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
	)	

REPLY IN SUPPORT OF
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") respectfully submits the following reply in support of its petition (the "Petition") for 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, and in response to the comment in opposition filed by Wholesale Point, Inc. ("Wholesale Point").

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.

As AEP Energy demonstrated in its Petition, it is similarly situated to the petitioners who were 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 to the Petition). If and when AEP Energy is required to plead in response to the Complaint, one of the defenses that AEP Energy will assert is that the alleged recipients of the faxes at issue provided their prior express invitation or permission to receive such faxes.

Only one party submitted comments in opposition to the Petition: the named plaintiff in the putative class action pending against AEP Energy.[1] Wholesale Point argues that the Commission should deny the Petition. For the reasons set forth below, the Commission should reject its arguments, and grant the retroactive waiver sought by AEP Energy.

I. AEP Energy Is Similarly Situated To The Parties Granted Retroactive Waivers In The *Order*.

As AEP Energy previously demonstrated, it is similarly situated to the parties who were granted retroactive waivers in the *Order*. (*See* Petition at 5-6.) AEP Energy is facing a putative class action lawsuit in which the plaintiff contends that AEP Energy violated the

[1] *See Comment of Wholesale Point, Inc. to Petition of AEP Energy, Inc.*, CG Docket Nos. 02-278 and 05-338 (June 12, 2015) (the "Comment").

TCPA and the Commission's regulations by not including opt-out notices on alleged advertising faxes. If and when AEP Energy is required to plead in response to the Complaint in that action,[2] one of the defenses that AEP Energy will raise is that the alleged recipients of the faxes at issue provided their prior express invitation or permission to receive such faxes.

Moreover, any alleged advertising faxes at issue in *Wholesale Point* were 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.

Wholesale Point argues that AEP Energy is not entitled to a waiver because, according to Wholesale Point, in connection with seeking a waiver, AEP Energy is required to demonstrate the existence of prior express permission or invitation, and has not done so. (*See* Comment at 1-3.) Wholesale Point is wrong.

Contrary to what Wholesale Point suggests, in the *Order*, the Commission did not condition the granting of waivers upon a determination that the petitioners had demonstrated prior express permission. Instead, the Commission made clear that "the granting of such waivers

[2] AEP Energy's response to the Complaint is due June 29, 2015.

[shall not] be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of recipients to be sent the faxes at issue . . . ." *Order* ¶ 31.

As noted above, if and when AEP Energy is required to plead in response to the Complaint, AEP Energy will assert as a defense to Wholesale Point's claims that any alleged advertising faxes were sent with the prior express permission or invitation of the recipients. Moreover, if necessary and at the appropriate time, AEP Energy will present evidence to the district court presiding over the *Wholesale Point* action demonstrating that prior express permission or invitation. Wholesale Point – not surprisingly – disputes the existence of such prior express invitation or permission. (*See* Comment at 1-3.) But as the Commission made clear in the *Order*, the existence of a dispute over the existence of prior express invitation or permission is not a reason to deny a retroactive waiver of the opt-out notice requirement. *See Order* ¶ 31 & n.104.

Wholesale Point also argues that the Petition should be denied because, according to them, AEP Energy does not demonstrate that it was confused about the opt-out notice requirement. (*See* Comment at 3-4.) In the *Order*, however, the Commission did not require proof that individual petitioners were confused by the conflicting language in the Commission's rules and orders. Instead, the Commission noted the conflicting language, and found that it "presumptively establishes good cause for retroactive waiver of the [opt-out notice] rule." *Order* ¶ 26. The only specific finding that the Commission made in the *Order* about the petitioners' subjective understanding was the determination that "we find nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so." *Id.*

Wholesale Point next asserts that, "[i]mportantly, AEP [Energy] does *not* contend in its petition that its facsimiles were advertisements." (Comment at 4 (emphasis in original).) Wholesale Point does not explain, however, why this supposedly is "important" (or relevant at all). Nor does Wholesale Point direct the Commission to anything in the *Order* that requires a petitioner to "contend" (or allege or admit) that the alleged faxes at issue in a putative class action lawsuit were advertisements for purposes of the TCPA. (*See id.*) In any event, Wholesale Point alleges repeatedly that AEP Energy transmitted advertising faxes (*see, e.g.*, Comment at 1; Complaint ¶¶ 1, 9 & 18).

Wholesale Point notably does not dispute AEP Energy's statement that, absent a waiver, AEP Energy potentially could be subjected to substantial damages for allegedly failing to comply with a rule that the Commission has determined was the subject of confusion. (*See* Comment at 4-5; Petition at 5-6.) Wholesale Point instead notes that AEP Energy is a subsidiary of American Electric Power Company, Inc., and glibly asserts that "[i]t is unlikely that any judgment entered against AEP [Energy] in this case would drain its resources." (Comment at 4-5.) With that argument, Wholesale Point not only ignores the legal and financial distinctions between a parent company and its subsidiary, but also attempts to invent a standard that does not appear anywhere in the *Order*.

For all of these reasons, AEP Energy is similarly situated to the parties granted waivers in the *Order*, and also is entitled to a retroactive waiver of the opt-out notice requirement.

II. The Petition Is Timely.

Wholesale Point also argues, in passing, that the Petition is "untimely." (*See* Comment at 4.) Contrary to what Wholesale Point asserts (*see id.*), the Commission did not set an absolute deadline of April 30, 2015 for the filing of any petitions for retroactive waiver. Instead, as AEP

Energy notes in its Petition, the Commission stated in the *Order* that it "expect[s] that parties will make every effort to file [petitions for waiver] within six months of the release of this Order." (*See* Petition at 4 (quoting *Order* ¶ 30).)

At the time the Commission issued the *Order* – and invited similarly situated parties to submit petitions for waiver within a six month period – AEP Energy was not a defendant in a TCPA action based upon alleged advertising faxes. Instead, as AEP Energy notes in its Petition, it was not served with the Complaint in *Wholesale Point* until May 1, 2015 (*i.e.*, the day after the six month period identified by the Commission had expired), and it filed the Petition less than one week after being served.[3] AEP Energy respectfully submits that the Petition was timely.

[3] In the event that discovery in *Wholesale Point* proceeds, one of the issues that AEP Energy intends to explore is whether Wholesale Point, or its counsel, intentionally waited until after April 30, 2015 to file the Complaint – given that the fax attached to the Complaint allegedly was sent in *July 2012*, and that Wholesale Point is no stranger to the TCPA, having acted as named plaintiff in at least four other putative class actions under the TCPA dating back to 2007.

For all of the reasons set forth above and in the Petition, Petitioner AEP Energy 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: June 19, 2015

Respectfully submitted,

AEP ENERGY, INC.

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