STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
CONCURRING IN PART AND DISSENTING IN PART

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; *Junk Fax Prevention Action of 2005*, CG Docket No. 05-338; *Application for Review filed by Anda, Inc.*; *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*.

While I concur with the relief provided today, I must dissent from the decision that the Commission has statutory authority to require opt-out notices on fax advertisements sent at a recipient's request (i.e, solicited faxes). In reality, the item before us addresses a technology that is waning in use but still can be important in certain segments of the economy.

In 2006, the Commission adopted a rule requiring fax senders to include opt-out notices on their fax advertisements, even if the recipients consented to receive fax ads from the senders. While some have argued that the rule is a good policy that benefits consumers, it suffers from a fundamental flaw: the FCC lacked authority to adopt it.

Section 227(b)(1)(C) prohibits the sending of *unsolicited* fax advertisements—ads that are sent "without … prior express invitation or permission, in writing or otherwise"—except in the context of an established business relationship and subject to certain other requirements, including that such unsolicited ads contain an opt-out notice.[1] Thus, on its face, the provision and the related opt-out notice requirement do not apply to *solicited* fax advertisements: ads that are sent *with* prior express invitation or permission.[2]

The order attempts to shoehorn solicited fax ads into the statute by claiming: that the FCC needed to define the scope of prior express permission; that such permission lasts only until it is revoked; and that there must be a means to revoke it. A hop, a skip, and a jump later, we have an opt-out requirement on solicited faxes. The order notes that an agency is entitled to fill gaps in a statute. But it is not entitled to invent gaps in order to fill them with the agency's own policy goals, no matter how well intentioned.[3]

If Congress was concerned that consumers that had consented to receive fax ads might change their minds, it could have provided for that in the statute, but it chose not to do so. In fact, I distinctly remember working on this issue while it was being debated in Congress. I raised this precise issue with staff of the sponsor of the Senate bill and the answer was that a future Congress would need to address it, if it chose to do so. The FCC should respect that reality and not substitute its own policy judgment. Tellingly, section 227(b)(2)(E)(iii) contemplates that someone that made a request not to receive any more unsolicited faxes might later give consent to receive them. The fact that Congress provided for a change of heart in that situation but did not address the opposite case helps confirm that Congress did not intend the statute to cover that case.

In addition, even if the Commission had authority to adopt such a requirement, it is impermissibly broad because it captures one-time faxes sent with the recipient's express permission. In those instances, it should be clear that the fax is not an unsolicited advertisement because the recipient consented to

[1] 47 U.S.C. § 227(b)(1)(C); 47 U.S.C. § 227(a)(5) (defining an "unsolicited advertisement").

[2] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992) ("In answering this question, we begin with the understanding that Congress "says in a statute what it means and means in a statute what it says there."); *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917) (citing *Hamilton v. Rathbone*, 175 U. S. 414, 421 (1899)).

[3] *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) (quoting *Pruidze v. Holder*, 632 F.3d 234, 240 (6th Cir. 2011)) ("Chevron empowers agencies to 'fill statutory gaps, not to create them, and in this instance Congress left no gap to fill.'").

receive that very fax. Yet a sender could be subject to real liability if it does not include an opt-out notice. Indeed, this happened in the case of *Nack v. Walburg*.[4] Plaintiff Michael Nack filed a complaint against Defendant Douglas Walburg based upon the receipt of one fax advertisement that did not contain opt-out language. It was undisputed that Nack's agent consented to receive the sole fax in question. And the court even noted that the FCC's authority to impose an opt-out notice on solicited faxes was "questionable." But because the court determined it was barred under the Hobbs Act from entertaining a challenge to the requirement itself, it reluctantly "place[d] the parties back before the district court where Walburg faces a class-action complaint seeking millions of dollars even though there is no allegation that he sent a fax to any recipient without the recipient's prior express consent."

The order also notes that a commenter suggested that the Commission may require opt-out notices on solicited faxes as part of its authority to implement the statute's prohibition on *future* unsolicited advertisements. While the order does not explicitly rely on this argument, it is worth noting that it is also unpersuasive.

The "future unsolicited advertisements" language must be read in the context of the entire provision, which deals exclusively and unambiguously with unsolicited fax ads. That is, section 227(b)(1)(C) contemplates that a person that had received unsolicited fax ads in the past pursuant to an established business relationship may want to stop receiving unsolicited fax ads in the future. So section 227(b)(1)(C)(iii) makes clear that if the person makes a request not to send any more faxes, the sender can no longer rely on the established business relationship exception and will be prohibited from sending future unsolicited advertisements to that person.

This reading is reinforced by language in section 227(b)(2)(E), which details the requirements for the request not to send future unsolicited ads. One of the requirements is that it must be "made to the telephone or facsimile number of the sender of such an unsolicited advertisement". Thus, the future unsolicited ads prohibition applies to senders of prior unsolicited ads – not to senders of prior solicited ads.

Moreover, because the mechanism for making a request not to send future unsolicited ads is perfectly clear, there is nothing further for the Commission to interpret or implement to effectuate that prohibition. There is no ambiguity for the Commission to resolve. And as the Supreme Court recently stated, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[5]

Although I do not agree that the Commission has authority to impose an opt-out requirement on solicited faxes, I am sympathetic to petitioners that were confused about the Commission's enforcement of an unclear rule. To provide relief to these petitioners, I concur with the decision to grant each petitioner a retroactive waiver of the rule and to provide waiver recipients with a six month window to come into compliance with this requirement. I likewise concur with the Commission's willingness to consider granting relief to other similarly situated parties. At my request, staff has committed to engage in significant outreach to ensure that fax senders, including those that might not normally follow FCC proceedings, will be aware of the opt-out requirement. This outreach will be critical because, now that the Commission has reaffirmed its rule, companies (including small businesses and offices) that do not include opt-out notices on all of their faxes may find themselves subject to costly litigation.

I appreciate the Chairman's staff and the Bureau staff for working with my staff to make the best of a bad situation.

[4] *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013).

[5] *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S.Ct. 2427, 2445 (2014).