

**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)

**REPLY OF ACA INTERNATIONAL, THE EDISON ELECTRIC INSTITUTE, THE
CARGO AIRLINE ASSOCIATION, AND THE AMERICAN ASSOCIATION OF
HEALTHCARE ADMINISTRATIVE MANAGEMENT**

ACA International, the Edison Electric Institute, the Cargo Airline Association, and the American Association of Healthcare Administrative Management (together, the “Petitioners”) welcome the widespread support for the Petition,¹ which urges the Federal Communications Commission (“FCC” or “Commission”) to continue to protect consumers against unlawful robocalls and reconsider certain aspects of the *TCPA Exemptions Order*.²

The record overwhelmingly demonstrates that granting the Petition is in the public interest and supports the Commission’s consumer protection objectives. The Commission should ensure that informational calls are subject to uniform consent and opt-out rules, and it should reconsider the blanket three-calls-per-thirty days restriction that would apply indiscriminately to a wide array of callers and use cases. Doing so will allow landline subscribers to continue receiving the same time-sensitive communications about their utility service, financial accounts, package deliveries, and healthcare that they receive today during critical moments. It will also empower consumers with meaningful choice while continuing to offer strong protections against unlawful calls and bad actors.

¹ Petition for Partial Reconsideration of ACA, EEI, CAA, and AAHAM, CG Docket No. 02-278 (filed Mar. 29, 2021) (“Petition”).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 35 FCC Rcd 15188 (2020) (“*TCPA Exemptions Order*”).

I. COMMENTERS SUPPORT THE PROMPT ISSUANCE OF AN ERRATUM CONFIRMING THAT PRIOR EXPRESS WRITTEN CONSENT IS NOT REQUIRED FOR INFORMATIONAL CALLS.

Every commenter agrees: the Commission should promptly issue an Erratum correcting the codification of 47 C.F.R. § 64.1200(a)(3).³ As drafted, that provision would inadvertently require “prior express written consent” for certain exempt informational calls made to landlines.⁴

No commenter asked the Commission to apply the written consent requirements to informational calls, and there is no evidence in the record such a requirement would help consumers or serve the Commission’s consumer protection goals. To the contrary, it “conflicts with the Commission’s existing definition of prior express written consent, which only applies to ‘seller[s]’ that deliver ‘advertisements or telemarketing messages.’”⁵ Nothing in the body of the *TCPA Exemptions Order* or the underlying *Notice* indicated the Commission’s intent to revisit the longstanding distinction between “prior express written consent” (telemarketing calls) and “prior express consent” (informational calls).⁶ And certainly nothing in this proceeding gave parties notice of such a rule change under the Administrative Procedure Act (“APA”).⁷

II. THE RECORD OVERWHELMINGLY CONFIRMS THAT TELEMARKETING OPT-OUT RULES SHOULD NOT APPLY TO INFORMATIONAL CALLS.

Many commenters agree that the Commission should reconsider its decision to extend its *telemarketing* opt-out rules to exempt *informational* landline calls. The Commission’s

³ See, e.g., Petition at 4-9; Comments of the National Consumer Law Center, CG Docket No. 02-278, at 9 (filed Apr. 27, 2021) (“NCLC Comments”); Informal Comments of Alarm Industry Communications Committee, CG Docket No. 02-278, at 4 (filed Apr. 27, 2021) (“AICC Comments”); Comments of Sirius XM Radio, Inc., CG Docket No. 02-278, at 7 (filed Apr. 27, 2021) (“Sirius/XM Comments”); Comments of the American Bankers Association *et al.*, CG Docket No. 02-278, at 9 (filed Apr. 27, 2021) (“Trade Association Comments”).

⁴ *TCPA Exemptions Order*, 35 FCC Rcd at 15206-7.

⁵ Trade Association Comments at 9; see also AICC Comments at 4 (noting that a written consent requirement “runs contrary to the Commission’s stated intentions throughout the *TCPA Exemptions Order* to bring some parity to wireline and wireless requirements.”); Sirius/XM Comments at 4-5 (“It is

prerecorded call rules currently provide robust consumer protections. For example, informational prerecorded calls must identify the caller, provide a toll-free contact number, and allow the consumer to opt out.⁸ These requirements have been in place for years, and informational callers are familiar with them.⁹ The *TCPA Exemptions Order* “included no finding that the existing rules have proven to be ineffective or insufficient to protect callers from unwanted informational calls.”¹⁰

The Commission failed to justify its rule change—and no party has disputed that.¹¹ In supporting the new requirements as written, NCLC claims that “the right to opt out should apply to all of the types of calls—both telemarketing and non-telemarketing calls.”¹² But the Petitioners *have not* asked the Commission to abandon opt-out requirements altogether. Rather, the Petitioners have requested narrow reconsideration of the Commission’s decision to extend the telemarketing opt-out requirements to a subset of informational calls.

nonsensical that the Commission would not require callers to obtain any consent for the first three informational calls, but then would require written consent to make a fourth informational call.”).

⁶ Petition at 5-6.

⁷ See, e.g., *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016). See also Sirius/XM Comments at 6 (observing that the *Notice* “provided no indication that the Commission was considering changing the standard of consent” and “[n]o interested parties had an opportunity to comment on or object to this change in the public record”); *id.* at 3 (noting the Commission did not “purport to justify such a radical change to existing rules”); NCLC Comments at 9 (“[T]here was no mention in the *Notice of Proposed Rulemaking* indicating that the Commission was considering imposing this new requirement on non-telemarketing calls, nor was there an indication in the Commission’s final issuance, in December 2020, of the regulations that the Commission had decided to do so.”); AICC Comments at 4 (requiring written consent would be “counterintuitive and unsupported by the record”).

⁸ 47 C.F.R. § 64.1200(b)(1)-(2); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961, ¶¶ 55-71 (2015), *rev’d in part*, *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

⁹ See Petition at 11; AICC Comments at 5 (noting that existing requirements “have worked well”).

¹⁰ Sirius/XM Comments at 11; see also AICC Comments at 5.

¹¹ See Sirius/XM Comments at 11 (noting the *TCPA Exemptions Order* “fails to provide any justification for why the telemarketing opt-out rules should apply to exempt informational calls to residential lines”).

¹² NCLC Comments at 10.

Extending the telemarketing opt-out rules to informational calls would harm consumers and offer no new protections. For example, the new rules “could mean that consumers will miss out on important service announcements, such as an automaker’s safety recall, service outage updates, or a continuing subscription’s upcoming renewal.”¹³ And they would impose unnecessary costs. Operationalizing the new requirements—interactive keypress opt-out, compliance training, recordkeeping, segregated do-not-call lists, opt-out recordings, and more—will impose significant and unnecessary burdens while confusing consumers who mistakenly opt out of important informational calls (when they intend to stop only telemarketing calls).¹⁴

Contrary to NCLC’s suggestion, applying a *more prescriptive type* of opt-out and recordkeeping regime designed for telemarketers would not address concerns with informational prerecorded calls to residential landlines.¹⁵ And the generic statistics NCLC cites regarding the volume of unwanted calls do not provide actionable information about exempted calls to landlines. Bad actors will not comply with an opt-out regime regardless of how prescriptive it is, and no evidence has been provided to demonstrate that extending the onerous telemarketing opt-out rules to informational communications will deter illegal robocalls. NCLC’s untimely request to extend the telemarketing rules to all informational prerecorded calls is also procedurally improper and outside the scope of this proceeding.¹⁶

¹³ Sirius/XM Comments at 11.

¹⁴ *See, e.g.*, Comments of American Bankers Association, CG Docket 02-278, at 8 (filed Oct. 26, 2020) (deciphering consumers’ opt out choices would be difficult); Comments of ACA, CG Docket 02-278, at 8 (filed Oct. 26, 2020) (opt-out requirements would impose unnecessary burdens); Comments of Consumer Bankers Association, CG Docket 02-278, at 1-2 (Oct. 26, 2020) (consumers might accidentally opt out of important calls); Comment of Professional Association for Customer Engagement, CG Docket 02-278, at 2 (filed Oct. 26, 2020) (specific opt-out rules would be “disruptive, costly and potentially injurious”).

¹⁵ NCLC Comments at 11 (citing complaint reports published by the Federal Trade Commission and YouMail, among others).

¹⁶ *See id.* at 10.

III. THE RECORD STRONGLY SUPPORTS RECONSIDERATION OF THE BLANKET THREE-CALLS-PER-30 DAYS LIMIT FOR EXEMPT INFORMATIONAL CALLS TO RESIDENTIAL LANDLINES.

A. The Limit Would Harm Consumers and is Contrary to the Public Interest.

The Commission should reconsider the one-size-fits-all limitation of three calls per 30 days for all exempt informational prerecorded calls placed to residential landlines.¹⁷ That limit will harm consumers by preventing them from receiving important notifications about power outages, account updates, vaccine appointments, deliveries, and other time-sensitive matters.¹⁸ Consumers welcome, expect, and rely on these calls—and no commentator disputes this.

For example, studies show that utility consumers expect their service providers to proactively communicate about outages and service-related events.¹⁹ Utilities commonly may need to send five notices about “blue sky” (unplanned) outages.²⁰ The messages include: (i) an initial outage notification; (ii) notice that a repair crew has been dispatched; (iii) notice that the crew is onsite; (iv) an estimated time to restore power and the reason for the outage; and (v) notice that the outage has been fixed. Consumers may also get at least three periodic payment reminders and alerts on their usage to help prevent overages²¹—and these calls primarily benefit low-income consumers.²² Natural disasters, such as the Texas winter freeze and California

¹⁷ See Petition at 12.

¹⁸ The three-call limit will also harm small businesses and could reduce competition. Callers often use multiple vendors to place calls. But those callers—especially small businesses—cannot comply with the three-call limit unless they route their traffic through a single vendor to keep track of the number of calls placed. This will make it more difficult for small business service providers to stay afloat.

¹⁹ *Business Customer Overall Satisfaction with Electric Utilities Climbs, J.D. Power Finds*, J.D. Power (Nov. 13, 2019), <https://bit.ly/2R3tG3I> (“Proactive communication about power outages and estimated restoration times have played a key role in [the increase in customer satisfaction].”).

²⁰ See Joint Reply of California Utilities, CG Docket No. 02-278, at 2 (filed May 6, 2021) (“California Utilities Reply”).

²¹ *Id.*

²² See Reply Comments of National Rural Electric Cooperative Association *et al.*, CG Docket No. 02-278, at 3 (filed May 6, 2021) (“NRECA Reply”).

wildfires, can last for weeks, and more than three notifications are often needed. Utilities may also make more than three calls due to state regulatory mandates.²³

Other industries also have robust examples where consumers benefit from more than three calls per thirty days, and for which during critical times there may not be an appropriate opportunity to establish a new TCPA consent. Package delivery companies may need to place more than three calls when the phone is unanswered and the package remains undelivered. As reliance on online shopping increases due to the pandemic, consumers can be expected to order more than three shipments (and therefore need more than three notifications) per month. And more than three calls for upcoming reminders, past-due notifications, and receipt of payment can maintain consumer goodwill and allow access to credit and services in the future.

Indeed, when the Commission granted TCPA wireless exemptions for package delivery and healthcare calls, it recognized that more than three calls in a 30-day period is appropriate and in the public interest.²⁴ The Commission must afford similar flexibility to landline calls to avoid arbitrary and harmful outcomes. Importantly, a blanket three-call limitation on exempted calls would hit some of the most vulnerable populations the hardest—approximately 40% of households with a landline, and the 2-3% who have only a landline.²⁵

Consumers are also harmed by calls from bad actors who do not intend to follow the law. To that end, the Petitioners appreciate the concerns raised by NCLC about scam, fraud, and illegal calls to residential landlines.²⁶ But here too, these generic industry statistics, even if

²³ See California Utilities Reply at 2; NRECA Reply at 4.

²⁴ See 47 C.F.R. § 64.1200(a)(9)(i).

²⁵ Stephen J. Blumberg, Ph.D., 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), available at <https://bit.ly/3nUSpU2>.

²⁶ NCLC Comments at 11.

accurate, do provide any information about legitimate, lawful informational calls subject to the FCC’s exemptions. Likewise, no evidence or citation exists in this record to substantiate assertions that “[t]he absence of any limits—until these regulations go into effect—on prerecorded non-telemarketing calls to residences (along with telemarketers’ rampant violations of the do-not-call rule) is one of the reasons consumers are abandoning landlines.”²⁷ To the contrary, consumers’ decreasing reliance on landlines is a decades-old trend predating the rise of illegal robocalls and explained by factors like the success of mobile telephony and broadband.²⁸

With nothing to justify the blanket three-call restriction, the *TCPA Exemptions Order* violates the APA by inventing numerical limits and reversing decades of precedent absent supporting record evidence.²⁹ The *TCPA Exemptions Order* made no empirical or qualitative attempt to justify the blanket three-call limit.³⁰ Here again, commenters agree.³¹ And while NCLC opposes reconsideration, it does not defend the *TCPA Exemptions Order* for doing rigorous factfinding or reaching defensible conclusions.³²

The three-call limit also cannot be salvaged by the fact that it resembles other limits adopted in the past.³³ The federal debts exemption, which NCLC invokes, dealt with a specific type of call from a specific type of caller—and parties noted how that call limit was legally

²⁷ *Id.* at 5.

²⁸ See Jeffrey Sparshott, *More People Say Goodbye to Their Landlines*, Wall St. J. (Sept. 5, 2013), <https://on.wsj.com/3eptzsf>.

²⁹ No party supported the blanket three-call limit in the underlying rulemaking. Although NCLC proposed a three-call limit for collections calls, it did not endorse that same limit for all calls.

³⁰ Petition at 13.

³¹ See, e.g., Sirius/XM Comments at 8 (highlighting the “arbitrariness of the three-call limit” and noting that the FCC did not discuss “how the limit would affect vastly disparate callers with different needs”).

³² NCLC’s apparent blanket opposition is particularly disappointing because the Petition had not even proposed a specific new limit; instead, it merely asked the Commission to take a fresh look at the variety of informational calls and circumstances in the record.

³³ See NCLC Comments at 6.

suspect and unsupported by the record.³⁴ That proceeding is not a model for developing call limits, much less a three-call monthly limit, and the Commission’s other TCPA exemptions support a higher limit. The exemptions for healthcare and package delivery calls (among others) permit more than three calls per month.³⁵ Far from supporting the *TCPA Exemptions Order*, other exemptions show why the blanket three-call limit is both unsupported and unsupportable.

Relying on prior express consent or the “emergency purposes” exception instead of the landline exemptions, as NCLC suggests, would also cause some harm to consumers and frustrate the delivery of important, time-sensitive calls when they are needed most.³⁶ In many situations, callers cannot rely on prior express consent. For package delivery notifications, as an example, the Commission has recognized that it is not feasible to obtain the recipient’s consent because the package delivery company often has no preexisting relationship with the package recipient.³⁷ And while the “emergency purposes” exception is important, it is not always an option.³⁸

Even absent a three-call limit, the Commission’s existing requirements provide robust consumer protections. If consumers wish to opt out, the Commission’s rules already allow them to do so. And the Petitioners support the Commission’s STIR/SHAKEN and TRACED Act efforts to prevent unlawful calls and give redress for erroneously blocked calls.

³⁴ See, e.g., Petition for Reconsideration of Great Lakes Higher Education Corp. *et al.*, CG Docket No. 02-278 (Dec. 16, 2016) (explaining that the limit lacked any rational basis and ignored evidence).

³⁵ See Sirius/XM Comments at 9-10.

³⁶ See NCLC Comments at 7.

³⁷ *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).

³⁸ AICC Comments at 5 (explaining that alarm companies’ messages impact public safety, even if they do not fall under the emergency purposes exemption).

B. The Commission Should Structure More Nuanced Call Limitations on Reconsideration.

On reconsideration, if the Commission determines that call limits are needed, it should adopt important safeguards to ensure that consumers ultimately receive the calls they expect.

First, the Commission should ensure that any limits apply on a “per event” or “per account” basis rather than a “per telephone number” basis. Calls made in response to a specific event reasonably may have different timing and call volume needs than other calls. For package delivery notifications, call frequency is determined by the number of deliveries, specific delivery features (*e.g.*, signature requirements), and other factors rather than a timing benchmark. Utility outage, repair work, and demand response notifications to support energy conservation programs are often subject to weather developments rather than a planned 30-day cycle—and often without much advance notice. Prescription notifications are driven by the renewal periods for various prescriptions. Safety recall notifications are driven by the occurrence of a recall event and follow-up actions. And changes in financial account status do not always follow a 30-day cycle (*e.g.*, security incidents; identity theft prevention; or deposit, payment, or other notifications).

A “per account” limit, likewise, reflects that a caller has many different touchpoints with the same landline. When family members share a landline, each member may have a different relationship with the same healthcare provider that calls about different medical needs. A single person may use the same landline number for different personal and business accounts with a utility or bank. In these situations, a three-call total per landline limit is illogically restrictive.

Second, if another federal or state agency has reviewed specific categories of calls and adopted limits for such calls, the Commission should defer to the other agency’s more granular assessment of the appropriate call volumes for that specific context. ***Third***, it is also important that any limitation apply only when the caller has succeeded in placing the call with the

customer. A call attempt that is unsuccessful—*i.e.*, that does not result in a completed call in which the prerecorded message is delivered—should not count against the limitation.

IV. COMMENTERS UNANIMOUSLY AGREE THE COMMISSION SHOULD CONFIRM THAT THE 2016 *EEI DECLARATORY RULING* APPLIES TO LANDLINE AND WIRELESS CALLS ALIKE.

To ensure all consumers with a landline phone can continue to receive the same informational calls, outage notifications, healthcare updates, account-related messages, safety warnings, and other notifications that their neighbors with wireless phones will receive, the Petitioners asked the Commission to confirm that its past guidance regarding “prior express consent” in the utilities context under the 2016 *EEI Declaratory Ruling*,³⁹ and other applicable consent guidance, applies with equal force to calls placed to residential landlines.

Because informational prerecorded calls to residential landlines were wholly exempt when the *EEI Declaratory Ruling* was issued, the Commission did not have occasion to squarely address whether the informational communications would satisfy the “prior express consent” requirement when placed to residential landlines. That question, however, became timely as the *TCPA Exemptions Order* effectively curtailed the landline exemptions. No party opposes the Petitioners’ request, and NCLC sees “little reason for this interpretation to differentiate between the types of equipment being called.”⁴⁰ We welcome comments in support of harmonizing prior express consent and removing unintended written consent burdens. With no opposition in the record, the Commission should promptly grant the Petitioners’ requested clarification.

V. CONCLUSION.

For the foregoing reasons, the Commission should grant the Petition promptly.

³⁹ Petition at 18-20; *see Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 31 FCC Rcd 9054, ¶ 10 (2016) (“*EEI Declaratory Ruling*”).

⁴⁰ NCLC Comments at 13.

Respectfully submitted,

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