



April 23, 2015

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written *Ex Parte* Communication—*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act: Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278

Dear Ms. Dortch:

On behalf of the U.S. Chamber of Commerce¹ and the U.S. Chamber Institute for Legal Reform² (collectively referred to as “Chamber”), we respectfully submit this *ex parte* written communication to the Federal Communications Commission (“FCC” or “Commission”) in response to its Public Notice³ requesting comment on the Petition for Expedited Declaratory Ruling (“Petition”) filed by Edison Electric Institute (“EEI”) and the American Gas Association (“AGA,” and collectively, “Petitioners”)⁴ in the above-referenced docket, as the filing is after the comment period on the pending petition.

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all size, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting and defending America’s free enterprise system.

² The U.S. Chamber Institute for Legal Reform seeks to promote civil justice reform through legislative, political, judicial, and educational activities at the global, national, state, and local levels.

³ Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Edison Electric Institute and American Gas Association, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, DA 15-244 (rel. Feb. 24, 2015).

⁴ Edison Electric Institute and the American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 12, 2015) (“Petition”).

The Chamber strongly urges the Commission to grant the Petition and provide the commonsense formal clarification that: (1) emergency communications to customers about their utility services are exempt from Telephone Consumer Protection Act (“TCPA”) requirements; and (2) non-telemarketing communications to a number provided by a customer do not violate the TCPA. Additionally, to further address the types of frivolous TCPA litigation discussed in the Petition, the Chamber reiterates its call for swift clarification and relief for businesses, who in good faith, are contacting customers at provided phone numbers that have been reassigned.

I. The TCPA Does Not Prohibit Companies From Reaching Out To Customer-Provided Numbers For Informational or Transactional Purposes

Prior express consent⁵ is a term not defined within the TCPA itself, but that has been addressed and defined by the Commission. For example, in the Commission’s Report and Order from February 15, 2012,⁶ the FCC adopted a rule that requires “prior express written consent” for autodialed or prerecorded telemarketing calls to wireless numbers, but left intact the “prior express consent” requirement for non-telemarketing calls made via such technologies. The Order details a number of requirements necessary to fulfill the heightened requirements for “prior express written consent.”⁷ However, the Order does not disrupt previous rulings that “prior express consent” required for informational/transactional calls can be acquired in a number of ways, including by customers providing their phone numbers to a company with which they are doing business.⁸

There should be no argument that the types of calls described in the Petition fall under the informational call category that can be placed via autodialed/prerecorded calls to wireless phones without TCPA liability.⁹ The purpose of the calls described by the Petitioners is not to sell anything to consumers but to communicate time-sensitive service notification, warnings before non-payment disconnects, and other important information.

⁵ The TCPA provides that calls using an automated dialing system or an artificial or prerecorded voice to cellular telephones are prohibited, unless “a call [is] made for emergency purposes or made with the prior express consent of the called party.” 47 U.S.C. § 227 (b)(1)(A).

⁶ *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, FCC 12-21, Report and Order, 27 FCC Rcd. 1830 (2012).

⁷ *Id.*

⁸ *Id.*

⁹ “To provide safe, reliable, and efficient services, EEI and AGA members often need to contact their customers to: (a) warn about planned or unplanned service outages; (b) provide updates about outages or service restoration; (c) ask for confirmation of service restoration or information about the lack of service; (d) provide notification of meter work, tree trimming or other field work; (e) verify eligibility for special rates or services, such as medical, disability or low-income rates, programs and services; (f) warn about payments or other problems that threaten service curtailment; and (g) provide reminders about time-of-use pricing and other demand-response events.” *Supra* note 4, at 3.

Therefore, it seems to be completely reasonable that there should be no TCPA liability as long as the utility can show that the phone number was provided by the customer in connection with the establishment or connection of service.

However, utility companies—just like businesses in every other sector of the American economy—are confronting the current reality of TCPA litigation: plaintiffs and TCPA lawyers are filing lawsuits with the hope that the burdens and costs of defending a TCPA action (often in federal court and often involving a nationwide putative class) will encourage a lucrative settlement. The Chamber notes that many TCPA cases are filed by lawyers who do not even check with their clients as to whether prior consent was given, or check their client’s phone records for proof that they received the complained-of calls. Instead, suits are filed with the expectation that businesses should foot costly defense and discovery bills while the plaintiff waits to see if she has a case.¹⁰

TCPA litigation risk exists even if the person receiving the notification from a utility company regarding a service outage in her area—a notification that a reasonable customer would want to receive—went to a number that the customer provided as her point of contact. Once entangled in TCPA litigation, the utility will need to defend and go through discovery (and battles over class discovery) before going through the expense of summary judgment filings to try to end the litigation. Thus, the clarification that the Petitioners seek is an important means for their members to dismiss abusive litigation at its inception by being able to show a court that the FCC has exempted certain types of calls placed by utility companies.

The risk of expensive TCPA litigation defense has compelled the Petitioners to ask for an up-front statement that informational and transactional calls placed by their members should not be subject to liability under the TCPA—so that their member utilities can try to forestall the expenses of litigation about calls that are entirely permissible under the Commission’s rules. The Chamber respectfully notes that the fact that companies even have to petition the FCC for clarification on this matter is outlandish and speaks to the current abusive nature of TCPA litigation. As Commissioner O’Rielly stated on April 1, 2015, “[w]e

¹⁰ One example of which the Chamber is aware involved a very active TCPA Plaintiffs’ lawyer. His client claimed that a certain major American company had been calling him 2-3 times a day for 15 months. Based solely on that representation, a lawsuit was filed. Upon receiving service of the lawsuit, the company conducted its investigation, found no such outbound calls had been placed. The company reported its findings and asked that the lawsuit be dropped unless and until the plaintiff had evidence of the calls of which he complained. However, the attorneys refused and the case progressed through a motion to dismiss (since the allegations were that calls were made) and through discovery. Even when plaintiff’s own phone records were subpoenaed months later, and completely supported the company’s investigation, the lawyer refused to dismiss his case and argued that even though the calls did not show up on his client’s phone records, his client told his story very convincingly and that his client’s word should be enough for the jury. The company finally filed a request for Rule 11 sanctions for the failure to dismiss the lawsuit, from which the Chamber learned of this abuse.

can't paint all legitimate companies with the brush that every call from a private company is a form of harassment."¹¹

II. The TCPA is Chilling the Ability of Businesses to Communicate with their Customers

Consumer groups repeatedly have made the argument that businesses are attempting to gut the TCPA, and this will lead to a slippery slope of more robocalls. Therefore, we appreciate Commissioner O'Rielly's recent statement that he is "concerned that catering to this unfounded fear will end up hurting the people [businesses] are trying to help."¹² As highlighted in the Petition and comments on it as well as other filings in the docket,¹³ the TCPA is stopping vital communications by businesses with their customers because of the fear of litigation.

Companies are facing significant TCPA liability risks every time they pick up the phone. The Petitioners point out that because of this risk their "members might have to consider curtailing their customer communications efforts in the face of continued uncertainty regarding the application of the Commission's rules."¹⁴ However, this scenario outlined by the Petitioners is no longer hypothetical. Concern over TCPA liability already has led some businesses to cease communicating important and time-sensitive information via voice and text to consumers.

In its comments on the Petition, Southern Company states that its subsidiaries "are reluctant to institute further notification programs that extend beyond outage communications because of the current lack of clarity surrounding implementation of the TCPA. . . ."¹⁵ Southern Company goes on to note that it is "among the many utilities who have chosen to limit their telephone and text message communications with customers in order to limit such liability risks."¹⁶ Southern Company also points out in its comments that, in addition to not communicating with consumers, the communications it does send out are not done through "common and highly effective means of communication (i.e., automated text messages or calls to customers' wireless telephones),"¹⁷ though these are the types of

¹¹ The Honorable Michael O'Rielly, Fed. Comm. Comm'n, Keynote Address at the Association of National Advertisers Law & Public Policy Conference, at 4 (Apr. 1, 2015).

¹² *Id.*

¹³ *See also, for example*, National Rural Electric Cooperative Association Comments at 6 (filed Nov. 17, 2014) and Coalition of Higher Education Assistance Organizations Comments at 3 (filed Nov. 17, 2014), CG Docket No. 02-278.

¹⁴ *Supra* note 4, at 12.

¹⁵ *Comments of Southern Company* (filed Mar. 26, 2015), at 7, CG Docket No. 02-278.

¹⁶ *Id.* at 7-8.

¹⁷ *Id.* at 3.

communications their customers prefer.¹⁸ With the threat of TCPA litigation to businesses so profound and imminent that they no longer communicate in the most effective manner possible with their customers, it is clear that Commission action is desperately needed to rectify this situation.

The Commission has already recognized the dramatic and ever-increasing uptick in cellphone use among Americans. Today, 90% of Americans own wireless telephones.¹⁹ While many Americans still have a landline, 58.8% of U.S. households are mostly or entirely wireless-only.²⁰ In addition to using cellphones for voice communication, text messaging is increasingly relied upon. Consumers in the United States open 98% of their text messages,²¹ read 90% of those messages within three minutes,²² and respond, if needed, in about 90 seconds.²³ In comparison, e-mails have an average open rate of 22% with the typical user responding in about 90 minutes.²⁴ When the threat of potentially business-annihilating statutory damages forces businesses to reject the use of the most effective communications technologies—such as text messaging—to provide the fastest, most-up-to-date information, consumers are harmed.

The wireless marketplace, consumer use of mobile technology, and the way businesses contact customers are vastly different than when the TCPA was enacted almost 25 years ago. The Commission's rules implementing the TCPA have not kept pace and have created an untenable regulatory environment that has created a tsunami of class action TCPA lawsuits driven not by aggrieved consumers, but by opportunist plaintiffs' firms taking advantage of uncertainty in the law. Without further comprehensive and clear rules on how modern technologies fit into the TCPA, more companies are bound to make the difficult decision to chill communications with their consumers. The Chamber notes that several petitions are pending before the Commission that

¹⁸ *Id.* at 4. Southern Company regularly surveys their customers to determine which type of communications they prefer. In their most recent survey from November 2013, customers indicated they prefer text messages or telephone calls, with email being the least preferred method of contact. *Id.*

¹⁹ Pew Internet Project, *Mobile Technology Fact Sheet*, Pew Research Center (2014), available at <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

²⁰ Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2014*, at 1-3 (Dec. 16, 2014) (“*CDC Wireless Substitution Estimates*”), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf>.

²¹ Armando Roggio, “Text Messaging Effective for Retailers,” *PracticalECommerce.com*, Aug. 9, 2013, available at <http://www.practicalecommerce.com/articles/4139-Text-Messaging-Effective-for-Retailers->.

²² Chery Conner, “Fifty Essential Mobile Marketing Facts,” *Forbes.com*, Nov. 12, 2013, available at <http://www.forbes.com/sites/cherylconnor/2013/11/12/fifty-essential-mobile-marketing-facts/>.

²³ *Supra*, Note 21.

²⁴ *Id.*

relate to modern technologies that are not the “autodialers” (random/sequential dialers) that the TCPA was designed to address.

III. Businesses Should Not Be Subject to TCPA Litigation for Reassigned Phone Numbers

While the Chamber supports all of the relief sought by the Petitioners, relief from the increasingly abusive reassigned number theory of TCPA liability also is needed to fully achieve the regulatory certainty sought by the Petitioners. Even if the Commission were to grant the Petition and clarify that calls made to customers at their provided numbers are exempt, the issue of calls made to recycled numbers would still pull utility companies into TCPA litigation. Therefore, we reiterate our call for the Commission to clarify that calls made by a company with good faith and valid consent to reassigned numbers that had been provided by that company’s customers do not result in liability under the TCPA.

As the Commission is aware, the Chamber has already filed several comments on the recycled number issue.²⁵ Additionally, as we have previously noted, there is no fool-proof solution for businesses to adequately verify whether a customer’s number is still assigned to the consenting individual. Further, even if such a system were available, this would be a large and potentially costly burden to place on all businesses, particularly small businesses, every time they want to pick up the phone.

By favorably resolving the reassigned numbers issue raised in the multiple, pending petitions, including one filed by United Healthcare Services, the Commission can bring much needed clarity to the business community and curb abusive lawsuits.

IV. Conclusion

By having even to file this Petition to obtain formal Commission clarification that non-telemarketing communications to customers about their utility services are not prohibited by the TCPA (even if autodialed or prerecorded) demonstrates just how far the plaintiffs’ bar has twisted this originally well-intentioned law. Rather than being sanctioned for bringing frivolous cases and wasting precious time and resources of the courts, not to mention placing a costly and undeserved burden on businesses, TCPA lawyers are enjoying the bounties of settlements that companies are often forced to enter into because of the uncapped statutory damages and the expenses involved in discovery and litigation.

²⁵ See, for example, U.S. Chamber Comments and Reply Comments on United Healthcare Services Petition (filed Mar. 10, 2014, and Mar. 24, 2014, respectively), U.S. Chamber and U.S. Chamber Institute for Legal Reform Joint Comments on Rubio’s Restaurant Petition (filed Sept. 24, 2014), U.S. Chamber and U.S. Chamber Institute for Legal Reform Comments on Consumer Bankers Association (filed Dec. 1, 2014), and U.S. Chamber et al. Letter to the Commission (filed Feb. 2, 2015), CG Docket No. 02-278.

Utility companies and legitimate businesses should not be put in a position where they have to choose between two unacceptable options: 1) Ceasing communications with customers for a legitimate purpose, such as an upcoming power outage; or 2) incurring significant, potential TCPA liability resulting not from any actual injury or harm to any consumer but from opportunist plaintiffs' firms taking advantage of uncertainty in the law to line their own pockets.²⁶ The Petitioners are asking for commonsense clarifications. Therefore, the Commission should swiftly grant the Petition to help ensure consumers are not missing out on important communications, some of which could well be life-saving,²⁷ and to ensure businesses around the country are no longer subject to costly, abusive litigation.

Respectfully Submitted,



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²⁶ In 2011, the average attorney's fee for a TCPA class action settlement totaled \$870,000, while class members on average received \$9.53. In 2014, the average attorney's fee for a TCPA class action settlement totaled \$2.4 million, while class members on average received \$4.12. Exhibit 6: "Recent TCPA Class Action Settlement Averages," Notice of *Ex Parte* of Wells Fargo at 18 (filed Jan. 26, 2015), *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278, available at <http://apps.fcc.gov/ecfs/document/view?id=60001016697>. By these numbers, it is clear who the real winners are in TCPA class action settlements.

²⁷ Georgia Power has ceased its efforts to automatically enroll customers who depend on life-support equipment in outage notification programs. *Comments of Southern Company* at 7, CG Docket No. 02-278 (filed Mar. 26, 2015).