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May 14, 2012

BY HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554

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MAY 14 2012

Federal Communications Commission
Office of the Secretary

Re: *Junk Fax Prevention Act of 2005; Petition for Declaratory Ruling To Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent, CG Docket No. 05-338*

Dear Ms. Dortch:

Enclosed please find an original and six copies of the Application for Review of Anda, Inc., regarding the Order issued on May 2, 2012, by the Consumer and Governmental Affairs Bureau in the above-referenced docket.

Respectfully submitted,



Matthew A. Brill
of LATHAM & WATKINS LLP

Enclosures

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

FILED/ACCEPTED

MAY 14 2012

Federal Communications Commission
Office of the Secretary

In the Matter of)
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Junk Fax Prevention Act of 2005)

CG Docket No. 05-338)
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Petition for Declaratory Ruling To Clarify That)
47 U.S.C. § 227(b) Was Not the Statutory Basis)
for Commission's Rule Requiring an Opt-Out)
Notice for Fax Advertisements Sent with)
Recipient's Prior Express Consent)

APPLICATION FOR R

original

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May 14, 2012

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

In the Matter of)

Junk Fax Prevention Act of 2005)

CG Docket No. 05-338)

Petition for Declaratory Ruling To Clarify That)
47 U.S.C. § 227(b) Was Not the Statutory Basis)
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Notice for Fax Advertisements Sent with)
Recipient's Prior Express Consent)

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules,¹ Anda, Inc. ("Anda") seeks review by the full Commission of the Order adopted by the Consumer and Governmental Affairs Bureau on May 2, 2012, in the above-captioned proceeding.² The *Bureau Order* dismissed Anda's Petition for Declaratory Ruling,³ which asks the Commission to clarify that 47 U.S.C. § 227(b), a provision that authorizes the Commission to adopt opt-out notice rules only for "unsolicited" fax advertisements, was not the statutory basis for the Commission's rule requiring an opt-out notice on fax advertisements sent with the recipient's express prior consent. For the reasons discussed herein, the Commission should promptly vacate the *Bureau Order* and grant the relief sought in Anda's Petition.

¹ 47 C.F.R. § 1.115.

² See *Junk Fax Prevention Act; Petition for Declaratory Ruling To Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, CG Docket No. 05-338, Order, DA 12-697 (rel. May 2, 2012) ("*Bureau Order*" or "*Order*").

³ See *Petition for Declaratory Ruling, Petition for Declaratory Ruling To Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, CG Docket No. 05-338 (filed Nov. 30, 2010) ("*Petition*").

INTRODUCTION

In 2006, the Commission adopted a rule requiring that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice” that complies with certain technical rules.⁴ The Commission did so without any prior notice or opportunity for comment, explanation, or specific citation to statutory authority; instead, it buried the rule within a final order implementing the Junk Fax Prevention Act of 2005 (“JFPA”). The rule went well beyond the opt-out notice requirements that Congress authorized the Commission to adopt under the JFPA, which focused exclusively on advertisements faxed without any form of consent or pursuant to an “established business relationship” with the recipient (*i.e.*, with *implied* consent). And while the Commission’s order adopting the rule listed no fewer than 11 statutory provisions at the end of the order apparently covering all of the rules adopted therein, the Commission never identified which of those provisions purportedly formed the legal basis for extending an opt-out notice requirement to fax advertisements sent with the recipient’s prior express consent.

The ambiguity surrounding the rule’s legal basis has continued to confound courts and private parties alike. At least one court has erroneously concluded that the rule arose out of 47 U.S.C. § 227(b)(2), a provision of the JFPA that authorizes the Commission to adopt opt-out notice rules only for *unsolicited* fax advertisements.⁵ As a result, the court permitted plaintiffs to sue for damages under the private right of action established by Section 227(b)(3), which authorizes private suits based on “a violation of this subsection or the regulations prescribed

⁴ 47 C.F.R. § 64.1200(a)(3)(iv).

⁵ *MSG Jewelers, Inc., v. C & C Quality Printing, Inc.*, 2008 TCPA Rep. 1811 (Mo. Cir. July 17, 2008); *see* 47 U.S.C. § 227(b)(2)(D) (authorizing the Commission to adopt rules regarding the “notice contained in an unsolicited advertisement”).

under this subsection.”⁶ The rule’s legal basis is also at issue in a case currently pending before the Eighth Circuit, which found the rule sufficiently perplexing that it asked the Commission to file an *amicus* brief.⁷ Anda itself is facing lawsuits in Missouri and Florida where plaintiffs’ class-action lawyers have seized on the rule’s uncertain legal basis and are seeking hundreds of millions of dollars in damages. If confusion persists among courts over the legal basis of the rule, these copycat lawsuits—seeking crippling damages that Congress never intended to authorize—will only proliferate.

Notwithstanding this pervasive and harmful uncertainty regarding the rule’s statutory basis, the *Bureau Order* concluded that Anda had “identif[ied] no controversy to terminate or uncertainty to remove.”⁸ The *Bureau Order* went on to suggest in dicta that Section 227(b) “could” have been the statutory basis for the rule,⁹ even though the text, purpose, and legislative history of Section 227(b) all run counter to that interpretation. As explained below, the *Bureau Order* is plainly erroneous, and the Commission should not only vacate the *Order* but also clarify that Section 227(b) was *not* the statutory basis for the rule at issue.

BACKGROUND

A. Statutory and Regulatory Background

From its earliest efforts to regulate fax communications, Congress has declined to impose restrictions on advertisements sent with the recipient’s express consent. In 1991, Congress enacted the Telephone Consumer Protection Act (“TCPA”), which prohibited the sending of

⁶ *Id.* § 227(b)(3).

⁷ *Nack v. Walburg*, No. 11-1460, Order, slip op. at 1 (8th Cir. Jan. 11, 2012).

⁸ *Bureau Order* ¶ 1.

⁹ *Id.* ¶ 7.

“unsolicited advertisements” via fax.¹⁰ The TCPA defined “unsolicited advertisement” to mean “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”¹¹ The TCPA thus exempted from its restrictions any fax advertisements sent *with* the recipient’s “prior express invitation or permission.”

In 2005, Congress enacted the JFPA.¹² The JFPA left unchanged the law governing faxes sent with the recipient’s express permission. However, the JFPA created an exception to the prohibition of unsolicited advertisements where the sender has an “established business relationship” (“EBR”) with the recipient—as long as the sender provides an “opt-out” notice on the fax informing recipients how to stop future faxes.¹³ Congress deemed the opt-out notice necessary because the existence of some type of business relationship may not reflect a willingness to receive faxes from the other party to that relationship.¹⁴ Critically, Congress expressly limited this opt-out notice requirement to faxes sent pursuant to the EBR exception; it saw no need to impose any opt-out notice requirement for faxes sent *with* the recipient’s express

¹⁰ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

¹¹ *Id.* § 227(a)(4).

¹² Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (“JFPA”).

¹³ *See* 47 U.S.C. §§ 227(a)(2), (b)(1)(C), (b)(2)(D). In the JFPA, Congress restored the EBR exception that the Commission had first recognized in 1992 but later disclaimed in 2003. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 54 (1992); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Reconsideration, 18 FCC Rcd 16972 ¶¶ 5-6 (2003).

¹⁴ *See* S. REP. NO. 109-76, at 6-7 (2005) (“[I]n reinstating the EBR exception, the Committee determined it was necessary to provide recipients with the ability to stop future unwanted faxes sent pursuant to such relationships.”); *see also id.* at 7 (explaining that the Committee “added the requirement that every unsolicited facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations”).

consent, presumably because such recipients had opted in to receiving faxes and could easily withdraw such consent.

In December 2005, the Commission issued a Notice of Proposed Rulemaking to implement the JFPA, tracking the statutory language for the EBR exception and the “specific [opt-out] notice requirements on unsolicited facsimile advertisements.”¹⁵ In particular, the NPRM proposed adopting new rules that would “require[] senders of *unsolicited* facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender.”¹⁶ The Commission also sought comment on a number of supplemental rules surrounding the opt-out notice requirement.¹⁷ But it did not solicit comments on, or even raise the possibility of, extending the opt-out notice requirement to fax advertisements sent with the recipient’s express permission.

Nevertheless, when the Commission adopted final rules in April 2006, it included a requirement—without discussion, analysis, or citation to the JFPA—that even “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice.”¹⁸ This statement was in direct conflict with an earlier footnote stating that “the opt-out notice requirement *only* applies to communications that

¹⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 ¶¶ 19-20 (2005) (“*JFPA NPRM*”).

¹⁶ *Id.* ¶¶ 19, 20 (emphasis added).

¹⁷ *See, e.g., id.* ¶ 22 (proposing a possible exemption for “certain classes of small business senders”).

¹⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 ¶ 48 (2006) (“*JFPA Order*”).

constitute *unsolicited* advertisements.¹⁹ Despite these contradictory statements, the codified rule adopted the more expansive requirement. Under the text of the new rule, “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.”²⁰ The Commission failed to identify a specific source of statutory authority for this rule, instead listing a number of statutory provisions at the end of its order, and ostensibly relying on the implicit assumption that one of these provisions authorized a sudden expansion of the statutory opt-out notice requirement to faxes sent with express consent.²¹

By leaving the statutory basis for the rule unclear, the Commission unwittingly exposed companies communicating with customers via fax to private lawsuits seeking enterprise-crippling damages that Congress never intended to authorize. Section 227(b)(3) of the statute allows private parties to bring an action for damages “based on a violation of this subsection [§ 227(b)] or the regulations prescribed under this subsection.”²² Thus, if a court concludes that the Commission relied on Section 227(b)(2)—the provision that codifies the JFPA’s requirement of an opt-out notice for *unsolicited* faxes—when adopting its rule requiring the same notice for faxes sent with express consent, then it could arguably allow a private lawsuit alleging violations of that rule to proceed, even if the defendant’s conduct was fully consistent with the text of Section 227(b)(2) itself and protected by the First Amendment.

At least one court has so concluded, finding that the opt-out notice requirement for solicited faxes arises under Section 227(b) and can thus give rise to a private right of action

¹⁹ *Id.* ¶ 42 n.154 (emphasis added).

²⁰ 47 C.F.R. § 64.1200(a)(3)(iv).

²¹ *See id.* ¶ 64 (locating authority for all rules adopted in the order under “sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended”).

²² 47 U.S.C. § 227(b)(3).

under Section 227(b)(3).²³ Since 2008, Anda has been facing a similar suit in Missouri state court, where plaintiffs are seeking over \$150 million dollars in damages by alleging deficiencies in an opt-out notice on fax advertisements sent with the Missouri recipients' express consent.²⁴ Just in the past month, plaintiffs' lawyers filed a new complaint against Anda in a Florida federal district court under the same theory, seeking to impose even more crushing liability in connection with a far larger number of faxes sent to recipients nationwide.²⁵ And in another case involving different parties before the Eighth Circuit, the confusion surrounding the opt-out notice requirement for solicited faxes prompted the Court to request that the Commission submit an *amicus* brief explaining the rule.²⁶

B. Anda's Petition for Declaratory Ruling

On November 30, 2010, Anda filed a Petition for Declaratory Ruling asking the Commission to clarify the statutory authority, if any, for the Commission's regulation requiring an opt-out notice on fax advertisements sent with the recipient's express prior consent.²⁷ The Petition noted that it is unclear that the Commission had such authority at all because Congress expressly limited the JFPA's opt-out notice provisions to *unsolicited* advertisements,²⁸ as the legislative history confirms.²⁹ The Petition also pointed out that a contrary reading of the statute

²³ *MSG Jewelers, Inc., v. C & C Quality Printing, Inc.*, 2008 TCPA Rep. 1811 (Mo. Cir. July 17, 2008).

²⁴ *Medical West Ballas Pharmacy, Ltd. v. Anda, Inc.*, No. 08SL-CC00257 (Mo. Cir. Ct. filed Jan. 22, 2008).

²⁵ *Physicians Healthsource, Inc. v. Anda, Inc.*, No. 12-cv-60798 (S.D. Fla. filed May 1, 2012).

²⁶ *Nack v. Walburg*, No. 11-1460, Order, slip op. at 1 (8th Cir. Jan. 11, 2012).

²⁷ See Petition at 1.

²⁸ *Id.* at 8.

²⁹ *Id.* at 9 (citing S. REP. NO. 109-76, at 7 (2005)).

raises serious First Amendment concerns.³⁰ But rather than asking the Commission to invalidate its regulation prospectively, the Petition asked the Commission to clarify that, at a minimum, Section 227(b) was not the statutory basis for the regulation.³¹ The Petition explained that, absent such clarification, the Commission's regulation would expose legitimate senders of solicited fax advertisements, such as Anda, to class action lawsuits seeking massive damages that Congress never intended.³²

In August 2011, several Members of Congress submitted a joint letter to the Commission in support of Anda's Petition.³³ The letter noted that, "[d]ue to the lack of statutory citation by the Commission, a number of class-action lawsuits have been filed and threaten to impose massive liability on legitimate business that are simply communicating with customers in that method that the *customer* has requested."³⁴ The letter also made clear that the rule requiring an opt-out notice on solicited faxes "depart[s] from Congress's intent in enacting the Junk Fax Prevention Act of 2005."³⁵ According to the Members, "there was no reason to extend the opt-out notice requirement to fax advertisements sent *with the recipient's express consent*," because in cases "[w]here recipients have made their wishes known by expressly opting *in* to receiving such faxes, that business or individual need not be told how to opt *out*."³⁶ The Members thus

³⁰ *Id.* at 10-11.

³¹ *Id.* at 8-15.

³² *Id.* at 16.

³³ See Letter of Reps. Lee Terry, Debbie Wasserman Schultz, John Shimkus, Jim Matheson, Mike Rogers, Joe Walsh, and Cliff Stearns, to FCC Chairman Julius Genachowski, Aug. 31, 2011, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310800A2.pdf ("Aug. 31 Letter").

³⁴ *Id.* at 1 (emphasis in original).

³⁵ *Id.*

³⁶ *Id.*

urged the Commission to clarify that the rule was based on some grant of authority other than Section 227(b).³⁷

After the Petition had languished for over 15 months without even being docketed, Anda filed a mandamus petition with the D.C. Circuit, seeking an order compelling the Commission to address the Petition.³⁸ The D.C. Circuit ordered the Commission to respond by May 21, 2012.³⁹ A week later, the Consumer and Governmental Affairs Bureau released a cursory, eight-paragraph order dismissing Anda's Petition.⁴⁰

The *Bureau Order* found that there is “no need to issue a declaratory ruling” because the Petition purportedly “raises no issue of controversy or uncertainty”⁴¹—notwithstanding the uncertain legal basis for the rule, the resulting controversy regarding the rule in courts, and calls from Congress, courts, and private parties to clarify the rule's legal basis. The *Bureau Order* went on to suggest (in dicta) that Section 227(b) “could” have been the statutory basis for the rule, but without substantively resolving the issue.⁴² For the reasons discussed below, the Commission should vacate the *Bureau Order* and issue a declaratory ruling clarifying that Section 227(b) was *not* the statutory basis for the rule requiring opt-out notices on solicited faxes.

³⁷ *Id.* at 2.

³⁸ Petition for Writ of Mandamus, *In re Anda, Inc.*, No. 12-1145 (D.C. Cir. filed Mar. 12, 2012).

³⁹ *In re Anda, Inc.*, No. 12-1145, slip op. at 1, (D.C. Cir. Apr. 24, 2012).

⁴⁰ *See Bureau Order* ¶ 1.

⁴¹ *Id.* ¶ 5.

⁴² *Id.* ¶ 7.

DISCUSSION

I. THE BUREAU ERRED IN DETERMINING THAT THERE IS NO “UNCERTAINTY TO REMOVE” BY ISSUING A DECLARATORY RULING

The Bureau’s summary determination that there is “no controversy to terminate or uncertainty to remove” regarding the rule’s statutory basis is plainly erroneous.⁴³ According to the *Bureau Order*, the rule’s statutory basis is evident from paragraph 64 of the 2006 *JFPA Order*, which “cited the statutory provisions, including section 227 of the Act, that provide the Commission authority for the rules adopted in that *Order*.”⁴⁴ But that paragraph cites nearly a dozen different statutory provisions, and the Commission never identified which of those provisions purportedly formed the legal basis for extending an opt-out notice requirement to fax advertisements sent with the recipient’s prior express consent.⁴⁵ The fact that Section 227 was included in a string cite pertaining to the entire *JFPA Order*—in response to a notice of proposed rulemaking that never mentioned such a requirement, much less identified Section 227 as relevant authority—certainly does not compel the conclusion that Section 227, to the exclusion of all other statutory provisions cited in that paragraph, was the legal basis for the particular rule at issue.

The Commission could well have relied on one of the many other provisions cited in paragraph 64 of the *JFPA Order*. One of the provisions cited by the Commission was Section 303(r), which authorizes the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the

⁴³ *Id.* ¶ 1.

⁴⁴ *Id.* ¶ 5 (citing *JFPA Order* ¶ 46).

⁴⁵ *JFPA Order* ¶ 46 (citing “the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332”).

provisions of this Act.”⁴⁶ Another provision cited by the Commission was Section 4(i), which authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”⁴⁷ Both sections provide the Commission with authority to adopt regulations that are “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁴⁸ By the Bureau’s own logic, the inclusion of Sections 303(r) and Section 4(i) in the *JFPA Order*’s string cite suggests that those provisions—and *not* Section 227—could have formed the legal basis of the rule at issue.

With no guidance but this string cite, courts are understandably confused when attempting to discern the rule’s statutory basis. In a case currently pending before the Eighth Circuit, the court spent considerable time during oral argument inquiring about this issue,⁴⁹ and later asked the Commission to file an *amicus* brief (which ultimately declined to address the rule’s statutory basis).⁵⁰ Other courts have simply assumed that the rule was properly promulgated pursuant to Section 227(b), and in turn have allowed plaintiffs’ class-action lawyers to invoke Section 227’s private right of action to bring lawsuits seeking hundreds of millions of dollars in damages.⁵¹ These courts have done so even though, as explained below, the text and the legislative history of Section 227(b) indicate that Congress did not intend that provision to

⁴⁶ 47 U.S.C. § 303(r).

⁴⁷ *Id.* § 154(i).

⁴⁸ *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

⁴⁹ See Transcript of Oral Argument at 24-28, 33-34, *Nack v. Walburg*, No. 11-1460 (8th Cir. Dec. 15, 2011).

⁵⁰ See Amicus Br. for the Federal Communications Commission Urging Reversal, *Nack v. Walburg*, No. 11-1460 (8th Cir. Feb. 24, 2012).

⁵¹ See, e.g., *MSG Jewelers, Inc., v. C & C Quality Printing, Inc.*, 2008 TCPA Rep. 1811 (Mo. Cir. July 17, 2008).

authorize a rule requiring opt-out notices on faxes sent with the recipient's express consent.

Adding to the confusion are the internal contradictions in the *JFPA Order* itself, which states that “the opt-out notice requirement *only* applies to communications that constitute *unsolicited* advertisements,”⁵² even as it adopted a rule extending the requirement to *solicited* faxes.

Although the Bureau was well aware of the confusion surrounding the rule,⁵³ the *Bureau Order* failed even to acknowledge it.

The *Bureau Order* also failed to grapple with the significant First Amendment concerns with expanding the opt-out notice rule to solicited faxes—concerns that only deepen the uncertainty as to the rule's legal basis. Courts evaluating the constitutionality of the statutory requirements applicable to *unsolicited* faxes have upheld those requirements by pointing to “a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such *unwanted* advertising places on the recipient.”⁵⁴ But the government's interest in preventing the cost-shifting and interference associated with unwanted fax advertisements vanishes when the recipient provides express consent to receive such faxes. Importantly, these courts also have concluded that the statute's restrictions are sufficiently

⁵² *JFPA Order* ¶ 42 n.154 (emphasis added).

⁵³ See Petition at 7 (noting judicial confusion over the rule's legal basis); see also *Nack v. Walburg*, No. 11-1460, Order, slip op. at 1 (8th Cir. Jan. 11, 2012) (ordering Commission to clarify rule); Letter of Matthew A. Brill, Latham & Watkins LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, *Petition for Declaratory Ruling To Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent* (filed Sep. 14, 2011) (responding to staff's requests for additional facts regarding judicial confusion).

⁵⁴ *Missouri ex rel. Nixon v. AM Blast Fax*, 323 F.3d 649, 655 (8th Cir. 2003) (emphasis added); see also *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56, 57 (9th Cir. 1995) (articulating “the government's substantial interest in preventing the shifting of advertising costs to consumers” and finding that “*unsolicited* fax advertisements shift significant advertising costs to consumers”) (emphasis added).

narrowly tailored precisely because advertisers remain free to “obtain consent for their faxes” through “telephone solicitation, direct mailing, and interaction with customers in their shops.”⁵⁵ When an advertiser *has* obtained such consent, the government would be hard-pressed to justify further limits on such speech, including potentially massive liability exposure for any failure to comply with technical opt-out notice requirements.

Instead of addressing these concerns and issuing a definitive ruling clarifying the rule’s legal basis—for example, a clarification that the rule was promulgated pursuant to the Commission’s ancillary authority under Sections 4(i) and 303(r)—the Bureau simply dismissed Anda’s Petition with a cursory, eight-paragraph order. As a legitimate sender of consensual fax communications that now faces devastating liability exposure because of the uncertain statutory basis of the Commission’s rule, Anda deserves more careful treatment of the issues raised in its Petition, as do other parties that now face massive liability based solely on their participation in consensual business-to-business communications. The Commission should not countenance the Bureau’s attempt to sidestep these issues by asserting that there is “uncertainty to remove,”⁵⁶ and should instead vacate the *Bureau Order*.

II. THE COMMISSION SHOULD CLARIFY THAT ITS OPT-OUT NOTICE REQUIREMENT FOR FAXES SENT WITH PRIOR EXPRESS CONSENT WAS NOT ADOPTED PURSUANT TO SECTION 227(B) OF THE ACT

In vacating the *Bureau Order*, the Commission also should take the opportunity to resolve the uncertainty surrounding the rule’s legal basis once and for all, by declaring that the rule was adopted pursuant to some statutory grant of authority other than Section 227(b). The Commission arguably should have done so when it first adopted the rule in 2006; indeed, Section 553 of the Administrative Procedure Act (“APA”) requires agencies to point affirmatively to the

⁵⁵ *AM Blast Fax*, 323 F.3d at 659.

⁵⁶ *Bureau Order* ¶ 1.

relevant source of authority “to assist judicial review [and] to provide fair treatment for persons affected by [the] rule.”⁵⁷ Such a ruling would put an end to extortionate lawsuits brought under an erroneous interpretation of Section 227(b) against senders of consensual fax communications. Every day that passes without Commission resolution of these issues prolongs the exposure of legitimate businesses to abusive litigation.

As explained in the Petition, the rule simply does not align with the text, legislative history, or purpose of Section 227(b). Section 227(b) contains no language authorizing the Commission to adopt rules regarding faxes sent with the recipient’s express consent, and certainly does not instruct the Commission to require an opt-out notice in such cases. Instead, when Congress enacted the JFPA and Section 227(b), it expressly limited the JFPA’s opt-out notice provisions to “unsolicited advertisements.”⁵⁸ Nothing in the JFPA, or in Section 227(b)(2) in particular, authorizes the Commission to expand the JFPA’s opt-out notice requirement to other fax advertisements, such as those sent with the recipient’s express consent.

The legislative history of the JFPA underscores the fact that Congress’s concerns were limited to the problem of unwanted faxes. Specifically, once it departed from the express consent requirement and codified the EBR provision, Congress sought to ensure that consumers had a means of rebutting the *presumption* of consent afforded by an EBR: “[I]n reinstating the EBR exception, the Committee determined it was necessary to provide recipients with the ability

⁵⁷ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977); *see also* 5 U.S.C. §§ 553(b)(2), (c) (requiring an agency engaging in rulemaking to include a “reference to the legal authority under which the rule is proposed” in its notice of proposed rulemaking, and to provide “a concise general statement of [the rule’s] basis and purpose” when adopting a final rule).

⁵⁸ *See* 47 U.S.C. § 227(b)(2)(D) (instructing the Commission adopt rules “provid[ing] that a notice contained in an *unsolicited* advertisement complies with the requirements under this subparagraph”) (emphasis added).

to stop future *unwanted faxes sent pursuant to such relationships*.”⁵⁹ Congress thus saw its opt-out notice requirement as a narrow solution to a specific problem—the possibility that presumed consent based on an EBR relationship could still lead to unwanted faxes where a recipient would not have otherwise provided actual and affirmative consent. In contrast, nothing in the legislative history remotely suggests that consumers who *expressly* consented to receive fax advertisements (*i.e.*, who opted *in*) should receive detailed notice describing how they can opt out. Several Members of Congress have since confirmed, in an August 31, 2011 letter to Chairman Genachowski, that “[t]he Commission’s imposition of an opt-out notice requirement for *solicited* faxes appears to depart from Congress’s intent” in enacting the JFPA and Section 227(b).⁶⁰

There is no support for the *Bureau Order*’s assertion, in dicta, that Section 227(b) “could . . . have given the Commission authority to adopt the rule.”⁶¹ The *Bureau Order* makes the convoluted argument that, because Congress did not define the phrase “prior express invitation or permission” when prohibiting faxes sent *without* such permission, it somehow opened the door for the Commission to regulate faxes sent *with* such permission.⁶² In support of this argument, the Bureau cites a case recognizing the “gap-filling” authority of administrative agencies.⁶³ But this argument misses the mark for several reasons. As an initial matter, a

⁵⁹ S. REP. NO. 109-76, at 7 (2005) (emphasis added); *see also id.* (explaining that the Committee “added the requirement that every *unsolicited* facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations . . .”) (emphasis added).

⁶⁰ Aug. 31 Letter at 1 (emphasis in original).

⁶¹ *Bureau Order* ¶ 7.

⁶² *Id.*

⁶³ *Id.* ¶ 7 n.26 (citing *Nat’l Cable & Telecomms. Ass’n v. Gulf Power*, 534 U.S. 327, 339 (2002)).

definitional gap in a statute regarding *unsolicited* fax advertisements hardly qualifies as “statutory authority” to adopt substantive rules regulating *solicited* fax advertisements. More fundamentally, if the Commission was relying on “gap-filling” authority when it adopted the opt-out notice rule for solicited faxes, then, by definition, it was *not* relying on the express statutory authority contained in Section 227(b). Instead, the Commission more likely was relying on Sections 303(r) and 4(i), which, as explained above, are “gap-filling” statutes that authorize the Commission to adopt rules “as may be necessary” to carry out its functions.⁶⁴ And finally, contrary to Bureau’s assertion, the *JFPA Order* did not “specifically tie[] the opt-out notice requirement [for solicited faxes] to the purposes of Section 227.”⁶⁵ The *JFPA Order* mentioned the requirement only once—as an afterthought, without any citation to statutory authority, in a paragraph devoted mainly to the unrelated issue of the legal status of consent obtained prior to the new rules’ effective date.⁶⁶ The rule was not “tied” to *any* specific legal authority, and certainly not to Section 227.

In the declaratory ruling requested by this Petition, the Commission would have the opportunity to clarify that it adopted Section 64.1200(a)(3)(iv) pursuant to Sections 303(r) and 4(i), and not pursuant to Section 227(b). In addition, the Commission may wish to initiate a proceeding to modify its rules if it determines that an opt-out notice requirement can no longer be justified for faxes sent with the express consent of the recipient. But, in all events, the Commission cannot permit courts to proceed under the erroneous assumption that it promulgated Section 64.1200(a)(3)(iv) pursuant to Section 227(b) of the Act, as that provision does not supply

⁶⁴ 47 U.S.C. §§ 303(r), 151(i).

⁶⁵ *Bureau Order* ¶ 7.

⁶⁶ *JFPA Order* ¶ 48.

the requisite authority and indeed cannot be interpreted as doing so without raising a serious risk of violating the First Amendment.

CONCLUSION

For the foregoing reasons, Anda respectfully requests that the Commission promptly vacate the *Bureau Order* and issue a declaratory ruling clarifying that its rule requiring an opt-out notice for fax advertisements sent with the recipient's express permission did not arise under Section 227(b). Failure to do so not only would be inconsistent with under Section 553 of the APA, but would also expose legitimate senders of solicited fax advertisements to class action lawsuits seeking massive damages that Congress did not intend to authorize and that raise serious constitutional concerns.

Respectfully submitted,



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May 14, 2012

CERTIFICATE OF SERVICE

I, Matthew A. Brill, do hereby certify that on this 14th day of May, 2012, I caused the foregoing Application for Review to be served upon the following individuals by hand delivery.

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