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	Re: Waiver Request by Healthways, Inc. and Healthways WholeHealth Networks, Inc.
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 the Recipient's Prior Express Permission	

To: Office of the Secretary

Attention: The Commission
Consumer and Governmental Affairs Bureau

Reply in Support of Application for Review

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November 2, 2015

Edward Simon ("Simon") and Affiliated Health Care Associates ("Affiliated") (collectively "Applicants"), by their attorneys, submit this reply in support of their Application to Review the August 28, 2015, Order, DA 15-976 ("August 28 Order"), of the Acting Chief, Consumer and Governmental Affairs Bureau granting a retroactive waiver to Healthways, Inc. and Healthways WholeHealth Networks, Inc. (collectively, "Healthways") and to respond to Healthways' opposition submitted on October 23, 2015.[1]

1. Applicants are entitled to make all arguments seeking reversal of Healthways' waiver. Healthways repeatedly contends that Applicants are attempting to "collaterally attack" the *Anda Commission Order.* (*E.g.,* Opp'n at 3.) But the waiver was granted in the Bureau's August 28 Order and not in the *Anda Commission Order.* Indeed, neither Healthways nor Applicants were parties to any of the petitions that resulted in the *Anda Commission Order.* Thus, the earliest opportunity that Applicants had to express its opposition was in the context of their Comments to Healthways' Petition for waiver (which Petition was filed *after* the *Anda Commission Order*). Moreover, in its August 28 Order, the Bureau did not preclude anyone, including Applicants, from raising arguments *de novo* against a petition for waiver. This was consistent with the *Anda Commission Order* which stated that "all future waiver requests will be adjudicated on a case-by-case basis" and that the Commission would not "prejudge the outcome of future waiver requests."[2] Applicants are therefore free to make all arguments against the waiver issued to Healthways in the August 28 Order.

2. Even if the Commission has the authority to "waive" § 64.1200(a)(4) (which it does not), it cannot do so retroactively. The August 28 Order is silent as to the Commission's authority to *retroactively* waive § 64.1200(a)(4), assuming that the Commission could waive it in the first place (which it cannot; *see* ¶ 3 below). This is no coincidence because, as the Supreme Court has explained, "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."[3] Just as the TCPA does not expressly (or otherwise) authorize the

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[1] Healthways incorrectly observes (Opp'n. at 1) that the Application for Review was brought by only Simon; both Simon and Affiliated opposed Healthways' underlying Petition for Waiver and both filed the Application for Review. The page limitation for a reply does not permit Applicants to present all arguments supporting their Application. The fact that Applicants have omitted any argument in this reply should not be construed as a waiver of such argument. Applicants maintain all arguments.

[2] *Anda Commission Order* ¶30, n. 102.

[3] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Even if the Bureau's August 28 Order is considered an adjudicatory rule, it is invalid because it does not satisfy the requirements

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Commission to issue retroactive regulations, it does not authorize the Commission to retroactively waive any of its regulations implementing the TCPA.

Nor can authority for a waiver to Healthways be found in 47 C.F.R. § 1.3. That section generally enables the Commission to waive the requirements of a regulation, but not a cause of action already accrued under a *statute* for a violation of a regulation.[4] Applicants' cause of action fully vested when Healthways sent them faxes without opt-out notices in August 2014. Moreover, Simon commenced the underlying litigation against Healthways in reliance upon § 64.1200(a)(4)(iv) *before* the *Anda Commission Order* issued. Healthways offers no argument in response.[5]

3. The Commission has no authority to "waive" § 64.1200(a)(4), and doing so would violate the separation of powers. Healthways argues that that the Bureau did not violate the separation of powers because it merely waived the Commission's "own rules" rather than a statutory private right of action. (Opp'n. at 5-8.) This argument fails because "[i]nsofar as the statute's language is concerned, to violate a regulation that lawfully implements [the statute's] requirements is to violate the statute."[6] In the *Anda Commission Order*, the Commission ruled that

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for retroactive application of adjudicatory rules. *See, e.g., Retail, Wholesale, and Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). According to Healthways, *Bowen* and *Retail, Wholesale* are distinguishable because they involve "new rules" and "not retroactive waivers." (Opp'n. at 4-5.) But the "new rule" in this situation is the waiver—the abrogation of a statutory private right of action—that is being applied against those who relied on the *existing* rule (§ 64.1200(a)(4)(iv).)

[4] *E.g., National Ass'n of Broadcasters v. F.C.C.*. 569 F.3d 416, 426 (D.C. Cir. 2009) ("the Commission has authority under its rules, see 47 C.F.R. § 1.3, to waive requirements not mandated by statute where strict compliance would not be in the public interest…."). Healthways' quote from this case crucially leaves out the words "*not mandated by statute*." (Opp'n. at 7.)

[5] All that Healthways does is point to the language from §1.3 that the Commission may waive its rules "at any time." (Opp'n at 3.) But this provides no authority a "retroactive" waiver if and when the Commission should order a waiver.

[6] *Global Crossing Telecommc'ns, Inc. v. Metrophones Telecommc'ns, Inc.*, 550 U.S. 45, 54 (2007) (citing *MCI Telecommc'ns Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014). The court in *Stryker* found that "[i]t would be a fundamental violation of the separation of powers for [the Commission] to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court." The court held that "nothing in the waiver…invalidates the regulation itself" and that "[t]he regulation remains in effect just as it was originally promulgated" for purposes of determining whether the defendant violated the "regulation prescribed under" the TCPA. *Id.* The court concluded that "the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power." *Id.*

§ 64.1200(a)(4) is a regulation that lawfully implements the TCPA and that a violation of the regulation is a violation of the statute under § 227(b)(3).[7] The Commission simply has no authority under the TCPA or otherwise to "waive" a violation of the TCPA that has occurred, and therefore any purported waiver of that violation is invalid. Contrary to the August 28 Order (at ¶ 13), the Bureau's issuance of a waiver to Healthways does not merely "interpret" a statute, but effectively nullifies the TCPA's private right of action. Moreover, issuing a waiver does not just "defin[e] the scope of when or how our rules apply," but instead attempts to constrict the scope of the private right of action which the Bureau cannot do.[8]

4. Healthways did not properly allege and cannot show that it obtained prior express permission. Unable to provide any evidence of prior express permission, Healthways relies on the Bureau's determination that no such proof is required for a waiver. (Opp'n. at 9-10.) Healthways resorts to this because Healthways' Petition baldly claimed, without more, that recipients of its faxes "provided their prior express invitation or permission to receive such faxes," even though it was required to "plead with particularity" in order to obtain a waiver.[9] Healthways did not plead with any greater "particularly" in its Reply Comment when it merely claimed that it would "present" unspecified "evidence to the district courts demonstrating that prior express permission."[10] Healthways did, however, acknowledge in its Reply Comment (at 7-8) that on April 7, 2015, the Court in the Simon litigation rejected Healthways' only purported evidence of prior express permission (Healthways' Participating Practitioner Agreements).[11] The Court found that the applications, which upon acceptance by Healthways constituted the Participating Practitioner Agreements, do not state that an applicant, by providing his or her fax number, consents to receive any faxes. Thus, the Court concluded that Healthways did not obtain prior express permission. The Court's ruling is consistent with the Commission's prior orders: the Commission stresses that prior express permission "requires that the consumer understand that by providing a fax number, he or

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[7] *Anda Commission Order* ¶¶ 14, 19-20.

[8] The waiver to Healthways is not saved because the Bureau stated that "the granting of a waiver does not confirm or deny whether the petitioners had prior express permission." (Opp'n at 6.) That puts the cart before the horse; the waiver should have never been granted in the first place. Healthways is also wrong about the waiver being of a "limited temporal window." (*Id.* at 8.) The waiver is about nine years long: from August 2006 (when §64.1200(a)(4)(iv) became operative) through April 30, 2015.

[9] Petition at 6, filed March 2, 2015.

[10] Reply Comment at 7, filed April 21, 2015.

[11] *Simon v. Healthways Inc.*, 2015 WL 1568230, at *6 (C.D. Cal. Apr. 7, 2015).

she is agreeing to receive faxed advertisements."[12] The Court's ruling is a judicial finding that precludes a waiver of a regulation premised on there being prior express permission.[13]

Now Healthways desperately asserts in its Opposition (at 11)—for the first time to the Commission—that prior express permission can be found in the "history of [providers] sending and receiving information to and from HWHN via fax," in "applications for credentialing" and "requests to receive information via fax." None of this is in the record of these proceedings (or even sought to be demonstrated in the Opposition), and thus Healthways' newly minted contentions must be ignored. It is simply "too little, too late."

5. Healthways failed to show that it is subject to "potentially substantially damages" because of its failure to comply with § 64.1200(a)(4)(iv). Healthways was required to show that it faces potential damages *from its failure to comply with § 64.1200(a)(4)(iv),* not from *any* violation of the TCPA. Healthways offered no facts establishing that it was subject to the regulation at all, let alone that it would sustain potentially substantial damages for its violation. (Opp'n at 9.)[14]

6. Healthways failed to demonstrate something more than an ignorance of the law. In the *Anda Commission Order*, the Commission clearly stated that "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."[15] Through its Rule 30(b)(3) designee, Ann Kent, in the Simon litigation, Healthways asserts that it was ignorant of the law.[16] Healthways cannot have it both ways—it cannot claim ignorance of the law in the Simon litigation in order to try to avoid an enhancement of damages for knowing/willful violations of the law and at

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[12] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014, 14129, ¶ 193; *see also Jemiola v. XYZ Corp.*, 802 N.E.2d 745, 748 (Ohio C.P. 2003) ("the recipient must be expressly told that the materials to be sent are advertising materials, and will be sent by fax.")

[13] *See, e.g.*, August 28 Order ¶ 18 stating that a "judicial finding" would rebut a presumption of confusion and misplaced confidence.

[14] This is just one of several ways that Healthways failed to show that it was "similarly situated." Alternatively, because the granting of a waiver under the August 28 Order is not dependent on any facts pertaining to any individual party requesting a waiver, the Bureau has impermissibly set itself up to grant waivers to each and every party that asks for one without regard to any relevant standard.

[15] *Anda Commission Order* ¶ 26.

[16] Ms. Kent claimed in her testimony that prior to the filing of the Simon litigation: (1) HWHN did not include opt-out notices on any faxes it sent ; (2) no one associated with HWHN had read any FCC rulings, orders or regulations regarding the TCPA; (3) nobody associated with HWHN was even aware of any FCC rulings, orders, or the TCPA; and (4) she could not claim that anyone associated with HWHN was confused or misled by any FCC ruling, orders, or regulations. *See* Application for Review at 3 and Ex. A thereto.

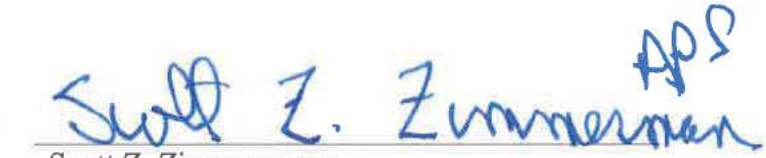
the same time obtain a waiver from the Commission based on the same asserted ignorance of the law.[17]

7. The Bureau's shift in the standard for waiver violated Applicants' due process rights. The Commission's admonition that "simple ignorance of the law" is insufficient completely disappeared from the August 28 Order. This shift in the standard by which waivers are to be determined violates Applicants' due process rights.

8. It would violate public policy to grant Healthways a waiver. A waiver of the opt-out notice requirement under § 64.1200(a)(4)(iv) is completely unwarranted for any fax that was required to have an opt-out notice independent of the regulation. The Commission declared in the *Anda Commission Order* that all faxes must contain an opt-out notice.[18] Accordingly, a waiver, at most, should be granted only if a fax was sent *exclusively* to persons who gave permission; otherwise, it makes no sense to waive the failure to provide an opt-out notice under § 64.1200(a)(4)(iv) because an opt-out notice was required to be on the fax in any case. Healthways' practice was to blast a single fax to numerous recipients at a time. Healthways makes no showing that it limited its fax blasts only to persons who gave permission (indeed, it makes no showing that anyone, including Simon and Affiliated, gave permission). Healthways' response that fax recipients who did not give permission are unaffected by the waiver completely misses the point. (Opp'n. at 8-9.) The point is that there is no reason to shield Healthways from liability for its failure to comply with § 64.1200(a)(4)(iv) when it was legally required to provide an opt-out notice in its faxes anyway.[19]

Respectfully submitted,

Aaron P. Shainis



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[17] The Bureau's creation of a "presumption of confusion" and the limited ability to rebut this presumption is not supported by the evidence and is contrary to law. (August 28 Order at ¶¶ 15-18.) Further, without waiver of these arguments, Ms. Kent's testimony about Healthways' ignorance of the law is sufficient to rebut any such presumption.

[18] *Anda Commission Order*, *e.g.*,¶ 2, n. 2.

[19] It is again noted that Simon raised this argument in opposition to Healthways' Petition but the argument was ignored by the Bureau in the August 28 Order. *See* Simon's Comment at 26-27.

CERTIFICATE OF SERVICE

I, Malinda Markland, do hereby certify that copies of the foregoing "Reply in Support of Application for Review" were sent on this 2nd day of November, 2015, via regular mail, to the following:

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