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May 23, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: FCC Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338

Dear Ms. Dortch:

On behalf of Anda, Inc., I am writing in response to the May 19, 2014 letter filed by Anderson + Wanca,¹ which asserted that the D.C. Circuit's recent decision in *Natural Resources Defense Council v. EPA*, --- F.3d ---, 2014 WL 1499825 (D.C. Cir. Apr. 18, 2014), precludes the grant of a retroactive waiver or related relief sought by Anda and other petitioners. As counsel for Staples, Inc. and Quill Corp. recently noted, the *NRDC* case has no bearing on the proper construction of the TCPA or the application of the Commission's rules; that case involved a fundamentally different statutory scheme, and the EPA also had not relied on the type of waiver authority this Commission possesses under Section 1.3 of its rules and well-established D.C. Circuit precedent.²

I write separately to note that the plaintiffs' lawyers' suggestion that the Commission lacks authority to determine the validity or enforceability of its own rules flies in the face of their sustained efforts to prevent the federal and state courts adjudicating their TCPA claims from deciding those issues. Indeed, far from relying on the proposition that the Communications Act "clearly vests authority in the courts" over the issues presented by civil defendants such as Anda,³ Anderson + Wanca has argued in the past that *only* the FCC can adjudicate such issues as

¹ Letter from Brian J. Wanca, Wanca + Anderson, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 02-278 and 05-338 (May 19, 2014).

² Letter from Helgi C. Walker, Gibson Dunn & Crutcher LLP, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 02-278 and 05-338 (May 21, 2014).

³ *NRDC*, 2014 WL 1499825 at *7 (emphasis in original).

a result of the Hobbs Act.⁴ Importantly, Anderson + Wanca's Hobbs Act arguments (which the *Walburg* court ultimately accepted) applied every bit as much to efforts to challenge the existence of a private right of action as to challenges to the rule's validity.⁵ Having successfully persuaded the courts that it is not "possible or prudent" for them to resolve questions regarding the validity or enforceability of the Commission rule in question "without the benefit of full participation by the agency,"⁶ it is simply untenable for Anderson + Wanca to claim at this juncture that the Commission is powerless to grant any relief to the various petitioners. The Commission should not tolerate such a shell game, and neither the *NRDC* case nor any other authority requires it to do so.

Even apart from *NRDC*'s failure to address anything analogous to the Commission's waiver authority and the absence of any assertions of exclusive agency authority under the Hobbs Act in that case, the declaratory ruling and waiver requests pending before the Commission in this matter seek entirely different relief from the "affirmative defense" at issue in the EPA litigation. Anda initially sought a declaratory ruling that the Commission's opt-out notice rule applicable to faxes sent with express permission did not arise under Section 227(b) of the Act,⁷ and later argued in the alternative that a retroactive waiver of the Commission's rule would serve the public interest.⁸ The requested relief would not put the Commission in the position of usurping judicial authority by establishing a new "affirmative defense" to a statutory violation or by "deciding whether penalties are appropriate in a given private civil suit," as was the case in *NRDC*.⁹ Rather, Anda and other petitioners have presented the Commission with antecedent questions regarding the validity and application of *the Commission's own rule*. Now that several courts, with the Commission's full support, have taken the position that the Commission is authorized to decide those issues, there is plainly no basis to question the Commission's power to do so.

⁴ See *Nack v. Walburg*, 715 F.3d 680, 682, 685-86 (8th Cir. 2013) (accepting argument of Anderson + Wanca that the trial court lacked jurisdiction to consider arguments regarding the validity of the fax opt-out rule applicable to faxes sent with express consent, despite "questionable" nature of purported authority for the rule, on the ground that a party seeking to advance such claims must instead "petition the agency itself"), *cert. denied*, 134 S. Ct. 1539 (2014).

⁵ *Id.* at 686-87.

⁶ *Id.* at 687.

⁷ 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, at 1 (filed Nov. 30, 2010).

⁸ See Comments of Anda, Inc., CG Docket Nos. 02-278 and 05-338, at 3 (filed Feb. 14, 2014).

⁹ *NRDC*, 2014 WL 1499825 at *7-8.

LATHAM & WATKINS^{LLP}

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

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