

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

WHOLESALE POINT, INC.,)
on behalf of plaintiff and)
the class members defined herein,)
)
Plaintiff,)
)
v.)
)
AEP ENERGY, INC.,)
and JOHN DOES 1-10,)
)
Defendants.)

COMPLAINT – CLASS ACTION

MATTERS COMMON TO MULTIPLE COUNTS

INTRODUCTION

1. Plaintiff Wholesale Point, Inc., brings this action to secure redress for the actions of defendant AEP Energy, Inc., in sending or causing the sending of unlawful advertisements to telephone facsimile machines in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”), the Illinois Consumer Fraud Act, 815 ILCS 505/2 (“ICFA”), and the common law.

2. The TCPA expressly prohibits unsolicited fax advertising. Unsolicited fax advertising damages the recipients. The recipient is deprived of its paper and ink or toner and the use of its fax machine. The recipient also wastes valuable time it would have spent on something else. Unsolicited faxes prevent fax machines from receiving and sending authorized faxes, cause wear and tear on fax machines, and require labor to attempt to identify the source and purpose of the unsolicited faxes.

PARTIES

3. Plaintiff Wholesale Point, Inc., is an Illinois corporation with offices at 7223 South Route 83 Suite 198, Willowbrook, Illinois 60527, where it maintains telephone facsimile equipment.

4. Defendant AEP Energy, Inc., is an Illinois corporation that has offices at 1 Riverside Plaza, Columbus, Ohio 43215. It does business in Illinois. Its registered agent is CT Corporation System, 208 South LaSalle Street, Suite 814, Chicago, Illinois 60604.

5. Defendants John Does 1-10 are other natural or artificial persons that were involved in the sending of the facsimile advertisements described below. Plaintiff does not know who they are.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. §§1331 and 1367. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).

7. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendant:

- a. Has committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
- b. Has transacted business in Illinois.
- c. Is located in Illinois.

8. Venue in this District is proper for the same reason.

FACTS

9. On July 13, 2012, plaintiff Wholesale Point, Inc., received the fax advertisement attached as Exhibit A on its facsimile machine.

10. Discovery may reveal the transmission of additional faxes as well.

11. Defendant AEP Energy, Inc., is responsible for sending or causing the sending of the faxes.

12. Defendant AEP Energy, Inc., as the entity whose products or services were advertised in the faxes, derived economic benefit from the sending of the faxes.

13. Defendant AEP Energy, Inc., either negligently or wilfully violated the rights of plaintiff and other recipients in sending the faxes.

14. The faxes do not contain an “opt out” notice that complies with 47 U.S.C. §227.

15. The TCPA makes unlawful the “use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine ...” 47 U.S.C. §227(b)(1)(C).

16. The TCPA provides for affirmative defenses of consent or an established business relationship. Both defenses are conditioned on the provision of an opt out notice that complies with the TCPA. *Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013).

17. On information and belief, the faxes attached hereto were sent as part of a mass broadcasting of faxes.

18. On information and belief, defendant has transmitted similar fax advertisements to at least 40 other persons in Illinois.

19. There is no reasonable means for plaintiff or other recipients of defendant’s advertising faxes to avoid receiving illegal faxes. Fax machines must be left on and ready to receive the urgent communications authorized by their owners.

COUNT I – TCPA

20. Plaintiff incorporates ¶¶ 1-19.

21. The TCPA, 47 U.S.C. §227(b)(3), provides:

Private right of action.

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State–

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the Court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court

may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.

22. Plaintiff and each class member suffered damages as a result of receipt of the faxes, in the form of paper and ink or toner consumed as a result. Furthermore, plaintiff's statutory right of privacy was invaded.

23. Plaintiff and each class member is entitled to statutory damages.

24. Defendant violated the TCPA even if their actions were only negligent.

25. Defendant should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

26. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with fax numbers (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), (c) were sent faxes by or on behalf of defendant AEP Energy, Inc., promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

27. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

28. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.

f. Whether defendant thereby committed a trespass to chattels.

29. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

30. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

31. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

32. Several courts have certified class actions under the TCPA. *Holtzman v. Turza*, 08 C 2014, 2009 WL 3334909, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009), aff'd in relevant part, 728 F.3d 682 (7th Cir. 2013); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D.Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.*, 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.*, 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.J.); *G.M. Sign, Inc. v. Group C Communs., Inc.*, 08 C 4521, 2010 WL 744262, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1st Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94, 50 P.3d 844 (2002); *Core*

Funding Group, LLC v. Young, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577 (Mo. App. 2010).

33. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Actual damages;
- b. Statutory damages;
- c. An injunction against the further transmission of unlawful fax advertising;
- d. Costs of suit;
- e. Such other or further relief as the Court deems just and proper.

COUNT II – ILLINOIS CONSUMER FRAUD ACT

34. Plaintiff incorporates ¶¶ 1-19.

35. Defendant engaged in unfair acts and practices, in violation of ICFA § 2, 815 ILCS 505/2, by sending fax advertising to plaintiff and others.

36. Defendant engaged in an unfair practice by engaging in conduct that is contrary to public policy, unscrupulous, and caused injury to recipients of their advertising.

37. Plaintiff and each class member suffered damages as a result of receipt of the unlawful faxes, in the form of paper and ink or toner consumed as a result.

38. Defendant engaged in such conduct in the course of trade and commerce.

39. Defendant's conduct caused recipients of their advertising to bear the cost thereof.

This gave defendant an unfair competitive advantage over businesses that advertise lawfully, such as by direct mail. For example, an advertising campaign targeting one million recipients would cost \$500,000 if sent by U.S. mail but only \$20,000 if done by fax broadcasting. The reason is that instead of spending \$480,000 on printing and mailing his ad, the fax broadcaster

misappropriates the recipients' paper and ink. "Receiving a junk fax is like getting junk mail with the postage due". Remarks of Cong. Edward Markey, 135 Cong Rec E 2549, Tuesday, July 18, 1989, 101st Cong. 1st Sess.

40. Defendant's shifting of advertising costs to plaintiff and the class members in this manner makes such practice unfair. In addition, defendants' conduct was contrary to public policy, as established by the TCPA and Illinois statutory and common law.

41. Defendant should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

42. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date three years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant AEP Energy, Inc., promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

43. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

44. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

45. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

46. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

47. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

48. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unlawful fax advertising;
- c. Attorney's fees, litigation expenses and costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT III – CONVERSION

49. Plaintiff incorporates ¶¶ 1-19.

50. By sending plaintiff and the class members unlawful faxes, defendant converted to their own use ink or toner and paper belonging to plaintiff and the class members.

51. Immediately prior to the sending of the unlawful faxes, plaintiff and the class members owned and had an unqualified and immediate right to the possession of the paper and ink or toner used to print the faxes.

52. By sending the unlawful faxes, defendant appropriated to their own use the

paper and ink or toner used to print the faxes and used them in such manner as to make them unusable. Such appropriation was wrongful and without authorization.

53. Defendant knew or should have known that such appropriation of the paper and ink or toner was wrongful and without authorization.

54. Plaintiff and the class members were deprived of the paper and ink or toner, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of receipt of the unlawful faxes.

55. Defendant should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

56. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant AEP Energy, Inc., promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

57. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

58. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.

f. Whether defendant thereby committed a trespass to chattels.

59. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

60. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

61. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

62. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unlawful fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT IV – PRIVATE NUISANCE

63. Plaintiff incorporates ¶¶ 1-19.

64. Defendant's sending plaintiff and the class members unlawful faxes was an unreasonable invasion of the property of plaintiff and the class members and constitutes a private nuisance.

65. Congress determined, in enacting the TCPA, that the prohibited conduct was a "nuisance." *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.*, 401 F.3d

876, 882 (8th Cir. 2005).

66. Defendant acted either intentionally or negligently in creating the nuisance.

67. Plaintiff and each class member suffered damages as a result of receipt of the unlawful faxes.

68. Defendant should be enjoined from continuing its nuisance.

CLASS ALLEGATIONS

69. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers, (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant AEP Energy, Inc., promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

70. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

71. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

72. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business

practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

73. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

74. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

75. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unlawful fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT V – TRESPASS TO CHATTELS

76. Plaintiff incorporates ¶¶ 1-19.

77. Plaintiff and the class members were entitled to possession of the equipment they used to receive faxes.

78. Defendant's sending plaintiff and the class members unlawful faxes interfered with their use of the receiving equipment and constitutes a trespass to such equipment. *Chair King v. Houston Cellular*, 95cv1066, 1995 WL 1693093 at *2 (S.D. Tex. Nov. 7, 1995) (denying a motion to dismiss with respect to plaintiff's trespass to chattels claim for unlawful faxes), vacated on jurisdictional grounds 131 F.3d 507 (5th Cir. 1997).

79. Defendant acted either intentionally or negligently in engaging in such conduct.

80. Plaintiff and each class member suffered damages as a result of receipt of the unlawful faxes.

81. Defendant should be enjoined from continuing trespasses.

CLASS ALLEGATIONS

82. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant AEP Energy, Inc., promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

83. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

84. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unlawful fax advertisements;
- b. Whether defendant thereby violated the TCPA;
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- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

85. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

86. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

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88. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unlawful fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

s/ Daniel A. Edelman
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NOTICE OF LIEN AND ASSIGNMENT

Please be advised that we claim a lien upon any recovery herein for 1/3 or such amount as a court awards. All rights relating to attorney's fees have been assigned to counsel.

s/ Daniel A. Edelman
Daniel A. Edelman

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EXHIBIT A

AMERICAN ELECTRIC POWER

TO: CURRENT COMED CUSTOMER
FROM: TALOHR/ WITH AEP ENERGY X 267
SUBJECT: RATE REDUCTION ON COMED BILL.
DATE: 7/13/2012

Good afternoon,

I spoke with you this morning in regards to lowering your rate on your COMED electricity bill. Your ComEd account qualifies for a rate reduction only **6.55 cents per kwh** . AEP energy is a Chicago based electric supplier with an A+ rating with the Better Business Bureau. We are located in the downtown Chicago area and have been in business for OVER 100 years. We are very reputable and competitive company and would like to apply the low rate to your next ComEd meter read. This low rate also includes your transmission service charge as well as your purchased electricity adjustment charge. ALL INCLUSIVE RATES. Your Company does have the potential to save money annually which is always a plus for your business. I look forward to speaking with you in regards to a rate deduction for your ComEd acct and getting you started on your savings.

Thank You,

Talohr Ram

AMERICAN ELECTRIC POWER Energy Solutions

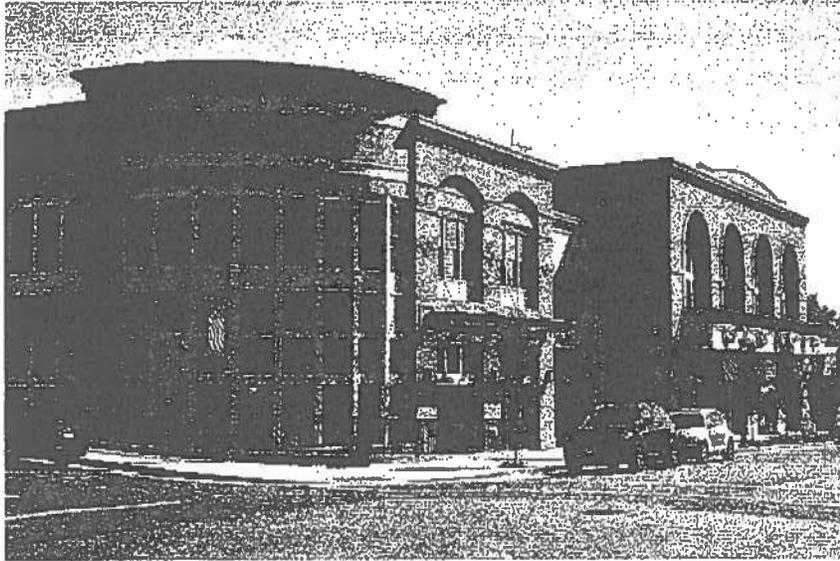
Office:832-518-4868 x 267

SMALL BUSINESS ELECTRIC SUPPLY

Save Money on Electricity with AEP Energy

Did you know that you can choose your electricity supplier and save up to 13%?

AEP Energy can turn your monthly electric bill into a competitive advantage by lowering your business expense.



Sign up now for up to a **13% discount off** the current ComEd supply rate with an AEP Energy fixed rate of 6.55 cents per kwh and 24-month term.

Call us for more information:
832-518-4868 x 267

TALOHK

Changing to AEP Energy could not be easier:

- No switching fees
- No visit to your business required
- No interruption in power delivery
- Continue to receive one consolidated bill from ComEd
- Same reliable delivery and repair services from ComEd

Energy Deregulation and Customer Choice

Before energy deregulation, local utilities controlled all three components of your service: generation (supply), transmission and distribution. With deregulation, state legislatures and public utility commissions created competition by separating the supply portion of your energy bill from delivery. Now retail energy companies compete to be your supplier. And, consumers benefit from innovative rate structures and cost savings.

How can AEP Energy offer lower supply rates?

Because local utilities no longer generate energy, they buy from the wholesale marketplace like AEP Energy does. Because AEP Energy purchases energy on a daily basis, our market intelligence and buying strategies allow us to offer you lower, more competitive rates.

Your Local Utility

Your local utility still delivers electricity to your location and is who you call in case of an outage or emergency. They also continue to maintain and repair power lines, meters and other equipment.

You will continue to receive one bill from, and remit monthly payments to, your local utility. The only change you will notice on your bill each month will be your new AEP Energy electricity supply rate.

About AEP Energy | AEP Energy makes it easy for customers to buy, manage and use energy. A competitive supplier of power since 2004, we have more than 100,000 customers. Nationally, AEP Energy provides solutions to increase efficiency and take control of costs.

A subsidiary of American Electric Power, AEP Energy combines an individualized, consultative approach with the resources of a Fortune 200 company. We define success by what makes our customers successful.

AEP Energy is a competitive retail electric service provider affiliated with American Electric Power, Inc. AEP Energy is not soliciting on behalf of and is not an agent for any AEP Utility.

866-258-3782

AEPenergy.com

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