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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 United Stationers Inc., *et al.*
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

Craftwood II, Inc., dba Bay Hardware, and Craftwood Lumber Company, 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 United Stationers Inc., United Stationers Supply Co., and Lagasse LLC (collectively, "United") and to respond to United's opposition submitted on October 13, 2015. The arguments why the Application should be granted and the waiver reversed are presented in the same order as set forth in the Application.[1]

1. Even if the Commission has the authority to "waive" § 64.1200(a)(4) (which it does not), it could not 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* ¶ 2 below). Likewise, United's opposition is mute on this issue. This is no coincidence because "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."[2] Just as the TCPA does not expressly (or otherwise) authorize the Commission to issue retroactive rules, it does not authorize the Commission to retroactively waive any of its regulations implementing the TCPA. United's silence on this issue can only be construed as a concession of the point.

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[1] The page limitation for a reply does not permit Craftwood to present all arguments supporting its Application. The fact that Craftwood has omitted any argument in this reply should not be construed as a waiver of such argument. Craftwood maintains all arguments.

Further, United plays a game of semantics when it contends that Craftwood did not comply with 47 C.F.R. § 1.115. (Opp'n. 4.) The Commission should review and reverse the August 28 Order as provided in the Application because the Order: (i) "conflict[s] with statute, regulation, case precedent, [and] established Commission policy"; (ii) "involves a question of law [and] policy which has not previously been resolved by the Commission"; (iii) "involves application of a precedent or policy which should be overturned or revised"; (iv) makes "an erroneous finding as to an important or material question of fact" and (v) constitutes prejudicial procedural error, including violations of Craftwood's due process.

[2] *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); *Williams Natural Gas Co. v. F.E.R.C.*, 3 F.3d 1544, 1554 (D.C. Cir. 1993).

2. The Commission has no authority to "waive" § 64.1200(a)(4), and doing so would violate the separation of powers. United argues that that there is no violation of the separation of powers because the Commission is merely waiving "its own rules" rather than a statutory private right of action. (Opp'n. at 6-9.) 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."[3] In the *Anda Commission Order* the Commission ruled that § 64.1200(a)(4) is a regulation that lawfully implements the TCPA, so a violation of the regulation is a violation of the statute under § 227(b)(3).[4] The Commission simply has no authority under the TCPA or otherwise to "waive" a violation of the TCPA and therefore any purported waiver of § 64.1200(a)(4) is invalid. Contrary to the August 28 Order (at ¶ 13), the Bureau's issuance of a waiver to United does not just "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.

3. United's petition was filed after April 30 and is untimely. In its reply in support of its underlying petition, United lamely argued that it failed to file by April 30 because it was sued and served after April 30.[5] But this argument could not possibly fly for a large, sophisticated company like United, which was placed on notice that it needed to file for a waiver by April 30. Indeed, United did not even deny that it was aware of the *Anda Commission Order* and the need to file by April 30. Now United abandons this excuse, but offers nothing in its

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[3] *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.*

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

[5] United filed its petition on May 18, 2015, almost three weeks after the April 30 deadline.

place. (Opp'n. at 10.) Accordingly, United's failure to meet the April 30 deadline is unexcused, which is sufficient reason *alone* for the Commission to reverse the waiver in United's favor. Other reasons also require reversal: Craftwood commenced substantial litigation against United on May 1 after determining that the company had *not* sought a waiver by the April 30 deadline and that United sent all of the faxes attached to Craftwood's Complaint after the *Anda Commission Order*, *i.e.,* after United was on notice that opt-out notices were required on all faxes. Acceptance of United's late-filed petition punishes Craftwood's good faith reliance on the Commission's April 30 deadline.[6] It also discourages private parties from enforcing the TCPA—an integral part of the statutory enforcement scheme—and increases the burden on the Commission to police junk fax advertising.

4. United does not assert that Craftwood has given prior express permission. United made no such assertion in its petition or in its opposition. This alone warrants reversal of the wavier in its favor.

5. United did not offer any explanation or proof that it actually sent *any* solicited faxes, and therefore "good cause" for a waiver cannot exist. United merely repeats in opposition that the Bureau did not require proof of permission for a waiver (Opp'n at 7), but fails to address how "good cause" for a waiver can possibly exist absent such proof.[7] And United did not even try to explain how it may have obtained any permission even though it was required to "plead with particularity." The Bureau lacks authority to dispense with this requirement.

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[6] The Bureau did not provide any reason in the August 28 Order for excusing United's blowing of the April 30 deadline other than to observe that the waiver would only cover fax ads sent up to April 30, 2015. (¶¶ 11, 20.) This makes a mockery of the Commission's admonishment that "[w]e expect parties making similar waiver requests to file within six months of the release of this order." *Anda Commission Order* ¶ 30.

[7] As the Commission recognized in the *Anda Commission Order,* a "waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest that would application of the rule." (¶ 23.) Without any prior express permission, there are no "special circumstances" that would warrant "deviation from the general rule," because § 64.1200(a)(4)(iv) would not apply in the first place. And without prior express permission, a waiver simply does not serve the public interest more than would application of § 64.1200(a)(4)(a).

Granting a waiver under such circumstances would an unfair and unwarranted advantage to United in the litigation brought by Craftwood and is arbitrary and capricious.[8]

6. United failed to show that it is subject to "potentially substantially damages" because of its failure to comply with § 64.1200(a)(4)(iv). United 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. United offered no facts of any kind to establish that it was subject to the regulation at all, let alone that it would sustain potentially substantial damages for its violation.[9]

7. United failed to demonstrate something more than it was ignorant 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."[10] United never even stated that it was aware of the TCPA or § 64.1200(a)(4)(iv). This alone requires reversal of the waiver. United cannot have it both ways—it cannot claim ignorance of the law in the Craftwood litigation in order to try to avoid an enhancement of damages for knowing/willful violations of the law and at the same time obtain a waiver from the Commission based on the same asserted ignorance of the law.[11]

8. There is no evidence of industry-wide confusion about § 64.1200(a)(4)(iv). The record – which was not before the Commission in connection with the *Anda Commission Order* – demonstrates that regulated entities immediately understood the plain language of § 64.1200(a)(4)(iv), thus belying any finding of industry-wide confusion. Accordingly, there can be no "presumption of confusion or misplaced confidence" in United's favor. (*See* Application for Review at 19, n.82.) United fails to address this in its opposition.

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[8] *See* Application for Review at 17.

[9] This is just one of several ways that United 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.

[10] *Anda Commission Order* ¶ 26.

[11] The Bureau's creation of a "presumption of confusion" and the limited ability to rebut this presumption is not support by the evidence and is contrary to law. (*Anda Commission Order* ¶¶ 16-18.)

9. The Bureau's shift in the standard for waiver violated Craftwood'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 Craftwood's due process rights. United offers no justification for this shift or the due process violation.

10. It would violate public policy to grant United a waiver. A waiver of the opt-out notice requirement under § 64.1200(a)(4)(iv) is completely unwarranted if the fax was required to have an opt-out notice independent of the regulation. The Commission declared in *Anda Commission Order* that all faxes must contain an opt-out notice.[12] 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 in any case. United makes no showing that it sent faxes only to persons who gave permission (indeed, it makes no showing that anyone, including Craftwood, gave permission). It would therefore violate public policy to grant a waiver in this circumstance. United's response that fax recipients who did not give permission are unaffected by the waiver completely misses the point. (Opp'n at 12.) The point is that there is no reason to shield United 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.[13]

October 23, 2015

Respectfully submitted,

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[12] *Anda Commission Order* ¶ 2, n.2; *see also id.* ¶¶ 26-29.

[13] It is again noted that Craftwood raised this argument in opposition to United's petition but the argument was ignored by the Bureau in the August 28 Order.

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 23rd day of October, 2015, via regular mail, to the following:

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