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

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

PETITION FOR PARTIAL RECONSIDERATION OF ACA INTERNATIONAL, THE EDISON ELECTRIC INSTITUTE, THE CARGO AIRLINE ASSOCIATION, AND THE AMERICAN ASSOCIATION OF HEALTHCARE ADMINISTRATIVE MANAGEMENT

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I. INTRODUCTION AND SUMMARY.

ACA International ("ACA"), the Edison Electric Institute ("EEI"), the Cargo Airline Association ("CAA"), and the American Association of Healthcare Administrative Management ("AAHAM") (together, the "Petitioners") support the Federal Communications Commission's ("FCC" or "Commission") goals of protecting consumers against unlawful robocalls and ensuring that consumers continue to receive important, time-sensitive information that they rely on from legitimate businesses. The Petitioners respectfully petition the Commission to reconsider certain aspects of its *TCPA Exemptions Order*, which amended longstanding exemptions from the Telephone Consumer Protection Act's ("TCPA") consent requirements for certain categories of informational calls.[1] The Petitioners request:

- **First**, to ensure that consumers can continue to receive the important informational calls that they have requested and consented to receive about their utility service, financial accounts, package deliveries, and healthcare, the Commission should promptly issue an Erratum correcting its codification of 47 C.F.R. § 64.1200(a)(3), which as drafted would inadvertently require "prior express written consent" for certain informational prerecorded calls placed to residential landlines. The Commission should fix this drafting mistake as quickly as possible, ideally through an Erratum pursuant to the proposed language in Appendix A, and separately from the other issues for reconsideration in this Petition.

[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 35 FCC Rcd. 15188 (2020) ("*TCPA Exemptions Order*").

- **Second**, the Commission should continue to recognize the different safety, physical and financial health, and other benefits to consumers of informational calls and reconsider its decision to extend its *telemarketing* opt-out requirements to certain *informational* prerecorded calls placed to residential landlines.

- **Third**, the Commission should revisit the one-size-fits-all limitation of three calls per 30 days for exempted prerecorded calls to residential landlines, along with certain limited elements of its exemption for package delivery communications to wireless numbers. On reconsideration, the Commission should evaluate the unique, pro-consumer aspects of financial services, electric utility, package delivery, and healthcare communications that need to be placed to residential landlines and determine an appropriate exemption framework.

- **Finally**, to ensure that utility customers with a landline phone can continue to receive the same outage notifications, safety warnings, and other notifications that their neighbors with wireless phones will receive, the Commission should confirm that its past guidance regarding "prior express consent" in the utilities context under the 2016 *EEI Declaratory Ruling* applies with equal force to calls placed to residential landlines.

Taking these steps to reconsider these aspects of the *TCPA Exemptions Order* will ensure that consumers are protected against unlawful calls and bad actors, have meaningful choice and control over the calls they receive, and can continue to receive time-sensitive informational communications.

II. ABOUT ACA, EEI, CAA, AND AAHAM

The Edison Electric Institute is the trade association that represents all U.S. investor-owned electric companies. Its members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. The electric power industry supports more than seven million jobs in communities across the United States. EEI's members invest more than $120 billion annually to provide customers with affordable, reliable, resilient, and increasingly clean energy. EEI's members also participate in unique mutual assistance programs to help restore power to customers in the event of emergencies and outages.

ACA International is the leading trade association for credit and collection professionals representing approximately 2,500 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs nearly 125,000 employees worldwide. The vast majority of ACA member companies are small businesses. Women make up nearly 70 percent of the total debt collection workforce and racial and ethnic minorities make up 41.8% of debt collection employees, compared to 36.1% of the total U.S. workforce. As businesses, community lenders, hospitals, and other providers throughout the country continue to face unprecedented challenges as a result of COVID-19, the work of ACA's members is more important than ever for their clients. As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. Significant research has confirmed the basic economic reality that losses from uncollected debts result in higher prices and restricted access to credit for consumers.

The Cargo Airline Association is the nationwide voice for members of the all-cargo air carrier industry, and others in the air cargo marketplace that depend on these services. It is responsible for representing the industry before federal and state regulatory bodies, the United States Congress and, when necessary, in the federal and state courts. Members include ABX Air, Amazon, Atlas Air Worldwide, DHL Express, FedEx Corporation, Kalitta, and UPS as well as airports with significant cargo activity.

The American Association of Healthcare Administrative Management is the premier professional organization in healthcare administrative management focused on education and advocacy in the areas of reimbursement, admitting and registration, data management, medical records, and patient relations. AAHAM was founded in 1968 as the American Guild of Patient Account Management. Initially formed to serve the interests of hospital patient account

managers, AAHAM has evolved into a national membership association that represents a broad-based constituency of healthcare professionals. Professional development of its members is one of the primary goals of the association. Publications, conferences and seminars, benchmarking, professional certification and networking offer numerous opportunities for increasing the skills and knowledge that are necessary to function effectively in today's health care environment. AAHAM actively represents the interests of healthcare administrative management professionals through a comprehensive program of legislative and regulatory monitoring and its participation in industry groups. AAHAM is a major force in shaping the future of health care administrative management, and one of its main focuses has been on efforts to ensure that stakeholders in the healthcare ecosystem can place calls that consumers expect.

III. THE COMMISSION SHOULD ISSUE AN ERRATUM PROMPTLY CONFIRMING THAT PRIOR EXPRESS WRITTEN CONSENT IS NOT REQUIRED TO PLACE INFORMATIONAL PRERECORDED CALLS TO RESIDENTIAL LANDLINES.

To ensure that consumers can continue to receive the important informational calls that they have requested and consented to receive about their accounts and financial health, utility service, healthcare, and package deliveries, the Commission should promptly issue an erratum correcting its codification of 47 C.F.R. § 64.1200(a)(3), which now appears to require "prior express written consent" for certain informational prerecorded calls placed to residential landlines. As amended by the *TCPA Exemptions Order*, section 64.1200(a)(3) prohibits callers from initiating "any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the ***prior express written consent*** of the called party," unless the call falls within an enumerated landline exemption, which includes the requirement that "the caller makes no more than three calls within any consecutive 30-day period to the residential line and

honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section."[2]

Through this amended language, the new rule would extend the Commission's prior express written consent requirements for telemarketing calls to a broad array of informational calls placed to residential landlines: non-commercial calls, informational commercial calls, healthcare calls, and calls from tax-exempt non-profit entities. The amended rule also creates an inconsistent outcome: exempted informational calls to residential landlines require ***no consent*** for the first three calls within 30 days, but ***prior express written consent*** for the fourth. For informational prerecorded calls to wireless phones, meanwhile, the Commission's rules would only require "prior express consent" to place the call without numerical limitation (absent some other applicable exemption).

This outcome was not intended by the Commission and plainly reflects an inadvertent drafting mistake in the rule's codification. Worse, as drafted, the Commission's rules would harm consumers that have specifically requested and provided "prior express consent" to receive informational calls from ACA, EEI, CAA, and AAHAM members about their accounts and financial health, utility service, package deliveries, and healthcare.

Nothing in the body of the *TCPA Exemptions Order* nor the underlying *Notice of Proposed Rulemaking* indicated the Commission's intent to revisit the longstanding distinction between "prior express written consent" (telemarketing calls) and "prior express consent"

[2] *TCPA Exemptions Order*, 35 FCC Rcd at 15206-7.

(informational calls).[3] In fact, the *TCPA Exemptions Order* indicated precisely the opposite.[4] Likewise, no commenter in this proceeding urged the Commission to apply the "prior express written consent" requirement to categories of informational calls. And certainly nothing in this proceeding gave regulated parties fair notice under the Administrative Procedure Act ("APA") that the Commission contemplated imposing its prior express written consent requirements for telemarketing calls on informational calls to residential landlines.[5]

Fixing this drafting error is therefore in the public interest. Taking such action would also ensure that the *TCPA Exemptions Order* aligns with the Commission's past treatment of informational calls. Since the *2012 TCPA Order*,[6] the Commission has consistently drawn a bright line between the TCPA consent requirements for telemarketing communications on one hand and informational communications on the other. Telemarketing calls and text messages

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[3] *See, e.g.*, Letter from Joshua Bercu, USTelecom, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed Mar. 8, 2021) ("There is no indication in the text of the [*TCPA Exemptions Order*] that the Commission intended to require that heightened standard, and instead substantial evidence to the contrary."); Letter from Margot Saunders, Senior Counsel, National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed Mar. 29, 2021) ("Neither the Request for Comments, nor the [*TCPA Exemptions Order*], made any mention of an intent to adopt a heightened standard for consent for these calls, and as such, it appears that the requirement for a writing is a 'scrivener's error' that can and should be easily rectified.").

[4] *See, e.g.*, *TCPA Exemptions Order* ¶ 20 (explaining that "callers can make more than three non-commercial calls using an artificial or prerecorded voice message within any consecutive 30-day period by obtaining the prior express consent from the called party, including by using an exempted call to obtain consent" without any reference to prior express written consent). Moreover, if the Commission had intended to impose a prior express written consent requirement on informational prerecorded or artificial voice calls, it would have amended that definition to encompass informational calls. But no such change was made.

[5] *See United States Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) ("Under the APA, an NPRM must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.") (internal quotation marks omitted).

[6] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830 (2012) ("*2012 TCPA Order*").

require "prior express written consent" (a standard implemented to harmonize the FCC's rules with the FTC's Telemarketing Sales Rule),[7] whereas informational communications require "prior express consent." The distinction is significant. "Prior express written consent" means "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered … advertisements or telemarketing messages," and requiring that such written agreement include certain clear and conspicuous disclosures.[8] By contrast, "prior express consent" appropriately can be satisfied in more flexible ways, such as when the recipient provides his or her number to the caller for communications "closely related" to the underlying transaction.[9]

The Commission adopted this two-tier framework because informational communications do not implicate consumers' privacy interests in the same way as telemarketing communications. Congress enacted the TCPA in 1991 to stop abusive cold-call telemarketing and fax-blast spamming.[10] When it promulgated its initial rules implementing the TCPA, the Commission acknowledged the TCPA's goal of "restrict[ing] the most abusive *telemarketing* practices."[11] The TCPA was intended to target nuisance marketing calls, not legitimate informational calls that consumers desire and need. And when it adopted several of the key exemptions in 1992, the

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[7] *Id.* ¶ 20.

[8] 47 C.F.R. § 64.1200(f)(9).

[9] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, ¶¶ 140-141 & n.474 (2015) ("*2015 TCPA Order*"), *rev'd in part, ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

[10] *See* S. Rep. 102-178, at 1-2 (1991) (stating that the purpose of the TCPA is to "plac[e] restrictions on unsolicited, automated telephone calls to the home" and noting complaints regarding telemarketing calls); H.R. Rep. No. 102–317, at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA).

[11] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, at n.24 (1992) ("*1992 TCPA Order*") (emphasis added).

Commission noted that such calls typically: (1) come from parties "with whom the consumer has an established business relationship,"[12] and (2) "do not adversely affect residential subscriber rights."[13] These same reasons continue to apply today. The Commission recognized in the *2012 TCPA Order* that requiring written consent would have a chilling effect on "highly desirable," pro-consumer informational notifications that are regularly sent by utilities, healthcare organizations, financial institutions, schools, and other entities.[14] It was precisely to encourage these wanted and beneficial informational communications that the Commission adopted a "prior express consent" standard.[15]

Callers across industry sectors, including Petitioners' members, regularly depend on the prior express consent framework and build their compliance programs in good-faith reliance on the Commission's past decisions. For organizations that make informational calls—including electric utilities, package delivery companies, healthcare providers, and the collections industry—complying with the prior express written consent rule would require significant costs and operational changes to existing processes. For utility customers using landlines, for instance, a written consent requirement also could impede the receipt of important calls about their electric service and emergency restoration information.

The Commission should fix this drafting mistake as quickly as possible, ideally through an Erratum pursuant to the proposed language in Appendix A. In past decisions where rules were promulgated inconsistent with the agency's intent, the Commission has expeditiously

[12] *Id.* ¶ 39.

[13] *Id.* ¶ 36.

[14] *2012 TCPA Order* ¶ 29.

[15] *Id.*

issued an Errata instead of waiting until an Order on Reconsideration can be finalized.[16] While the effective date of some of the new rules here are stayed pending further review, callers across industry sectors must begin to plan now for new compliance obligations and invest in resources to operationalize the updated requirements. Promptly issuing an Erratum will give good-faith callers a measure of certainty, allow them to prepare for the future, and reduce the likelihood of unnecessary class action TCPA litigation caused by a Commission drafting error.

IV. TO EMPOWER CONSUMER CHOICE AND AVOID IMPOSING UNNECESSARY EXPENSES THAT ULTIMATELY ARE PAID BY CONSUMERS, THE COMMISSION SHOULD HARMONIZE ITS OPT-OUT RULES FOR INFORMATIONAL PRERECORDED CALLS.

The Commission should continue to recognize the different safety, physical and financial health, and other benefits to consumers of informational calls and reconsider its decision to extend the ***telemarketing*** opt-out requirements to certain exempt ***informational*** calls. Ordinarily, informational prerecorded calls must identify the caller, provide a toll-free contact number, and allow the consumer to opt out.[17] These requirements have been in place for many years and have worked well.

Instead of applying these longstanding rules to exempted informational calls placed to residential landlines, the *TCPA Exemptions Order* went further and required compliance with sections 64.1200(b)(3) and (d) of the FCC rules, which apply to ***telemarketing*** prerecorded calls. The opt-out requirements for telemarketing prerecorded calls track the Commission's Do-Not-Call rules and require the following steps, among others:

[16] *See, e.g.*, *Emergency Broadband Benefit Program*, Erratum, WC Docket No. 20-445 (WCB rel. Mar. 11, 2021) (correcting an error in the codification of 47 C.F.R. § 54.1604).

[17] 47 C.F.R. § 64.1200(b)(1)-(2); *2015 TCPA Order* ¶¶ 55-71.

- The caller must provide an automated, interactive voice, and/or key press-activated opt-out mechanism, including brief explanatory instructions on how to use the opt-out mechanism, within two (2) seconds of identification.

- The automated, interactive voice and/or key press-activated mechanism must automatically record the called person's number in the caller's opt-out list and immediately terminate the call.

- When the artificial or prerecorded-voice telephone message is left on voicemail, the message must also provide a toll-free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the caller's opt-out list.[18]

In addition, the *TCPA Exemptions Order* amended section 64.1200(d) to require that informational callers "maintain[] a list of persons who request not receive such calls made by or on behalf of [the caller]."[19] While the text of the *TCPA Exemptions Order* contains little substantive discussion of these changes, the amended rules apparently require informational callers to have a written policy, train personnel on the policy, record disclosure of opt-out requests, maintain records of such disclosure, and honor the request for five years from the date on which the request is made.[20] Here again, these rules were designed for and apply to telemarketing. Yet without any reasoned explanation, cost-benefit analysis, or assessment of the impact on the informational calls that might no longer be able to reach consumers, the *TCPA Exemptions Order* extended these rules to a particular subset of informational calls placed to residential landlines.

[18] 47 C.F.R. § 64.1200(b)(3).

[19] *TCPA Exemptions Order*, 35 FCC Rcd. at 15210.

[20] *Id.*

Although the record illustrates that any new opt-out mandate would burden informational callers making exempted calls,[21] an opt-out requirement originally intended for telemarketers would be particularly onerous. The Commission provided no justification as to why the telemarketing opt-out rules should apply with equal force to exempt informational calls. Nor did the Commission find that the existing requirements for informational prerecorded calls—namely caller identification and the provision of a toll-free number—were insufficient.

In fact, there are especially good reasons to ensure that any opt-out requirements governing informational prerecorded calls are applied consistently. For example, callers primarily placing informational calls tend to have more experience operationalizing the baseline opt-out requirements for all prerecorded calls. Furthermore, as discussed above, consumers have different experiences and expectations with informational calls, which makes a telemarketing compliance regime ill-suited for informational communications. Unlike in the telemarketing context, callers have no incentive to place more informational calls than reasonably necessary to deliver the appropriate time-sensitive notification.

Thus, at a minimum, any opt-out rules applied to exempt informational prerecorded calls should remain consistent with those applicable when the caller has prior express consent, as set forth in the proposed revision in Appendix A. Caller identification and a toll-free opt-out number remain appropriate to protect consumers from unwanted informational calls, and the *TCPA Exemptions Order* did not find otherwise. Harmonizing the opt-out requirements will empower consumer choice while reducing the compliance costs of operationalizing rules specifically intended for telemarketers.

[21] *See, e.g.*, Letter from Jonathan Thessin, Vice President/Senior Counsel, American Bankers Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 6-7 (filed Dec. 2, 2020) ("Joint Trades Letter").

V. TO ENSURE THAT CONSUMERS CAN CONTINUE TO RECEIVE IMPORTANT, TIME-SENSITIVE COMMUNICATIONS, THE COMMISSION SHOULD UNDERTAKE A REASONABLE REVIEW OF THE CALL FREQUENCY LIMITS ADOPTED FOR EXEMPTED CALLS TO RESIDENTIAL LANDLINES.

Despite overwhelming evidence in the record to contrary, the *TCPA Exemptions Order* improperly established a one-size-fits-all limitation of three calls per 30 days for all exempt informational prerecorded calls placed to residential landlines. The *TCPA Exemptions Order* also retained the existing frequency limitations for exempted package delivery notifications to wireless numbers, without engaging with comments that presented reasons for those limitations to be updated.[22] On reconsideration, the Commission should evaluate the unique, pro-consumer aspects of financial services, electric utility, package delivery, and healthcare communications that need to be placed to residential landlines and determine an appropriate exemption framework.

Residential telephone lines remain an important conduit for ACA, EEI, CAA, and AAHAM members to communicate with their patients, customers, account holders, and package recipients. According to the National Center for Health Statistics, approximately forty percent of American households in the United States still retain a landline, and between two and three percent of Americans *only* have a landline.[23] As the number of residential-only households has declined in recent years, the ability to reach such households via their landlines—including for

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[22] *See, e.g.*, Joint Trades Letter at 6-7; Comments of FedEx Corporation, CG Docket No. 02-278, at 5-6 (filed Oct. 26, 2020) ("FedEx Comments"); Letter from James H. Ferguson, Corporate Vice President, FedEx Corporation, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Dec. 7, 2020).

[23] Stephen J. Blumberg and Julian V. Luke, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2019*, at 5 (Sept. 2020), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless202009-508.pdf.

time-sensitive, informational purposes—has become even more important, especially as consumers have increasingly relied on remote services during the COVID-19 pandemic. The informational commercial calls exemption thus creates a critical means for businesses to easily and efficiently communicate with consumers in real time about important issues affecting customers' safety (*e.g.*, power outage updates, utility work in the area), financial well-being (*e.g.*, time-sensitive account updates), healthcare (*e.g.*, telemedicine and remote care), and deliveries. Against these statistics, a blanket three-call limitation on informational prerecorded landline calls—as established in the *TCPA Exemptions Order*—would hit the most vulnerable consumers the hardest because they will be the most likely to miss time-sensitive communications.

The APA prohibits the Commission from plucking numerical limits out of thin air without supporting record evidence.[24] The *TCPA Exemptions Order* made no empirical or qualitative attempt to justify the three-calls-per-30-day limitation for exempted landline calls. No commenter specifically proposed or supported a limit of three calls per 30 days. And the *NPRM* did not propose a limit or provide any data to support a limit. Nor did the Commission explain why this single numerical standard should apply with equal force for school closing notifications, hospital follow-up calls, utility outage notifications, package delivery companies, educational institutions, credit professionals, grassroots campaigns, and other callers that face a wide panoply of different business requirements and federal and state regulations.

[24] *See Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (invalidating the FCC's "eight voices" test for media ownership); *Time Warner Ent. Co., L.P. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001) (invalidating the FCC's 40% vertical concentration limit for cable ownership).

The Commission has no record evidence showing why a specific number will adequately cover all—or even a reasonable number of—industries, callers, or informational use cases. Unlike other TCPA exemptions that may be limited to specific industries or callers, it is not feasible to ascertain a one-size-fits-all rule to govern these industry-spanning calls without a copious evidentiary record. A specific call limit, for example, may adequately cover school closing notifications but not healthcare messages or package deliveries during the COVID-19 pandemic. Nor would the same limit cover time-sensitive utility outages during a major wildfire or collection notifications for different accounts for which consumers are granted payment relief. Similarly, medical provider clients use collection calls to provide information about charity care, insurance, and other health care programs for which distressed consumers may be eligible (and for which there may be application deadlines).

No party has identified an administrable and fact-based standard or cost-benefit analysis supporting a singular limit for many, much less all, of these use cases. Although the Commission will receive some deference in drawing numerical lines, it must at least do so based on "a rational connection between the facts found and the choice made."[25]

As one example, the *TCPA Exemptions Order* failed to take into account the unique regulatory expectations that utilities face when dealing with natural disasters and large-scale outages. State regulators often require, encourage, and expect such notifications.[26] In response to Hurricane Irene, for example, the New Jersey Board of Public Utilities recommended that

[25] *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404-05 (D.C. Cir. 1995) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[26] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute & American Gas Association Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 31 FCC Rcd. 9054, ¶ 10 (2016) ("*EEI Declaratory Ruling*").

utilities "provide additional methods to report and check on the status of an individual outage" including via telephonic communication.[27] State public utilities commissions, moreover, pay careful attention to customer satisfaction with utilities; electric companies routinely have to include customer satisfaction data as part of their evidence in support of rate reviews. These time-sensitive notifications have taken on greater importance as customers faced unprecedented outages during the Texas winter freeze and had to rely increasingly on landlines during the COVID-19 pandemic while remaining homebound. During the Texas winter disaster, which lasted several weeks in some areas, some utilities reasonably found themselves needing to send many more than three notifications during the course of the outage given the changing facts and circumstances affecting power restoration efforts. An arbitrary three-call limit depriving residents of service restoration updates would have served no valid governmental purpose or consumer benefit.

As another example, the *TCPA Exemptions Order* ignored the unique reasons for updating the frequency limitation under the wireless exemption for package delivery text messages. As CAA member FedEx explained, delivery companies often need more than 160 characters to convey important details of the delivery.[28] A modest increase in allowable space will help consumers receive the information they need to successfully receive deliveries. FedEx also explained that there are many instances, apart from the need to collect a recipient's signature, when a delivery company may need to send additional messages to the recipient.[29]

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[27] *See, e.g., The Board's Review of The Utilities' Response to Hurricane Irene*, Order Accepting Consultant's Report and Additional Staff Recommendations and Requiring Electric Utilities to Implement Recommendations, Docket No. EO11090543, Recommendation 23-G-3 (Bd. of Pub. Utils., N. J., Jan. 23, 2013).

[28] *See* FedEx Comments at 6.

[29] *Id.*

Yet the *TCPA Exemptions Order* did not address these important, reasonable, and pro-consumer considerations.

The *TCPA Exemptions Order* also has a significant impact for package delivery communications to residential landlines. Analysis conducted by FedEx, a CAA member, indicates that the Commission's new three-call-per-30-days limit will act as a block to approximately 1.4 million package delivery notifications to residential landlines during the 30-day period. Ironically, these 1.4 million recipients would continue to receive notifications if they provided the shipper a mobile number, rather than a landline number. As the Commission was aware when granting the CAA petition regarding package delivery notifications, it is not feasible to obtain the recipient's prior express consent to send delivery notifications because the package delivery company often has no preexisting relationship with the package recipient.[30]

In addition, the *TCPA Exemptions Order* failed to grapple with the unique regulatory issues faced by consumers and callers in the collections space. The Consumer Financial Protection Bureau ("CFPB") recently issued final rules on debt collection practices that had been pending since 2013.[31] The 653-page document incorporated more than 23,000 comments, dozens of economic studies, hundreds of agency meetings, and numerous public fora. In the final rules, the CFPB established a presumption that a debt collector satisfies the Federal Debt Collection Practices Act's prohibition on repeated or continuous telephone calls if the debt collector places a telephone call to a person more than seven times within a seven-day period or

[30] *Cargo Airline Association Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 29 FCC Rcd. 3432, ¶ 4 (2014).

[31] *See Debt Collection Practices (Regulation F)*, 85 Fed. Reg. 76734 (Nov. 30, 2020) (to be cofidied at 12 C.F.R. pt. 1006).

within seven days after engaging in a telephone conversation with the person.[32] The *TCPA Exemptions Order*, however, did not mention the CFPB's seven-call limitation or provide a reasoned explanation, cost benefit analysis, or other justification for rejecting a harmonized call frequency limit for consumers.

Collectors and creditors prefer voluntary resolutions of legally owed past-due accounts though two-way communication because they are faster, more predictable, and private. In addition, voluntary resolutions avoid attorney fees, typically maintain the goodwill of the consumers, and allow consumers to continue to access credit and services in the future.[33] Consumers benefit by avoiding litigation. Indeed, when discussing a debt with a collector, consumers can learn about a variety of options to resolve their past-due accounts, including payment deferral, extended payment plans, or other financial assistance—any of which the consumer may prefer to litigation. The arbitrary limits placed by the FCC stifles these productive communications, thereby increasing the possibility of litigation.

On reconsideration, the Commission should reopen the record, reassess each exemption, and craft frequency limitations consistent with consumer expectations, other reasoned agency outcomes, and actual data in the Commission's record.

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[32] *Id.* at 76734.

[33] Bureau of Consumer Financial Protection, *Taskforce on Federal Consumer Financial Law Report*, Vol. I at 255 (Jan. 5, 2021), https://www.consumerfinance.gov/data-research/research-reports/taskforce-on-federal-consumer-financial-law-report/ (noting that "fair and reliable collection of consumer debts is essential for a well-functioning consumer economy. If creditors are unable to collect debts at reasonable cost and with reasonable certainty, then they will be less likely to lend in the first place, especially to riskier borrowers.").

VI. THE COMMISSION SHOULD ENSURE THAT CONSUMERS WITH A LANDLINE PHONE CAN CONTINUE TO RECEIVE THE SAME INFORMATIONAL CALLS THAT THEIR NEIGHBORS WITH WIRELESS PHONES WILL RECEIVE.

Even if the Commission issues an Erratum confirming that "prior express consent" is needed for non-exempt informational calls (*see* Section III), the question remains whether the caller has obtained the requisite "prior express consent" for additional calls that fall outside the exemption's call limit. To ensure that utility customers and other consumers with a landline phone can continue to receive the same outage notifications, safety warnings, and other notifications that their neighbors with wireless phones will receive, the Commission should confirm that its past guidance regarding "prior express consent" in the utilities context under the 2016 *EEI Declaratory Ruling*,[34] as well as other applicable consent guidance, applies with equal force to calls placed to residential landlines.

EEI's investor-owned electric utility members place important calls that their customers need and expect. These time-sensitive calls, for example, warn about forecasted, planned, or unplanned service outages; provide updates about outages or service restoration; or ask for confirmation of service restoration or information about the lack of service.[35] For that reason, the Commission clarified in the *EEI Declaratory Ruling* that when customers provide their mobile phone numbers to their utility, they thereby expressly consent to receive autodialed and prerecorded calls and texts reasonably and closely related to their utility service. As noted above, state regulators often require or encourage these notifications.[36] And the Commission

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[34] *See generally EEI Declaratory Ruling*.

[35] *See, e.g.*, Comments of the Edison Electric Institute, the American Gas Association, and the National Rural Electric Cooperative Association, CG Docket Nos. 02-278, 05-338, at 4 (filed Mar. 10, 2017).

[36] *EEI Declaratory Ruling* ¶ 10.

recognized "the wide range of potential risks to public health and safety presented by an interruption of utility service due to extreme weather conditions that can lead to unexpected service outages, or even service outages necessitated by repair and maintenance work."[37] Accordingly, the Commission granted EEI's requested clarification. These time-sensitive communications, the Commission observed, are "critical to providing safe, efficient and reliable service," and "many customers would welcome alerts warning them of extreme weather conditions approaching that might cause service outages, alerts about utility repair work in their immediate vicinity that might inconvenience them."[38] Utilities, in turn, must be able to rely on the telephone numbers provided by consumers in connection with utility service in order to place important, time-sensitive communications.

Because informational prerecorded calls to residential landlines were exempt when the *EEI Declaratory Ruling* was issued, the Commission did not have occasion to squarely address whether the utility communications would satisfy the "prior express consent" requirement when placed to residential landlines. That question, however, suddenly has become pressing as the *TCPA Exemptions Order* effectively curtailed the landline exemptions and ostensibly required at least "prior express consent" for communications that exceed the three-call-per-30-day limitation.

Confirming that the *EEI Declaratory Ruling* applies equally to residential landline calls would not only offer much-needed clarity to consumers, electric utilities, and other callers, but would also be consistent with the Commission's precedent. The Commission's standards for "prior express consent" should be the same whether or not the call is placed to a landline or a

[37] *Id.* ¶ 28.

[38] *Id* ¶ 30.

wireless number. And consistent with other Petitioners' other requests, the *TCPA Exemptions Order* should be clarified so that the same parties can abide by the same compliance standards for substantively similar calls. Just as it would be anomalous to require prior express written consent for informational calls (*see* Section III) or require telemarketing opt-out compliance for informational calls (*see* Section IV), so too would it be out of step to require electric utilities (or schools, which were also subject to the same 2016 decision), to obtain a heightened level of consent for informational calls just because they are placed to residential landlines instead of wireless numbers. For this reason, the Commission should reaffirm the *EEI Declaratory Ruling* and confirm that calls pursuant to that ruling satisfy the prior express consent requirement in the amended section 64.1200(a).

VII. CONCLUSION.

The Petitioners support the Commission's goals of protecting consumers against unlawful robocalls and ensuring that consumers continue to receive important, time-sensitive information that they rely on from legitimate businesses. Issuing an Erratum confirming that prior express written consent is not required for informational calls will give callers a measure of certainty and avoid operational difficulties. Likewise, the Commission should ensure that callers can rely on the same informational opt-out processes for informational calls whether or not the call is exempt. Revisiting the landline exemption call frequency limitations in a more granular fashion and addressing specific updates to the package delivery exemption for calls to wireless phones will also help ensure that the Commission's TCPA exemptions remain in line with consumer expectations. Finally, the Commission should confirm that utility companies and other callers

placing informational communications to landlines may continue to rely on the Commission's past rulings regarding "prior express consent" in the wireless context.

Respectfully submitted,

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APPENDIX A: PROPOSED REVISIONS TO 47 C.F.R. §§ 64.1200(a), (b), (d)

[The text added to 47 C.F.R. § 64.1200(a) by the 2020 *TCPA Exemptions Order* is in gray. The Petitioners' proposed revision is in red.]

(3) Except as provided in paragraph (a)(4) of this section, initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express ~~written~~ consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose and the caller makes no more than ~~three calls within any consecutive 30-day period~~ [*to be revisited by the Commission after a reasonable assessment of the unique, pro-consumer aspects of particular categories of informational calls*] to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b)(1)-(2) ~~and (d)~~ of this section;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing and the caller makes no more than ~~three calls within any consecutive 30-day period~~ [*to be revisited by the Commission after a reasonable assessment of the unique, pro-consumer aspects of particular categories of informational calls*] to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b)(1)-(2) ~~and (d)~~ of this section;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization and the caller makes no more than ~~three calls within any consecutive 30-day period~~ [*to be revisited by the Commission after a reasonable assessment of the unique, pro-consumer aspects of particular categories of informational calls*] to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b)(1)-(2) ~~and (d)~~ of this section; or

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103, and the caller makes no more than ~~one call per day to each patient's residential line, up to a maximum of three calls combined per week~~ [*to be revisited by the Commission after a reasonable assessment of the unique, pro-consumer aspects of particular categories of informational calls*] to each patient's residential line and honors the called party's request to opt out of future calls as required in paragraphs (b)(1)-(2) ~~and (d)~~ of this section.

(4) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message that includes or introduces an advertisement or constitutes telemarketing, other than a call made with the prior express written consent of the called party.

[In addition, Petitioners propose that the Commission strike any conforming references to "paragraphs (a)(3)(ii) through (v)" in 47 C.F.R. §64.1200(b)(3) and (d).]