Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Waiver	)	CG Docket No. 02-278
of Apex Energetics, Inc.	)	
	)	CG Docket No. 05-338
	)	
	)	
	)	

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or "Commission") regulations, 47 C.F.R. § 1.3, Apex Energetics, Inc. ("Apex") respectfully requests that the Commission grant Apex a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission's regulations, 47 C.F.R. § 64.1200(a)(4)(iv) (the "Opt-Out Rule") with respect to any facsimiles that have been transmitted by or on behalf of Apex prior to grant by the FCC of the instant submission. This request for waiver is being submitted pursuant to the Commission's recent Order granting a retroactive waiver of the Opt-Rule and inviting "similarly situated parties" to seek similar waivers.[1] As the Commission has already determined that good cause exists for such retroactive waiver requests and grant of the waiver would serve the public interest, Apex respectfully requests that the Commission expeditiously grant its petition for waiver.[2]

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[1] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket No. 02-278, 05-338, Order, FCC 14-164, ¶30 (rel. Oct. 30, 2014) ("*Fax Order*").
[2] *See Fax Order* at ¶22; *see also WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

I. BACKGROUND

Apex is a company that provides nutritional and bioenergetic products and services, as well as continuing education opportunities for healthcare professionals. Like many other companies in this industry, Apex now finds itself a defendant in a putative class action lawsuit filed in federal court which alleges violations of the Telephone Consumer Protection Act ("TCPA").[3] The named plaintiff in that case, along with the putative class, seeks damages for alleged violations of the TCPA on the grounds that, among other things, Apex allegedly sent facsimile transmissions to the named plaintiff and the putative class which did not bear the opt-out notice required by the Opt-Out Rule.[4] This petition for waiver does not ask the Commission to resolve the factual and legal questions raised in the pending litigation; these issues properly remain within the jurisdiction of the district court. By this filing, Apex seeks only to obtain the same retroactive waiver of the Opt-Out Rule that the Commission granted to multiple petitioners in the Fax Order.

II. GRANT OF THE APEX RETROACTIVE WAIVER REQUEST IS IN THE PUBLIC INTEREST.

As the Commission concluded in the Fax Order, good cause exists for a retroactive waiver of the Opt-Out Rule insofar as it relates to the failure to comply with the Opt-Out Rule's opt-out notice requirements for facsimile transmissions sent with the prior express invitation or permission of recipients.[5] The Commission recognized that this good cause is based, first, on the "inconsistency" between a footnote to the Junk Fax Order and the Opt-Out Rule; the Commission stated that this inconsistency has "caused confusion or misplaced confidence"

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[3] *See Affiliated Health Care Associates, P.C., v. Apex Energetics, Inc. and John Does 1-10*, Case No. 1:14-cv-07899 (N.D. Ill.). References to "DE ___" refer to ECF docket entries in the case.
[4] *See generally* Class Action Complaint, DE 1.
[5] *Fax Order* at ¶22.

regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission.[6] This acknowledged inconsistency has contributed to substantial uncertainty surrounding the opt-out notice requirements for *solicited* fax advertisements; as a "similarly situated party" – *i.e.*, a defendant in a pending TCPA lawsuit – good cause exists to resolve this inconsistency by granting Apex's request for a retroactive waiver.

Grant of the retroactive waiver request would also be in the public interest. Apex notes that the Commission has already decided that such retroactive waivers will serve the public interest because the "confusion or misplaced confidence…left some businesses potentially subject to significant damage awards" and that "on balance…it serves the public interest…to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward."[7] Based on this finding, the FCC granted a retroactive waiver to all of the petitioners explicitly referenced in the Order and further invited other "similarly situated parties" to seek retroactive waivers as well.[8]

The FCC's rational in granting retroactive waivers to the petitioners referenced above applies equally to Apex as it too is a defendant in a putative class action lawsuit in which its alleged failure to comply with the Opt-Out Rule has the potential to expose it to monetary damage awards. The Commission has acknowledged that substantial confusion previously existed with respect to the opt-out requirements for solicited fax advertisements. Thus, not only

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[6] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, fn. 154 ("Junk Fax Order") (2006) (stating that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements" (emphasis added)); *see also Fax Order* at ¶24.
[7] *Fax Order* at ¶27.
[8] *Id*. at ¶30.

does good cause exist to grant Apex a waiver of the Opt-Out Rule, but such a grant would be in the public interest.

III. CONCLUSION

For the foregoing reasons, Apex respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) effective through the date of such grant by the Commission.

Respectfully Submitted,

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