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

In the Matter of

Junk Fax Prevention Act of 2005 CG Docket No. 05-338

Rules and Regulations Implementing the CG Docket No. 02-278
Telephone Consumer Protection Act

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

OPPOSITION TO APPLICATION FOR REVIEW

Philadelphia Consolidated Holding Corp., on its behalf and on behalf of each of its subsidiaries, Philadelphia Indemnity Insurance Company, Tokio Marine Specialty Insurance Company, Maguire Insurance Agency, Inc., Gillingham and Associates, Inc., PCHC Investment Corp., Liberty American Insurance Group, Inc., Liberty American Insurance Services, Inc., Liberty American Select Insurance Company, and Liberty American Insurance Company (collectively, “PCH”), through their undersigned counsel, respectfully submit their Opposition to the Application for Review filed by Anderson + Wanca (“A+W”). A+W, filing in its capacity as a law firm representing plaintiffs who have filed lawsuits under the TCPA, but not as an aggrieved party, requests that the Commission review the Consumer & Governmental Affairs Bureau’s August 28, 2015, Order, granting relief to petitioners seeking retroactive waiver of the Commission’s opt-out requirements for fax advertisements.\(^1\) A+W, however, has not presented

any grounds on which the Commission can—or should—grant its Application for Review.
Rather, the Commission must reject A+W’s Application for Review, to the extent that A+W
requests that the Commission vacate the waivers granted by the Bureau, as the Application for
Review is nothing more than an untimely appeal of the Commission’s October 30, 2014, Order
granting retroactive waivers of the opt-out requirements to certain fax advertisements and
inviting similarly situated parties to file requests for waiver of the same requirement.2
1. DISCUSSION
A+W has not presented any factors that warrant the Commission’s review of the Bureau
Order, and the Commission must deny A+W’s Application. Under section 1.115(b)(2) of the
Commission’s rules, an interested party seeking an application for review must “specify with
particularity, from among the following, the factor(s) which warrant Commission consideration
...”. In its Application, A+W argues that it seeks review under section 1.115(b)(2)(i), which
permits an applicant to file for review if it believes that the Bureau action “is in conflict with
statute, regulation, case precedent, or established Commission policy.”3 But here the Bureau’s
actions were consistent with the clearly established Commission precedent: specifically, in the
Anda Waiver Order. Recognizing that there had been confusion regarding the application of its
opt-out requirement, in the Anda Waiver Order the Commission granted retroactive waiver
requests of that requirement, and invited additional similarly situated persons to file for similar

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waivers. In the *Bureau Order*, the Bureau appropriately exercised its authority, granting retroactive waivers to similarly situated petitioners.

A+W’s Application, even on its face, is simply a late-filed challenge to the Commission’s *Anda Waiver Order*. In its Application, A+W argues that the “Commission” has no authority to waive regulations under the TCPA and that the “Commission” may not “intervene in a private right of action.”⁴ A+W is not—and does not—claim that the Bureau acted beyond the scope of its authority in the Bureau Order; rather A+W claims that the Commission did not initially have the authority to issue the waivers. The Commission issued the *Anda Waiver Order* in October 2014, and any reconsideration of that order is long past due.⁵

Furthermore, the Commission—not the Bureau—already has rejected the claims that A+W again is raising for the *third time*: that the Commission does not have the authority to waive its regulations. In the *Anda Waiver Order*, the Commission rejected this contention, concluding: “[b]y addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided [it] authority as the expert agency.”⁶ To support its specious theory, A+W points to a Michigan court, which stated that an agency may not ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III case.⁷ In that case, however, the Court found that the faxes at issue were unsolicited; the court’s discussion of whether a waiver can

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⁴ Application for Review at 5.
⁵ 47 C.F.R. § 1.106(f) (requiring petitions for reconsideration to be filed within 30 days from the date of public notice of the final Commission action).
⁶ *Anda Waiver Order*, ¶ 21.
affect ongoing litigation therefore is *dicta*, not relevant to the issues in this proceeding, which pertain only to faxes for which the recipient consented.\(^8\)

*Dicta* from a single district court case certainly does not provide a basis for reconsidering the Bureau’s order, much less the Commission’s *Anda Waiver Order*. Since it was the Commission—not the Bureau—that rejected the arguments that A+W is now making, A+W has no basis for filing an Application for Review of the *Bureau Order*, and the Commission must deny the Application for Review.

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\(^8\) *Id.* at 496. Further, the court also ignores scores of precedent that the Commission is the agency with the expert authority to evaluate and implement its rules. *See, e.g.*, 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."). *Waiver Order*, ¶22 (citing 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)).
II. CONCLUSION

For the reasons stated above, PCH respectfully requests that the Commission deny A+W’s Application for Review of the Bureau Order.

Respectfully submitted,

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Certificate of Service

I, Jennifer Kashatus, do hereby certify that on October 13, 2015, I caused the foregoing Opposition to Application for Review to be served on the parties listed on the attached service list via U.S. first-class mail, postage prepaid.

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