

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

In the Matter of:)	
)	
Petition of AEP Energy, Inc. for)	CG Docket No. 02-278
Retroactive Waiver of 47 C.F.R.)	
§ 64.1200(a)(4)(iv))	CG Docket No. 05-338
)	

PETITION FOR RETROACTIVE WAIVER

Pursuant to 47 C.F.R. § 1.3 and Paragraph 30 of the Commission’s *Order*, CG Docket Nos. 02-278, 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (Oct. 30, 2014) (the “*Order*”), Petitioner AEP Energy, Inc. (“AEP Energy”) hereby requests that the Commission grant AEP Energy a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules, 47 C.F.R. § 64.1200(a)(4)(iv), with respect to any alleged advertising faxes sent with the recipients’ prior express invitation or permission.

In the *Order*, the Commission clarified that the opt-out notice requirement under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the “TCPA”), which is set forth in 47 U.S.C. § 227(b)(1)(C) and (2)(d) of the statute, and in the implementing regulation, 47 C.F.R. § 64.1200(a)(4)(iv), applies to solicited fax advertisements (*i.e.*, fax advertisements sent with the recipients’ prior express invitation or permission). The Commission also granted a retroactive waiver of Section 64.1200(a)(4)(iv) to several petitioners who were facing lawsuits alleging that the petitioners had violated Section 64.1200(a)(4)(iv) by failing to include the “opt-out” language in advertising faxes. The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest. *See Order* ¶¶ 26-28. The Commission invited “similarly-situated

parties” to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes. *See id.* ¶ 30.

AEP Energy is a competitive retail electric supplier that supplies electricity to business and residential customers in several states. As AEP Energy demonstrates below, it is similarly situated to the petitioners who were granted retroactive waivers in the *Order*. AEP Energy respectfully requests that the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) for the same reasons that supported the Commission’s retroactive waivers in the *Order*.

I. **BACKGROUND**

The TCPA prohibits the use of any telephone facsimile machine, computer, or other device to send an “unsolicited advertisement” to a fax machine. 47 U.S.C. § 227(b)(1)(C). The TCPA was amended in 2005 by the Junk Fax Protection Act (“JFPA”). *See* Junk Fax Protection Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). Among other things, the JFPA codified an exception to the TCPA’s prohibition on unsolicited advertising faxes for companies that send fax advertisements to those with whom they have an established business relationship. *See* 47 U.S.C. § 227(b)(1)(C)(i). The JFPA also amended the TCPA to require the sender of an “unsolicited advertisement” to provide a specified notice on the fax that allows recipients to “opt out” of any future fax transmissions from the sender. *See id.* §§ 227(b)(1)(C)(iii) and 227(b)(2)(D).

The Commission amended its rules to incorporate the changes in the JFPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (the “*Junk Fax Order*”). Among other

things, in the *Junk Fax Order*, the Commission adopted a rule that provided that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.” 47 C.F.R. § 64.1200(a)(4)(iv). The *Junk Fax Order*, however, also stated in a footnote that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.” *Junk Fax Order*, 21 FCC Rcd at 3810 n.154 (emphasis added).

Numerous parties filed petitions challenging the Commission’s rule applying the opt-out notice requirement to solicited advertising faxes. The Commission resolved those petitions in the *Order*, issued on October 30, 2014. In the *Order*, the Commission acknowledged that the “inconsistent footnote” in the *Junk Fax Order* (which stated that the opt-out notice requirement applied only to *unsolicited* advertisements) “caused confusion or misplaced confidence regarding the applicability of the [opt-out notice] requirement.” *Order* ¶¶ 24, 28. The Commission also recognized that “the lack of explicit notice” in the notice of proposed rulemaking that the Commission contemplated requiring opt-out notices on solicited fax advertisements “may have contributed to confusion or misplaced confidence.” *Id.* ¶ 25.

The Commission stated that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.” *Order* ¶ 26. The Commission found that “granting a retroactive waiver would serve the public interest,” because it would be “unjust or inequitable” to subject parties to “potentially substantial damages,” given the confusion and misplaced confidence about the rule’s applicability. *Id.* ¶¶ 27, 28.

The Commission “grant[ed] retroactive waivers of [its] opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by [its] rules.” *Order* ¶ 29. The

Commission stated that “[o]ther, similarly situated parties may also seek waivers such as those granted” in the *Order*. *Id.* ¶ 30. The Commission also said that it “expect[s] that parties will make every effort to file [petitions for waiver] within six months of the release of this Order.” *Id.*¹

II. THE COMMISSION SHOULD GRANT AEP ENERGY A RETROACTIVE WAIVER OF 47 C.F.R. § 64.1200(a)(4)(iv).

As demonstrated below, AEP Energy is similarly situated to the parties who were granted retroactive waivers in the *Order*, and the Commission likewise should grant AEP Energy a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) as applied to alleged advertising faxes sent to recipients who had provided prior express invitation or permission for such faxes.

The Commission’s rules provide that the Commission may suspend, revoke, amend, or waive any of its rules at any time “for good cause shown.” 47 C.F.R. § 1.3. In order to waive a rule, the Commission must find that (a) “special circumstances warrant a deviation” from the rule; and (b) waiver would “better serve the public interest” than would application of the rule. *See Order* ¶ 23. The Commission found in the *Order* that both of these requirements were satisfied with respect to the petitioners’ challenge of the application of the opt-out notice requirement to solicited faxes. *See id.* ¶¶ 26-27.

The same “special circumstances” identified by the Commission in the *Order* exist here.

¹ AEP Energy respectfully submits that this petition is timely, notwithstanding that it was filed shortly after April 30, 2015 (the date six months after the *Order*). The *Wholesale Point* action referenced below was not filed until May 1, 2015, and AEP Energy did not otherwise previously receive any notice that Wholesale Point, or any other person or entity, intended to assert a claim against AEP Energy allegedly arising out of advertising faxes. AEP Energy filed this petition less than one week after the filing of the *Wholesale Point* action.

AEP Energy is similarly situated to the parties granted retroactive waivers in the Order. AEP Energy currently is facing a putative class action lawsuit in which plaintiff contends that AEP Energy violated the TCPA and the Commission's regulations by not including opt-out notices on alleged advertising faxes. *See* Complaint, *Wholesale Point, Inc. v. AEP Energy, Inc., et al.*, No. 1:15-cv-03845 (N.D. Ill.) (a copy of the Complaint is attached as Exhibit A).

One of the defenses that AEP Energy likely will assert to the claims in that action is that the alleged recipients of any faxes at issue provided their prior express invitation or permission to receive such faxes.²

Moreover, the alleged advertising fax attached to the Complaint in *Wholesale Point* was sent after the Commission issued the *Junk Fax Order* – which included the “inconsistent” footnote stating that the opt-out notice requirement applied only to *unsolicited* advertising faxes – and before the Commission issued its October 30, 2014 *Order* clarifying the opt-out notice requirement. As the Commission has recognized, that footnote caused “confusion” and “misplaced confidence” regarding the applicability of the opt-out notice requirement to solicited faxes. *Order* ¶ 24. The Commission concluded that such confusion and misplaced confidence, coupled with questions about whether the Commission had provided adequate notice about its intent to adopt the opt-out notice requirement for solicited faxes, “presumptively establishes good cause for retroactive waiver of the rule.” *Id.* ¶ 26.

In addition, granting a retroactive waiver to AEP Energy would serve the public interest. *See Order* ¶ 27. The Commission found in the Order that the public interest requirement was satisfied because “a failure to comply with the rule which could be the result of reasonable confusion or misplaced confidence could subject parties to potentially substantial

² AEP Energy's response to the Complaint in *Wholesale Point* is not yet due.

damages.” *Id.* ¶ 27. The same is true here. As described above, AEP Energy is a defendant in a putative class action. Absent a waiver, AEP Energy potentially could be subjected to substantial statutory damages for allegedly failing to comply with a rule that the Commission has determined was the subject of confusion. Under those circumstances, a waiver would better serve the public interest than application of the rule.

For all of these reasons, Petitioner AEP Energy, Inc. respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission already has granted to other, similarly situated parties.

Dated: May 7, 2015

Respectfully submitted,

AEP ENERGY, INC.

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