

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of
1991

Junk Fax Prevention Act of 2005

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

CG Docket No. 02-278

CG Docket No. 05-338

Re: Waiver Request by the "RadNet
Entities"

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”), by his attorneys, submit this reply in support of his 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 the “RadNet Entities”¹ and to respond to the RadNet Entities’ opposition submitted on October 23, 2015.

1. Simon is entitled to make all arguments seeking reversal of the waiver to RadNet Entities. The RadNet Entities repeatedly contend that Simon is attempting to “collaterally attack” the *Anda Commission Order*. (E.g., Opp’n at 2.) But the waiver was granted in the Bureau’s August 28 Order and not in the *Anda Commission Order*. Indeed, neither the RadNet Entities nor Simon were parties to any of the petitions that resulted in the *Anda Commission Order*. Thus, the earliest opportunity that Simon had to express his opposition was in the context of his Comments to the RadNet Entities’ 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 Simon, 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 Simon is therefore free to make all arguments against the waiver issued to the RadNet Entities 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 Commission to issue retroactive regulations, it does not authorize the Commission to retroactively waive any of its regulations implementing the TCPA.

¹ The 22 “RadNet Entities” are listed in Exhibit A to their Petition.

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 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). Although cited in Simon’s Application for review, neither *Bowen* nor *Retail, Wholesale* are addressed in the RadNet Entities’ opposition.

Nor can authority for a waiver to the RadNet Entities 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. Simon's cause of action fully vested when certain of the RadNet Entities sent him faxes without opt-out notices prior to the *Anda Commission Order*. Moreover, Simon commenced the underlying litigation against the RadNet Defendants⁴ in reliance upon § 64.1200(a)(4)(iv) *before* the *Anda Commission Order* issued. The RadNet Entities offer 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. The RadNet Entities argue 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 3.) 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 § 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

⁴ Simon's litigation was filed on September 4, 2014 in the Los Angeles Superior Court and then removed to the U.S. District Court for the Central District of California by the “RadNet Defendants,” now pending as Case No. 2:14-cv-7997 BRO. The three “RadNet Defendants” are: RadNet Management, Inc., Beverly Radiology Medical Group and Breastlink Medical Group, Inc.

⁵ Because the Bureau's action is contrary to the TCPA it is not entitled to deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), as argued by the RadNet Entities. (Opp'n at 3, n. 7.)

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.* The RadNet Entities claim that *Stryker* is not “persuasive” but they never explain why. (Opp'n at 4, n. 17.)

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

Bureau's issuance of a waiver to the RadNet Entities 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. The RadNet Entities did not properly allege and cannot show that they obtained prior express permission. Unable to provide any evidence of prior express permission, the RadNet Entities rely on the Bureau's determination that no such proof is required for a waiver. (Opp'n. at 5.) The RadNet Entities resort to this because their Petition baldly claimed, without more, that that "[m]any of these health care professionals have specifically requested to receive such information in this manner [via fax]," even though they were required to "plead with particularity" in order to obtain a waiver.⁹ Further, notably absent is any statement from the RadNet Entities that "such information" means advertisements, such as the fax advertisements received by Simon. Indeed, in the litigation brought by Simon, RadNet Management admits that admitted that Simon did not give prior express permission and could only identify one company that supposedly gave permission.¹⁰

5. The RadNet Entities failed to show that they are subject to "potentially substantially damages" because of their failure to comply with § 64.1200(a)(4)(iv). The RadNet Entities were required to show that they face potential damages *from its failure to comply with § 64.1200(a)(4)(iv)*, not from *any* violation of the TCPA. They made no showing that they were subject to the regulation at all, let alone that it would sustain potentially substantial damages for its violation. (Opp'n at 6.)¹¹

⁸ Because the Bureau's action is contrary to the TCPA it is not entitled to deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), as argued by the RadNet Entities. (Opp'n at 3, n. 7.)

Further, the waiver to the RadNet Entities 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 3.) That puts the cart before the horse; the waiver should have never been granted in the first place. The granting a waiver to the RadNet Entities now and allowing them only later to try to prove that they obtained prior express permission in the Simon litigation gives them an unwarranted and unfair advantage in the litigation.

⁹ Petition at 3, filed Jan. 16, 2015.

¹⁰ See Application for Review at 2. Accordingly, at most, any waiver to the RadNet Entities should be limited to faxes sent to this one company (Pacific Coast Sports Medicine).

¹¹ Indeed, the RadNet Entities did not identify which of them – if any – sent any faxes that are the subject of their request for waiver and accordingly they do show that they are even subject to § 64.1200(a)(4)(iv). The opposition does not address this failing. (Opp'n 6 (wherein they merely

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6. The RadNet Entities 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.”¹² Nowhere do the RadNet Entities show that they, or any of them, had more than an “ignorance of the law.”¹³

7. The Bureau’s shift in the standard for waiver violated Simon’s 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 Simon’s due process rights.

8. It would violate public policy to grant the RadNet Entities 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.¹⁴ 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. Since it is admitted that Simon did not give permission to be sent faxes, by definition the faxes sent to him (and others who did not give permission) were required to have an opt-out notice. No waiver

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allude to the granting of waivers to “affiliated entities” in connection with other petitions.) Moreover, only three of the RadNet Entities are defendants in the Simon litigation and the other 19 face no liability whatsoever. These are just several of the multiple ways the RadNet Entities failed to show that they were “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. Indeed, the RadNet Entities crow that they “should not have to factually justify whether it qualifies for the waiver.” (Opp’n at 5.)

¹² *Anda Commission Order* ¶ 26.

¹³ For example, none of the RadNet Entities claim that they knew about the TCPA, let alone the rulemaking for, or footnote 154 in, the 2006 Junk Fax Order. Instead, the RadNet Entities merely stated in their Petition at 5 that they were “confused by conflicting language from the 2006 Junk Order.” This across-the-board statement covering 22 entities is ridiculous. They failed to identify either the particular RadNet Entity, or the individual(s) within any entity, that were “confused,” when they became “confused,” or how they became “confused.” They did not even identify the “conflicting language” that supposedly caused the “confusion.” Further, they did not claim this alleged “confusion” actually led any of them to omit opt-out notices in their faxes.

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.)

¹⁴ *Anda Commission Order*, e.g., ¶ 2, n. 2.

should be granted for these faxes because they independently needed to have an opt-out notice. Indeed, the RadNet Entities make no showing that they limited *any* of their fax blasts only to persons who gave permission. The RadNet Entities' response that fax recipients who did not give permission are unaffected by the waiver completely misses the point. (Opp'n. at 8.) The point is that there is no reason to shield the RadNet Entities from liability for their failure to comply with § 64.1200(a)(4)(iv) when they were legally required to provide an opt-out notice in its faxes anyway.¹⁵

Respectfully submitted,


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¹⁵ It is again noted that Simon raised this argument in opposition to the RadNet Entities' Petition but the argument was ignored by the Bureau in the August 28 Order. See Simon's Comment at 24-25.

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 US mail, to the following:

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