

FEDERAL TRADE COMMISSION



CAN-SPAM Act Rulemaking

Project No. R411008

COMMENTS OF KEYSpan ENERGY DELIVERY NEW YORK AND  
KEYSPAN ENERGY DELIVERY LONG ISLAND

INTRODUCTION

On May 12, 2005, the Federal Trade Commission (“Commission”) published a Notice of Proposed Rulemaking (“NPRM”) proposing rules pursuant to several distinct provisions of the CAN-SPAM Act.<sup>1</sup> In the NPRM, the Commission proposes rule provisions on five broad topics: (1) Defining the term “person;” (2) limiting the definition of “sender” to address scenarios where a single email contains advertisements from multiple entities; (3) clarifying that Post Office boxes and private mailboxes established pursuant to United States Postal Service regulations are “valid physical postal addresses;” (4) shortening the time a sender has to honor a recipient’s opt-out request; and (5) clarifying that a recipient may not be required to pay a fee, provide information other than his or her email address and opt-out preferences, or take any steps other than sending a reply email message or visiting a single Internet Web page to submit a valid opt-out request.<sup>2</sup> The Commission based the proposed rule provisions on the Commission’s law enforcement experience and on comments received in response to the Advance Notice of

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<sup>1</sup> Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70 Fed. Reg. 25,426 (Notice of Proposed Rulemaking May 12, 2005).

<sup>2</sup> *Id.* at 25,427.

Proposed Rulemaking (“ANPR”), published March 11, 2004, which sought comments on numerous issues raised by the Act.<sup>3</sup>

In addition to the Commission’s proposed rule provisions on the topics listed above, the Commission discusses other topics in the NPRM, in response to issues raised in comments responding to the ANPR.<sup>4</sup> Some of these other topics include the Act’s definition of “transactional or relationship message,” the Commission’s views on how the Act applies to certain email marketing practices, including “forward-to-a-friend” email marketing campaigns, and the expiration of opt-out requests (“other topics”).<sup>5</sup>

The NPRM invites comments to assist the Commission in determining whether the proposed regulations strike the appropriate balance between maximizing protections for email recipients and avoiding the imposition of unnecessary compliance burdens on legitimate industry.<sup>6</sup> The NPRM also invites comments on certain questions provided in the NPRM pertaining to these other topics, even though the Commission does not propose rule provisions addressing these other topics.<sup>7</sup>

The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (collectively, “KeySpan”) are both,<sup>8</sup> public utility companies and support the Commission’s effort to strike a balance between maximizing protections for email recipients while avoiding the impositions of unnecessary compliance burdens on

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<sup>3</sup> Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 11,776 (Advance Notice of Proposed Rulemaking March 11, 2004).

<sup>4</sup> Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70 Fed. Reg. 25,426, 25,427 (Notice of Proposed Rulemaking May 12, 2005).

<sup>5</sup> *Id.* at 25,427, 25,444.

<sup>6</sup> *Id.* at 25,427.

<sup>7</sup> *Id.* at 25,4287.

<sup>8</sup> KeySpan Energy Delivery New York provides gas distribution services to customers in the New York City boroughs of Brooklyn, Staten Island and a portion of Queens. KeySpan Energy Delivery Long Island provides similar services to customers on Long Island and the Rockaway Peninsula in Queens.

legitimate industry. KeySpan generally supports and agrees with the Commission's proposed rules regarding the definition of the term "person" and the clarification of the definition of "valid physical postal addresses." KeySpan also generally supports and agrees with limiting the definition of "sender" to address scenarios where a single email message contains advertisements from multiple entities. However, KeySpan respectfully requests that the proposed criteria regarding "the person who controls the content of the message" and "the person who determines the email addresses to which such message is sent" be removed from the proposed definition of the term "sender." If the Commission disagrees with the request, then in the alternative KeySpan respectfully requests that the Commission provide guidance as to what constitutes "controls" with respect to the portion of the proposed sender definition that states "the person *controls* the content of the message" and what constitutes "determines" with respect to the portion of the proposed sender definition that states "the person *determines* the email addresses to which such message is sent."

KeySpan respectfully disagrees with shortening the period that a sender has to honor a recipient's opt-out request. KeySpan respectfully requests that the Commission maintain the Act's ten (10) business day period that a sender has to honor opt-out requests.

KeySpan generally supports the proposed prohibition on charging a fee or imposing other requirements on recipients who wish to opt-out, with the exception of the prohibition on requiring personally identifiable information to be provided by the recipient who wishes to opt-out. KeySpan respectfully requests that the Commission

permit senders to require recipients to include personally identifiable information in order to opt-out of commercial email from the sender.

KeySpan respectfully requests that the Commission consider the following as transactional or relationship messages: legally mandated notices, debt collection emails, employer email messages sent to employees at the employer-provided email accounts, email messages sent on behalf of a third party with the permission of the employer to the employer's employees at the employer-provided email accounts, emails sent to a recipient after an offer of employment is made, email messages meant to complete or confirm a negotiation, email messages delivering newsletters or other electronically delivered content to recipients who have entered into a transaction with a sender that entitles the recipient to receive such content, and business relationship messages which are individualized messages that are sent from one employee of a company to an individual recipient or small number of recipients. As discussed in KeySpan's comments below, these messages are transactional or relationship messages because they fit within an existing transactional or relationship category. The modification of the existing transactional or relationship categories to specifically include these messages would accommodate changes in email practices and accomplish the purpose of the Act.

With respect to forward-to-a-friend scenarios, KeySpan supports the Commission's views and definitions of the terms "sender," "initiate," "procure," and "routine conveyance." However, KeySpan respectfully disagrees with the Commission's application of the term "induce" and requests that the term not be applied in such a broad manner. If the Commission disagrees with the request, then in the alternative KeySpan requests that the Commission provide guidelines or criteria in determining whether a

sender is “inducing” or “intentionally inducing” a recipient to forward a message to a friend.

Finally KeySpan respectfully requests that the Commission not require senders to keep opt-out lists indefinitely. KeySpan respectfully requests that the Commission limit how long opt-out requests remain in effect and suggests a limit of five years which is similar the duration of a person’s registration on the National Do Not Call Registry.

KeySpan hereby submits its comments in response to the Commission’s NPRM.

## **DISCUSSION**

### **KeySpan Generally Supports The Proposed Definition Of The Term “Person,” “Valid Physical Postal Address” And “Sender.”**

KeySpan supports and agrees with the proposed definition of the term “person” which appears throughout the Act and is used in a number of rule provisions. KeySpan agrees with the Commission that clarifying the definition so as not to limit it to a natural person will advance the implementation of the Act and will not result in any unnecessary compliance burdens.

KeySpan also supports and agrees with the proposed definition of the term “valid physical postal address” which provides that a sender may comply with the Act’s requirements by including in a commercial email message either the sender’s current address, a Post Office box the sender has registered with the United States Postal Service or a private mailbox that the sender has registered with a commercial mail receiving agency that is established pursuant to the United States Postal Service regulations. The proposed definition for “valid physical postal address” is clear, satisfies the Act’s valid physical postal address disclosure requirement, and does not result in any unnecessary compliance burdens.

KeySpan also generally supports and agrees with limiting the definition of “sender” to address scenarios where a single email message contains advertisements from multiple entities. However, KeySpan respectfully requests that the proposed criterion regarding “the person who controls the content of the message” and the proposed criterion regarding “the person who determines the email addresses to which such message is sent” (“criteria”) be removed from the proposed definition of the term “sender.” The proposed criteria are not clear and result in unnecessary compliance burdens.

KeySpan requests that these two criteria should be removed and not be used to determine who the sender is of a joint marketing piece. KeySpan believes that entities engaged in joint marketing campaigns wish to retain the ability to provide their own marketing copy and contribute email addresses to which the joint marketing piece is sent. KeySpan does not believe that if each entity provides its own marketing copy in a joint marketing campaign, the result should be that each entity is a sender of the message because each sender would be “the person [that] controls the content of the message.” KeySpan also does not believe that if each entity provides email addresses to which the joint marketing email would be sent, the result should be that each entity is a sender of the message because each sender would be “the person [that] determines the email addresses to which such messages is sent.” KeySpan believes that entities should be permitted to address who is controlling the content of the message and who is determining the email addresses in contracts negotiated and agreed to by the entities without having to consider which entity is the sender in terms of the CAN-SPAM Act.

KeySpan respectfully proposes that the proposed criterion providing that the “person [who] is identified in the ‘from’ line” should remain in determining which entity is the sender especially since recipients seem to believe that the entity that appears in the “from” line is the sender of the message.

Thus, KeySpan respectfully requests that the proposed definition of the term sender be modified to provide that when more than one person’s products or services are advertised or promoted in a single email message, the person who is within the Act’s definition and who is identified in the “from” line will be deemed as the sender.

If the Commission disagrees with the request of removing the two criteria, than in the alternative, KeySpan respectfully requests that the Commission provide guidelines or criteria in determining what constitutes “controls” with respect to the portion of the proposed sender definition that states “the person *controls* the content of the message” and what constitutes “determines” with respect to the portion of the proposed sender definition that states “the person *determines* the email addresses to which such message is sent.”

**The Proposed Shortening Of The Ten Business Day Period That A Sender Has To Honor Opt-Out Requests Does Not Maximize Protections For Email Recipients And Imposes Unnecessary Compliance Burdens On Legitimate Industry.**

KeySpan respectfully disagrees with shortening the time period within which a sender must honor opt-out requests. KeySpan respectfully requests that the Commission maintain the current ten (10) business day period. For several reasons, KeySpan believes that shortening the time period from ten (10) business days to three (3) business days will lessen protections for email recipients while unnecessarily increasing compliance burdens on legitimate industry.

First, if the time period for processing opt-out requests is shortened to a three (3) business day period, senders will need to transfer opt-out files to their email vendors on a more frequent basis. This sending of multiple lists in a short time frame will increase the risk of the email vendor using the wrong opt-out list. Increasing the number and frequency of opt-out lists transferred from senders to their email vendors creates a greater risk that the recipient's opt-out requests will not be honored, resulting in less protection to email recipients.

The risk of the email vendor using the wrong opt-out list and the risk of the recipient's opt-out request not being honored is even greater for a sender who provides their recipients with a list or menu from which the recipient can choose what type of emails the recipient would like to opt-out of. The greater number of opt-out options provided to the recipients increase the time required to accurately process the opt-outs. Requiring an email vendor to process the opt-out requests in a shorter period of time, increases the opportunity for error and the cost of compliance.

Second, shortening the time period to honor opt-out requests to the three (3) business day period will increase the risk of an opt-out request not being honored when manual procedures are used to suppress a person's email address from a sender's email distribution list. Small volume senders may have elected to use manual procedures to comply with the current ten (10) business day period. A decrease in the time period as significant as that proposed by the Commission would require an investment in technology that small volume legitimate senders could not absorb. In addition, even entities that employ the most sophisticated technology to respond to opt-out requests may receive opt-out requests that require manual processing. Opt-out requests requiring

manual processing include opt-out requests received by telephone or regular mail. It would be difficult to ensure that opt-outs received in other than an electronic manner would be processed within three business days.

Manual procedures require an individuals to manually create an opt-out list and manually scrub the distribution list, removing each person who has requested to be opt-out out from the distribution list. The opt-out list and the scrubbed distribution list must also be manually reviewed in order to ensure that a data processing error did not occur. This manual process is time consuming. Requiring that opt-out requests be honored within a three (3) business day period will increase the risk of an error and thus provide less protection to email recipients who have requested to be opted-out of the sender's email.

Finally, requiring that opt-out requests are honored within a three (3) business day period will also result in costs to legitimate industry who would need to employ more employees in order to meet the proposed three (3) business day opt-out period. The costs to entities that provide recipients with a list or menu, where recipients can choose what type of emails the recipients would like to opt-out of, would experience even higher costs and time consumption as a manual opt-out list is created for each type of email appearing in the opt-out list or menu. These costs, however, would not result if the Act's current ten (10) business day opt-out period was maintained, since employers would not need to hire more employees and there would be enough time for the employer's employees to manually process opt-out requests as well as continue to perform their other daily work responsibilities.

**KeySpan Generally Supports The Proposed Prohibition On Charging A Fee Or Imposing Other Requirements On Recipients Who Wish To Opt-Out, With The Exception Of The Prohibition On Requiring Personally Identifiable Information To Be Provided By The Recipient Who Wishes To Opt-Out.**

KeySpan generally agrees and supports the portion of the proposed rule clarifying that a recipient may not be required to pay a fee or impose other requirements on recipients who wish to opt-out. However, KeySpan respectfully disagrees with the portion of the proposed rule clarifying that a recipient may not be required to provide information other than his or her email address and opt-out preferences in sending a reply email message or visiting a single Internet Web page to submit a valid opt-out request.

KeySpan respectfully requests that the Commission permit senders to require recipients to include personally identifiable information, such as name, address and phone number, in order to opt-out of commercial email from the sender. KeySpan believes that the Commission should permit senders to collect personally identifiable information, in order that senders will be able to connect an email address with the person who uses that email address and determine if email addresses have been reassigned. The Act, in its definition of the term “recipient,” discusses reassignment of email addresses and states that “if an electronic email address is reassigned to a new user, the new user shall not be treated as a recipient of any commercial electronic mail message sent or delivered to that address before it was reassigned.”<sup>9</sup> To determine if an email address has been reassigned and whether therefore, according to the Act, the sender can treat the new assigned email user as a new recipient of its commercial email, senders would need to collect personally identifiable information so that they could provide the new recipient with the opportunity to opt-out. If the Commission does not permit senders to require

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<sup>9</sup> 15 U.S.C.S. § 7702(14).

personally identifiable information in order to process a recipient's opt-out request, then senders have no other method to determine whether an email address has been reassigned. Since it is common practice for individuals to change their email addresses every few years, if not more frequently, without the ability to obtain personally identifiable information, it will be difficult to determine whether email addresses have been reassigned to other individuals who would be valid recipients of a sender's commercial electronic messages.

**KeySpan Requests Guidance or Modifications To The Transactional or Relationship Message Categories.**

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While the Commission proposes no substantive modification to expand or contrast coverage of the definition of the term "transactional or relationship message," KeySpan respectfully requests that the Commission consider making some modifications to the definition of the term "transactional or relationship message" or provide clarification of what types of email messages would fall under the categories established in the definition of the term "transactional or relationship message."

**1) If The Subject Matter Of A Legally Required Notice Does Not Fit Within One Of The Existing Transactional Or Relationship Categories, Then The Legally Required Notice Should Be Exempt From Regulation Under The Act Or A New Transactional Or Relationship Category For Legally Required Notices Created.**

KeySpan respectfully requests that the Commission consider legally required notices as transactional or relationship messages. As a public utility company, KeySpan is legally required to send notices to existing customers. KeySpan believes that legally required notices could fit into a number of the existing transactional or relationship message categories depending on the subject matter of the notice. KeySpan also believes that email messages containing legally required notices sent to existing customers are

transactional or relationship messages because these notices generally provide information about a sender's product or service that the customer purchased, used or is using and relate to a commercial transaction or relationship that the recipient has already agreed to enter into.<sup>10</sup>

KeySpan respectfully requests that if the subject matter of a legally required notice sent to an existing customer does not fit within one of the existing transactional or relationship categories, then the legally required notice should be exempt from regulation under the Act or the Commission should establish another catch all category deeming local, state and federal legally required notices as transactional and relationship messages.

KeySpan believes emails containing legally required notices should be either exempt from regulation under the Act or a new transactional or relationship category for legally required notices created because the law has determined such notices important and legally requires them. Such a modification to the transactional or relationship category is necessary in order to accommodate email practices and accomplish the purpose of the Act. It has become common practice for senders to email legally required notices to individuals who purchased the sender's products or services online. Many individuals purchase products or services online and expect that any information

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<sup>10</sup> For example, under the Home Energy Fair Practices Act ("HEFPA"), New York Public Service Law Section 38, and the New York State Public Service Commission's regulations implementing HEFPA (16 N.Y.C.R.R §§ 11.11, 11.17), utilities are mandated to offer and inform customers about a Balance Billing Program where a customer's consumption is spread out over the year and the customer is billed the same amount every month. Also, under the General Laws of Massachusetts, (Chapter 164: Section 115A, Replacement of gas meters) each meter for measuring gas provided by a gas company to a consumer will, not later than seven years from the date of installation or replacement, be removed by the company from the premises of the consumer and replaced by it with a meter which has been newly tested, sealed and stamped in accordance with law. MASS. GEN. LAWS. ch.164, § 115A (2005). If KeySpan is unable to contact such meter customers by telephone (either because the number was not provided by the customer or the customer has changed their telephone number) and KeySpan has the customer's email address, KeySpan would deem email messages informing the customer of the meter law and asking the customer to contact KeySpan for an appointment as a transactional or relationship message.

regarding the product or service will be received electronically, especially legally required notices. KeySpan believes that legally required notices are not commercial messages where a commercial product or service is being advertised or promoted but rather is an important message that recipients would like to receive, as are the other existing transactional or relationship categories, thus further accomplishing the purpose of the Act.

**2) Debt Collection Emails Should Be Considered Transactional Or Relationship Messages.**

KeySpan respectfully requests that the Commission consider debt collection emails as transactional or relationship messages and not commercial messages. Debt collection emails seek to inform a recipient that a certain amount is owed to the sender for services rendered or for a product purchased. Debt collection emails are not commercial email messages because the primary purpose of a debt collection email is not the “commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)”<sup>11</sup> as defined in the Act. Rather the purpose of a debt collection email is to inform the recipient that the outstanding debt is due.

KeySpan believes that debt collection emails fit into two of the existing transactional or relationship categories. KeySpan believes that debt collection emails can be considered transactional or relationship under the category concerning the completion of a commercial transaction that the recipient has previously agreed to enter into with the sender because the payment of the outstanding debt owed by the recipient would complete the commercial transaction that the recipient previously agreed to enter into

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<sup>11</sup> 15 U.S.C.S. § 7702(2).

with the sender. KeySpan also believes that debt collection emails can be considered transactional or relationship under the category concerning account balance information or other type of account statement with respect to an account or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender because the debt collection email relates to an outstanding amount on the recipient's account that is due to the sender and must be paid. KeySpan respectfully requests that the Commission confirm that debt collection emails sent to recipients with outstanding balances due to the sender are transactional or relationship messages and not commercial messages.

**3) Employment Related Email Messages Should Be Considered Transactional Or Relationship Messages.**

KeySpan respectfully requests that the Commission consider the following as transactional or relationship messages: employer email messages sent to employees at the employer-provided email accounts, email messages sent on behalf of a third party with the permission of the employer to the employer's employees at the employer-provided email accounts and email messages sent to a recipient after an offer of employment is made. KeySpan believes that such email messages fit into the existing transactional or relationship category concerning information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled.

KeySpan believes that employer email messages sent to its employees at the employer-provided email accounts fit into the existing transactional or relationship employment relationship or related benefit plan category because such messages relate to the employment relationship between an employer and its employees. Employers use

employer-provided email accounts to communicate efficiently and directly to their employees. Employers have deemed the communication important enough to be sent to their employees at the employer-provided email account, not the employees' personal email accounts, and read by employees during the work day which is company time. KeySpan believes since employers are using the employer-provided email accounts, not the employees' personal email accounts and communicating information important enough to be sent to employees during working hours, these communications should be deemed "information directly related to an employment relationship" regardless of the messages' subject matter. KeySpan respectfully requests that the Commission confirm that employer email messages sent to its employees at the employer-provided email accounts are transactional or relationship messages.

KeySpan believes that certain email messages sent on behalf of a third party with the permission of the employer to the employer's employees at the employer provided email accounts fit into the existing transactional or relationship employment relationship or related benefit plan category because such messages would relate to the employment relationship between an employer and its employees or relate to an employee benefit plan. Many employers use third parties to provide employee benefit services or products. For example, employers may offer employees the services of certain health insurance carriers or 401K financial groups to provide medical or retirement planning benefits. KeySpan believes that if a third party has received an employer's permission to send benefit related email messages to employees at the employer-related email accounts that these messages should be deemed transactional or relationship under the existing transactional or relationship benefit plan category since these messages relate to a benefit

plan in which the recipient is currently involved, participating or enrolled in. KeySpan also believes that these types of email messages sent by third party, with the employer's permission, to employer-provided email accounts is information that directly relates to the employment relationship because these messages concern benefits employees receive as a result for being employed with the employer. KeySpan respectfully requests that the Commission confirm that email messages relating to employment benefits sent by third parties, with the employer's permission, to employer-provided email accounts are transactional or relationship messages.

KeySpan believes that email messages, regarding employment matters, sent to a recipient after an offer of employment is made fit into the existing transactional or relationship employment relationship or related benefit plan category because such messages would relate to the possible employment between the recipient and the employer or a benefit plan offered by the employer. When an individual interviews with an employer, a relationship is established between that individual and the employer. Once such a relationship is established, KeySpan believes that emails sent by an employer to the individual who has received an offer of employment with the employer relate to their future employment relationship or benefits offered by the employer to its employees. KeySpan believes that these types of email messages fit into the transactional or relationship employment relationship or related benefits plan category and are messages that an individual offered employment would like to receive especially since the individual is considering accepting the offer of employment with the sender of the email.

KeySpan also does not believe that such emails are commercial messages because the company's commercial products or services or Internet website is not being advertised or promoted in such email messages. KeySpan respectfully requests that the Commission confirm that email messages, regarding employment matters, sent to a recipient after an offer of employment are transactional or relationship messages.

**4) Email Messages Sent To Effectuate Or Complete A Negotiation Should Be Considered Transactional or Relationship Messages.**

KeySpan respectfully requests that email messages sent to effectuate or complete a negotiation be considered as transactional or relationship messages. Many businesses use email messages to negotiate, and complete transactions with parties with whom they are engaging in or considering engaging in commercial transactions. Businesses that send such emails do not send the emails to advertise or promote a commercial product or service or Internet website but rather to continue the discussion and negotiation of a business matter that both parties previously agreed to. Thus, KeySpan believes that such email messages fit into the existing transactional or relationship category concerning emails that facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender. KeySpan respectfully requests that the Commission confirm that email messages sent to effectuate or complete a negotiation are transactional or relationship messages.

**5) Email Messages Delivering Newsletters Or Other Electronically Delivered Content to Recipients Who Have Entered Into A Transaction With A Sender That Entitles The Recipient To Receive Such Content Should Be Transactional Or Relationship Messages.**

KeySpan respectfully requests that the Commission consider email messages delivering newsletters or other electronically delivered content to recipients who have

entered into a transaction with a sender that entitles the recipient to receive such content as transactional or relationship messages. KeySpan believes that such messages fit under the existing transactional or relationship category that concerns email messages that deliver goods or services, including product updates and upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient previously agreed to enter into with the sender. KeySpan believes that such messages fit under this existing transactional or relationship category because as part of the transaction the recipient has agreed to enter into with the sender, the recipient is entitled to receive future newsletters or other electronically delivered content. When the sender delivers the newsletters or other electronically delivered content that the recipient is entitled to as the result of a previous transaction that the recipient entered into with the sender, the sender is merely fulfilling its obligation by delivering the goods or services that the recipient is entitled to receive. KeySpan respectfully requests that the Commission confirm that email messages delivering newsletters or other electronically delivered content to recipients who have entered into a transaction with a sender that entitles the recipient to receive such content are transactional or relationship messages.

**6) Business Relationship Messages, Which Are Individualized Messages That Are Sent From One Employee Of A Company To An Individual Recipient Or Small Number Of Recipients, Should be Transactional Or Relationship Messages.**

KeySpan respectfully requests that the Commission consider business relationship messages, which are individualized messages that are sent from one employee of a company to an individual recipient or small number of recipients, as transactional or relationship messages. KeySpan believes that a modification to the transactional or

relationship categories is necessary, regarding business relationship messages, in order to accommodate email practices and accomplish the purpose of the Act.

KeySpan believes that many businesses have decided to personalize their relationships with their customers. Instead of customers interacting with a number of anonymous representatives from the business, an employee or a business representative is assigned to handle an individual customer or a small number of customers. Once a business representative is assigned to a customer or a small number of customers, the business representative begins to establish regular contact with the customer or with the small group of customers and a business relationship begins. KeySpan believes that a modification to the transactional or relationship categories is necessary in order to accommodate this common business practice. KeySpan believes that customers or small groups of customers who have established a business relationship with a business representative would like to receive emails from the business representative pertaining to matters related to that business relationship. KeySpan also believes that modifying the transactional or relationship categories to include a business relationship category will accomplish the purpose of the Act which ensures that recipients receive email messages that have a transactional or relationship nature and permit recipients to opt-out of commercial messages when such a relationship does not exist. KeySpan respectfully requests that the Commission confirm that business relationship messages, which are individualized messages that are sent from one employee of a company to an individual recipient or small number of recipients are transactional or relationship messages.

**KeySpan Disagrees With The Commission's Application Of The Term Induce And Requests That The Term Should Not Be Defined Broadly.**

With respect to forward-to-a-friend emails, KeySpan supports the Commission's views and definitions of the terms "sender," "initiate," "procure," and "routine conveyance." However, KeySpan respectfully disagrees with the Commission's application of the term "induce" and requests that the term should not be applied in such a broad manner. In the NPRM, the term "induce" is defined by the Webster's New International Dictionary to mean "to lead on to; to influence; to prevail on; to move to persuasion or influence."<sup>12</sup> KeySpan does not believe that a click-here-to-forward mechanism that states "Click here to send this email message to a friend," "Click here to forward this offer to a friend" or "Click here to send this message to another" should constitute leading on, influencing, or persuading the recipient to forward the message to a friend because such language does not urge the recipient to forward the message to another. Click here to forward the message language is merely describing what the click here to forward mechanism will do and is not intentionally leading, influencing or persuading the recipient to use the mechanism. KeySpan believes that such click here to forward mechanism language does not satisfy the definition of "induce" because there is only a de minimis, if any, persuasion or influence exerted through such statements.

If the Commission disagrees with the request, then in the alternative KeySpan requests that the Commission provide some guidelines or criteria to be used in determining whether a sender is "inducing" or "intentionally inducing" a recipient to forward a message to a friend. KeySpan believes that since the definition of the term "induce" and "intentionally induce" is broad and rather subjective, it leaves room for

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<sup>12</sup> Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70 Fed. Reg. 25,426, 25,441 (Notice of Proposed Rulemaking May 12, 2005).

interpretation and misapplication. KeySpan also believes further criteria and guidelines are needed in order to determine what language the Commission would interpret to be inducing language or intentionally inducing language and what language would exert de minimus, if any, persuasion or influence.

### **KeySpan Supports The Expiration Of Opt-Out Requests.**

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KeySpan respectfully requests that the Commission not require senders to keep opt-out lists indefinitely. KeySpan respectfully requests that the Commission limit how long opt-out requests remain in effect and suggests a limit of five years which is similar the duration of a person's registration on the National Do Not Call Registry.

KeySpan believes that a limit on how long opt-out requests remain in effect is required because, without such a limit, senders will have inaccurate, inactive and out of date opt-out email address records that are used to scrub their email distribution lists. Senders' opt-out email address records, without such a limit, will become inaccurate, inactive and out of date because individuals frequently change email addresses. In addition, email addresses often become inactive from non-use, and many individuals use their work email addresses as their personal email addresses and once an individual leaves their employment these email addresses are no longer used. KeySpan suggests a five year limit on how long opt-out requests remain in effect, which is similar to the duration of a person's registration on the National Do Not Call Registry, because KeySpan believes that individuals will change their email address, stop using an email address or change employment within five years.

KeySpan also believes that a limit on how long opt-out lists remain active is especially warranted because there does not exist a national registry or database for email

marketers to use to purge defunct email addresses from their distribution list. Without the availability of such a registry or database senders are required to use the same opt-out list indefinitely. Within time, these opt-out email address lists will become fairly substantial in size, especially as more businesses recognize the inexpensive, reliable and efficient method of legally advertising their products and services via email. As these opt-out lists grow substantially in size, it will become time consuming and costly for senders to store these opt-out email address lists in databases and to scrub their distribution lists with the opt-out lists, especially if manual procedures are used.

## **CONCLUSION**

For all the foregoing reasons, KeySpan requests that the proposed criterion regarding “the person who controls the content of the message” and the proposed criterion regarding “the person who determines the email addresses to which such message is sent” be removed from the proposed definition of the term “sender.” If the Commission disagrees with the request, then in the alternative KeySpan respectfully requests that the Commission provide guidance as to what constitutes “controls” with respect to the portion of the proposed sender definition that states “the person *controls* the content of the message” and what constitutes “determines” with respect to the portion of the proposed sender definition that states “the person *determines* the email addresses to which such message is sent.” KeySpan does not agree with shortening the period that a sender has to honor a recipient’s opt-out request and requests that the Commission maintain the Act’s ten (10) business day period for honoring opt-out requests. KeySpan requests that the Commission permit senders to require recipients to include personally identifiable information in order to opt-out of commercial email from the sender.

KeySpan requests that the Commission consider legally mandated notices, debt collection emails, employer email messages sent to employees at the employer-provided email accounts, email messages sent on behalf of a third party with the permission of the employer to the employer's employees at the employer-provided email accounts, emails sent to a recipient after an offer of employment is made, email messages meant to complete or confirm a negotiation, email messages delivering newsletters or other electronically delivered content to recipients who have entered into a transaction with a sender that entitles the recipient to receive such content, and business relationship messages which are individualized messages that are sent from one employee of a company to an individual recipient or small number of recipients as transactional or relationship messages. With respect to forward-to-a friend scenarios, KeySpan does not agree with the Commission's application of the term "induce" and requests that the term should not be applied in such a broad manner. If the Commission disagrees with the request, then in the alternative KeySpan requests that the Commission provide guidelines or criteria in determining whether a sender is "inducing" or "intentionally inducing" a recipient to forward a message to a friend. Finally, KeySpan requests that the Commission not require senders to keep opt-out lists indefinitely and suggests a limit of five years which is similar the duration of a person's registration on the National Do Not Call Registry.

Respectfully submitted,

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