 Anda Commission Order* at 13 (“[W]e affirm that the Commission’s rules require that an opt-out notice must be contained on all fax ads.”); *August 28, 2015 Order* at 5 (“[W]e reiterate that the rule remains in full effect.”). Further, *Bowen* does not help Simon’s case because the Supreme Court was very clear that its conclusion in that case was “resolved by the particular statutory scheme in question,” – a different scheme than applies here. 488 U.S. at 215.

Simon also cites *Retail, Wholesale, and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), but that case also relates to retroactive application of “newly adopted administrative rules,” not waiver. *Id.* at 389. Moreover, in discussing whether retroactive *rulemaking* is permissible, *Retail* considers, among other factors, “whether the new rule

represents an abrupt departure from well-established practice.” 466 F.2d at 390. Even if the Bureau had engaged in rulemaking, which it did not, far from being an “abrupt departure from well-established practice,” the Bureau’s decision is directly in line with the Commission’s recent precedent as established by the *2014 Anda Commission Order*.

Because the Commission and the Bureau already correctly concluded that the Commission has the authority to grant retroactive waivers, and because Simon does not present any authority that contradicts that conclusion, the Commission should deny Simon’s Application for Review.

III. The Bureau’s Grant Of The Retroactive Waiver Of The Opt-Out Notice Requirement To HWHN Did Not Violate The Separation Of Powers

A. Simon’s Argument Regarding The Separation of Powers Is A Thinly-Veiled Late-Filed Challenge To The Commission’s *2014 Anda Commission Order*

As with his argument regarding retroactivity, Simon argues in his Application for Review that “The Commission does not have the authority to ‘waive’ violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers.” (Application for Review at 8.) Again, the substance of Simon’s argument is not really that the Bureau acted beyond the scope of its authority in its *August 28, 2015 Order* – instead, Simon essentially claims that the Commission was wrong in initially granting the waivers in its 2014 order. (Application for Review at 6, 8.) As noted above, the Commission issued the *2014 Anda Commission Order* in October 2014, and any petition reconsideration of that order is long past due. The Commission should reject Simon’s improper attempt to collaterally attack that order.

B. Simon’s Argument that the Waivers Violate the Separation of Powers Has Twice Been Considered and Rejected.

As with the retroactivity argument, the Commission and the Bureau also already have considered and rejected the argument that issuing a waiver of the opt-out notice requirement violates the separation of powers. *2014 Anda Commission Order* at 11 (“[W]e reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have violated the separation of powers vis-à-vis the judiciary.”); *August 28, 2015 Order* at 12 (“At the outset, we dismiss arguments that by granting waivers while litigation is pending violates the separation of powers.”). As both the Commission and the Bureau explained, by issuing waivers they are interpreting a statute – the TCPA – exactly as Congress has authorized them to do. *2014 Anda Commission Order* at 11; *August 28, 2015 Order* at 12-13. In addition, the fact that there is a private right of action under the TCPA does nothing to curtail the Commission’s right to define the scope of when and how its rules apply. *Id.* For these reasons, Simon’s argument regarding the separation of powers is without merit.

C. The Granting of Waivers Does Not Violate The Separation of Powers Because The Waivers Are Limited And Do Not Amount To A Finding Regarding Liability.

Furthermore, contrary to Simon’s assertion, the Bureau’s waiver does not violate the separation of powers because it does not equate to a directive that a court find one way or another on the issue of liability. Quite the opposite – the Bureau reiterates multiple times that “the granting of a waiver does not confirm or deny whether the petitioners had prior express permission of the recipients to send the faxes,” *August 28, 2015 Order* at 10-11, 14, 15, and states that this issue “remains a question for triers of fact in the private litigation,” *id.* at 14. Far from intruding on the role of the judiciary, the Bureau reserved the critical issue – prior express consent – for the trier of fact. Indeed, it is Simon who actually urges the Commission to encroach

upon the function of the judiciary by resolving the issue of consent in the process of granting a waiver. (*See* Application for Relief at 15-16.)

Simon cites *United States v. Klein*, 80 U.S. 128 (1872), in support of his separation of powers argument, but that case has no bearing here. There, the Supreme Court invalidated legislation that purported to direct it to dismiss certain cases due to lack of jurisdiction. Here, the waivers do not equate to a finding of non-liability – in fact, the liability issue is explicitly reserved for the trier of fact. *August 28, 2015 Order* at 14. Simon also cites *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), but that case too is inapposite. There, the D.C. Circuit held that the EPA did not have the authority to create an affirmative defense to a particular statutory cause of action. 749 F.3d at 1063-64. *NRDC*, however, involved a different administrative agency and a fundamentally different regulatory scheme than is involved here. The EPA does not have the benefit of 47 C.F.R. § 1.3, which states that the Commission may waive its rules “at any time.” The D.C. Circuit recognized that distinction in *National Association of Broadcasters v. FCC*, 569 F.3d 416, 426 (DC. Cir. 2009), in which it held that where, as here, a requirement is not mandated by statute, the Commission “has the authority under . . . 47 C.F.R § 1.3 to waive requirements . . . where strict compliance would not be in the public interest.” And finally, *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 497-98 (W.D. Mich. 2014), which Simon also cites on this point, is neither controlling nor persuasive here because, in that case, the court determined that the fax was *unsolicited* – thus, its criticism of the Commission’s waiver is *dicta* and not relevant to this proceeding, which pertains only to faxes that were sent with prior express consent.

Simon’s argument that the Commission has violated the separation of powers has already been addressed, and expressly rejected, two separate times – initially in the *2014 Anda*

Commission Order, and again in the *August 28, 2015 Order*. Furthermore, it lacks a logical or legal basis, as the waivers were granted only as to faxes sent within a limited temporal window, and as they only have any effect if a court determines that there was prior express consent. Moreover, all of the case law that Simon cites falls short of supporting his argument. For these reasons, the Commission should affirm its prior decisions that the granting of waivers does not violate the separation of powers.

IV. Public Policy Considerations Support Retroactive Waiver In This Instance.

Simon argues that the Commission’s grant of the retroactive waiver of the opt-out requirements for Solicited Faxes violates public policy. In support of this argument, Simon points to the Commission’s comment in the *2014 Anda Commission Order* that the “waiver does not extend to the similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship.” (Application for Review at 20.) But this argument is misplaced because Healthways and HWHN made clear in their Petition and Reply that they sought a waiver for faxes sent with the prior express permission of the recipient – not on the basis of an established business relationship. *Petition of Healthways, Inc. and Healthways WholeHealth Networks, Inc. for Retroactive Waiver of 47 C.F.R. 64.1200(a)(4)(iv)* (hereinafter “Petition”) at 1; *Reply in Support of Petition for Retroactive Waiver* (hereinafter “Reply”) at 1. 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.

Further, Simon’s argument that the waivers are against public policy fails because the Commission and the Bureau both found that granting the waivers was in the public interest. *2014 Anda Commission Order* at 13-14; *August 28, 2015 Order* at 12. The Commission explained at length that the lack of adequate notice that the opt-out requirement applied to solicited faxes, coupled with the contradictory footnote in its guidance, resulted in a confusing situation for

businesses. *2014 Anda Commission Order* at 13. The Commission acknowledged 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,” but concluded that “[o]n 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.” *2014 Anda Commission Order* at 13-14.

Healthways and HWHN explained in their Petition that granting a waiver was in the public interest because they could be subject to a penalty of tens of millions of dollars based on a rule that was the subject of confusion. *Petition* at 6. The Commission should affirm its decision that public policy considerations support the granting of waivers.

V. HWHN Can And Will Show Prior Express Permission – When It Is So Required By The District Court.

A. HWHN Is Not Required To Show Prior Express Permission At This Stage.

Simon argues that Healthways and HWHN “never explained how or in what manner HWHN obtained prior express permission to send the faxes at issue, and that this fact required the rejection of Healthways’ and HWHN’s petition. (Application for Review at 15.) Simon is incorrect. Both the Commission and the Bureau were clear that the granting of the waivers preceded and had no bearing on the determination of whether the sender had prior express consent of the recipient. The Commission stated: “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,” and said, “[n]or should the granting of such waivers 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.” *2014 Anda Commission Order* at 15. The Bureau stated:

[W]e decline to conduct a factual analysis to determine whether the petitioners actually obtained consent. Instead, our findings here is that – assuming the proper consent was obtained – petitioners qualify for limited retroactive waivers. We reiterate the Commission’s statement that the granting of a waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.

August 28, 2015 Order at 14. Thus, both orders are abundantly clear about how the present case should proceed: the issue of prior express consent should be determined by the district court, and for those cases in which the court finds that Healthways and/or HWHN did have prior express consent, the opt-out requirement is waived.

B. HWHN Will Demonstrate That It Had Prior Express Permission To Send The Faxes In Question.

Because the Bureau properly did not and will not adjudicate the question of prior express consent, Simon’s arguments as to why HWHN cannot show prior express consent are irrelevant here. But in any event, those arguments are erroneous for multiple reasons.

For example, Simon argues that “the mere act of providing a fax number to another does not constitute prior express permission under the TCPA.” (Application for Review at 15.) As Simon well knows, however, the evidence of prior express permission goes well beyond that. By way of example only, in completing their Participating Practitioner Agreements, HWHN’s network providers were not merely writing their fax numbers on a piece of paper – they were signing up to join a network, and simultaneously providing the method by which HWHN could and should contact them. Moreover, the health care providers were not required to provide a fax number at all – they could, and many did, omit that information – and thus those who did provide a fax number were doing so voluntarily. At least one version of the Participating Practitioner

Agreement explicitly asked for the preferred method of contact, as well as a designated office contact.

Moreover, for many of the providers in question, there was a long history of sending and receiving information to and from HWHN via fax, and many of the providers submitted applications for credentialing through HWHN that specifically asked whether HWHN could send non-billing related correspondence to the fax number and address provided. In addition, a large number of the fax recipients had contacted HWHN via telephone and specifically requested to receive information via fax.

VI. The Bureau Properly Granted HWHN A Waiver Based On A Presumption Of Confusion And Misplaced Confidence

A. HWHN Was Not Required To Affirmatively Demonstrate Actual Confusion.

Simon contends that the Bureau's decision to "not require petitioners to plead specific, detailed grounds for individual confusion" in its *August 28, 2015 Order* reflected a departure from the *2014 Anda Commission Order*. (Application for Review at 17-18.) To the contrary, the Bureau directly followed the standard set forth in the *2014 Anda Commission Order* in granting the HWHN Petition. 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 they had to comply with the opt-out notice requirement for faxes sent with prior express permission. *2014 Anda Commission Order* at 13. The Commission did not engage in any case-by-case fact finding to determine whether the petitioners were actually confused with respect to the rules, and did not indicate that the Bureau must do so in regard to the similarly situated parties who could apply for waivers in the wake of the 2014 Order. *Id.* at 13-14. Thus, in its *August 28, 2015 Order*, the Bureau did not depart from the Commission's *2014 Anda Commission Order*.

Simon also contends that the Bureau 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. (Application for Review at 18-19.) Again, this argument fails because the Bureau did not create a new presumption; it followed suit with the Commission, which noted in granting the waivers that each petitioner cited the contradictory footnote regarding the opt-out requirement, and that nothing in the record demonstrated that any petitioner properly understood the opt-out notice requirement and yet failed to comply. *2014 Anda Commission Order* at 13; *August 28, 2015 Order* at 15. Here, HWHN cited the contradictory footnote, and Simon has not demonstrated that HWHN understood the requirement and yet failed to comply. Thus, the Bureau's 2015 Order aligns with the Commission's 2014 Order – and in fact, imposing a new requirement that HWHN demonstrate specific, detailed grounds for confusion would be an arbitrary and baseless departure from the *2014 Anda Commission Order*.

B. Simon's Argument As To Why HWHN Was Not Confused Is Erroneous.

Simon contends that HWHN claimed through its Rule 30(b)(6) designee (Ann Kent) that HWHN was not confused regarding the TCPA's requirements. (Application for Review at 17.) His contention mischaracterizes the designee's testimony. First, as Simon well knows, that deposition was taken in contemplation of mediation, without prejudice to being supplemented or continued at a later date. Second, Simon's claim that the designee testified that no one at HWHN read any rulings, regulations, or orders regarding the TCPA is misleading – read in context, the designee clearly was referring to herself and two other non-legal employees – not every single person employed by HWHN.

VII. Conclusion.

For the reasons stated above, Healthways and HWHN respectfully request that the Commission affirm its decision to grant them a retroactive waiver of Section 64.1200(a)(4)(iv) of Title 47 of the Code of Federal Regulations for any Solicited Faxes transmitted by HWHN (or on its behalf) prior to April 30, 2015.

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Respectfully submitted,

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