

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In the Matter of	)	
	)	
Advanced Methods to Target and Eliminate	)	CG Docket No. 17-59
Unlawful Robocalls	)	

**COMMENTS OF THE  
EDISON ELECTRIC INSTITUTE**

**Edison Electric Institute**

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Pursuant to sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") rules, 47 C.F.R. §§ 1.415, 1.419, the Edison Electric Institute ("EEI"), on behalf of its member companies, respectfully submits these Comments in support of the Commission's Second Further Notice of Proposed Rulemaking ("Second FNPRM").<sup>1</sup> EEI supports the Commission's efforts in this proceeding, because the problem of unwanted calls causes customers annoyance and wastes the time and effort of the electric company callers that may be attempting to reach customers during storms or about other situations closely related to their electric service.<sup>2</sup>

Providing electric company callers with a tool to mitigate the current litigation risk under the TCPA with the potential for very significant damage awards is important because the threat of litigation can have a chilling effect that causes electric company callers to be cautious and stop making wanted, lawful calls out of concern over potential liability for calling a reassigned number.<sup>3</sup> The Commission should therefore develop a cost-effective and reliable database so that electric company callers may identify and verify reassigned numbers before placing calls and texts. This will help ensure that customers receive the communications they desire and expect related to their electric service. It also important that the Commission establish safe harbor from liability under the TCPA for companies that rely on the database, which will encourage electric company callers to use the reassigned numbers database.

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<sup>1</sup> See *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking, FCC 18-31 (Mar. 22, 2018).

<sup>2</sup> Although the Commission's desire to move forward to find a solution to the problem of calls to a recipient of a reassigned number more broadly is admirable, addressing the underlying, related definitional issues under the Telephone Consumer Protection Act ("TCPA") that have been remanded back to the Commission by the DC Circuit should be its highest priority. These are the issues that have exposed legitimate businesses like electric utilities to significant liability and hinder beneficial communications with customers.

<sup>3</sup> In the FCC's 2015 ruling, callers are responsible for obtaining consent "not of the intended recipient of a call but of a subscriber," and grants such callers only a one-call safe harbor before charging them with "constructive knowledge" of a reassignment (even if that one call did not yield actual knowledge). See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 ¶ 72 (2015) ("2015 TCPA Order"). Earlier this year the D.C. Circuit affirmed the 2015 TCPA Order in part and remanded it in part in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

EEI is the trade association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. The electric power industry supports over seven million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 60 international electric companies, with operations in more than 90 countries, as International Members and hundreds of industry suppliers and related organizations as Associate Members. EEI's members are major users of telecommunications systems to support the goals of clean power, grid modernization and providing customer solutions. On behalf of the owners and operators of a significant portion of the U.S. electricity grid, EEI has filed comments before the Commission in various proceedings affecting the telecommunications' rights and obligations of its members who are impacted by the FCC's rules and policies. Accordingly, EEI and its members have a strong interest in the Commission's proposals to protect American consumers, including electricity customers, from unwanted and illegal robocalls, while also protecting legitimate, good-faith callers from abusive TCPA class action litigation.

## **Comments**

### **I. The FCC should establish a centralized database for reassigned numbers to provide callers with comprehensive and timely information to avoid calling reassigned numbers.**

EEI supports the FCC's proposal to ensure that one or more databases are available to provide callers with the comprehensive, timely and affordable information that is necessary to discover potential number reassignments before making a call. However, a centralized, comprehensive database of reassigned numbers would help electric companies mitigate the risks involved with communicating with customers and using one database presents operational simplicity and potential cost savings for callers. Even with a reassigned numbers database, the possibility of inadvertent calls to a reassigned number would not be eliminated entirely. Therefore,

with the threat of litigation under the TCPA, the Commission should provide a safe harbor for callers that use the reassigned numbers database. Additionally, the Commission should consider extending a safe harbor for callers that make other reasonable efforts to avoid calls to reassigned numbers whether relying on such a database or using vendor compliance solutions to mitigate risk. Providing such safe harbors would help address concerns that the TCPA's liability regime is a deterrent to callers who make wanted, lawful calls because of concerns about reassigned numbers. This also would help reduce the number of unwanted phone calls to reassigned numbers.

**A. To mitigate risk under the current FCC TCPA rules on automated calls to reassigned numbers, electric companies need timely, accurate and affordable methods to discover all reassignments.**

**1. Timely contact with electric company customers is critical.**

Telephone calls and texts to customer landline and cell phone numbers are the primary means for electric companies to initiate and handle customer interactions. Electric companies often need to provide information to customers about a range of service related issues. Given the reliance of modern American life on electricity and devices powered by electricity, these calls or texts are always important and are often critical. As demonstrated by last year's historic hurricanes and other natural disasters, the services that electric companies provide are essential to the public – electric services are used to heat, cool, cook, light and power homes, hospitals, factories and offices, and to provide power to other critical sectors, like the police, fire department and other emergency services providers.

Electric companies have a public service obligation to serve all customers within their franchised service areas and must communicate with all of them. As a consequence, electric companies often need to contact their customers with calls and texts closely related to the utility service such as to: (a) provide notification about planned or unplanned service outages; (b) provide

updates about outages or service restoration;<sup>4</sup> (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) inform about payment or other problems that threaten service curtailment; and (g) provide reminders about time-of-use pricing and other demand-response events.<sup>5</sup>

Electric companies' use of prerecorded outbound calls and text messages is an extension of long-established phone-based practices that have only become more important in recent years. Automated outbound calling is an efficient and cost-effective method to deliver important information to large numbers of customers quickly. Customer response to these outbound calls and text messages has been very positive and is currently considered an industry best practice. Elimination or limitation of an electric company's ability to provide these services would decrease customer satisfaction and increase the company's cost to deliver this important information.<sup>6</sup> The great number of electric company customers<sup>7</sup> and the time sensitivity of important service communications means that electric companies generally do not have the option to manually call each of their customers, particularly during emergency situations. In addition to cost, utilizing live agents to make a large volume of outbound calls would significantly degrade service provided to customers calling into call centers for regular business issues.

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<sup>4</sup> It bears emphasis that during circumstances like hurricanes, floods, tornadoes and other severe weather incidents or natural disasters, when customers may be forced to leave their homes or computers, the internet and landline phones may not be available to them. As a result, often the only effective way to reach these customers with timely information about restoration efforts is by calling their wireless phone numbers using automated technologies.

<sup>5</sup> See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, 31 FCC Rcd 9054 (2016).

<sup>6</sup> For example, according to the J.D. Power 2017 Electric Utility Residential Customer Satisfaction Study, overall satisfaction among customers who receive outage information is much higher than among those who do not receive such information. <http://www.jdpower.com/press-releases/jd-power-2017-electric-utility-residential-customer-satisfaction-study>

<sup>7</sup> The average size investor-owned electric (holding) company serves over 1.6 million residential customers. See EIA-861 Annual Electric Power Industry Survey, year 2016 data (latest available).

## **2. Electric companies still face significant liability under the TCPA.**

Electric companies that wish to use automated text messages or calls to customers' wireless telephones to inform customers of critical, service-related issues still risk facing billion-dollar damage claims under the TCPA. Under the 2015 TCPA Order, callers who place non-marketing calls and texts to wireless numbers using an autodialer or prerecorded voice must have the prior express consent of the current subscriber or customary user and may only place one call or text message to the reassigned number before they become liable for steep penalties.<sup>8</sup> The 2015 TCPA Order's "one free call attempt" rule for a mistaken call to a reassigned number did not provide meaningful relief to an electric company, because the first call or text to a wireless number after reassignment often will not serve as an opportunity for an electric company caller to obtain constructive or actual knowledge of reassignment, especially when the company may need to make more than one call to the same number during a storm or outage situation.

The 2015 TCPA Order's ruling on the definition of "called party"<sup>9</sup> not only expanded the avenues for an electric company caller to obtain express consent, but also increased the category of individuals who may assert a TCPA claim. The FCC's current interpretation of "called party" means that it can be very difficult to verify the identity of the "customary user" of a cellular telephone. Moreover, a caller is held strictly liable for calls made to a reassigned number, even if the caller has no knowledge of the reassignment. Accordingly, if left in place, the present rules mean that electric companies will be exposed to liability and will continue to need timely, accurate and affordable methods to discover all reassignments to manage their risk under the TCPA.

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<sup>8</sup> See 2015 TCPA Order at ¶¶ 72-84.

<sup>9</sup> The FCC defined "called party" to mean the current subscriber of the phone number and not the intended recipient of the call and found that the "called party" for purposes of determining consent under the TCPA is "the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan." See 2015 TCPA Order at P 41.

**B. It is critical for the Commission to establish safe harbor protections for businesses that make use of a reassigned number database or other reasonable tools to comply with the TCPA.**

In addition to establishing a reassigned number database, which will likely have some limitations, it is very important that the Commission also adopt a safe harbor for callers that rely on the reassigned numbers database. Although, the reassigned numbers database should contain a comprehensive inventory of reassigned numbers, establishing a reassigned number database by itself, in any of the ways described in the Second FNPRM, will not fully provide EEI's members with sufficient protection from TCPA liability for good faith calls, as a company that uses a reassigned number database still would not be able to ensure immediate knowledge of a reassignment.<sup>10</sup> A safe harbor would also address the initial challenge that the database may not be sufficiently comprehensive to capture a disconnected or reassigned number immediately prior to the database's establishment, with the result that a caller will not be able to learn of every customers' number reassignment by accessing the database.

The value of a reassigned numbers database by itself without a safe harbor from TCPA liability is also limited for electric company callers, because the database may not provide necessary information about disconnected and reassigned numbers that are associated with family calling plans (where phone numbers may be registered to a member of the household who is not the user of the phone/phone number) or that have been assigned to a phone for which no customer identification information is available, such as a prepaid phone. For example, some electric company customers reside in inter-generational households, where the electric service may be in one family member's name, while the telephone number associated with the account for electric service is held by a different family member, and the payment for electric service may be made by

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<sup>10</sup> There would likely be a delay between the time a number is disconnected or reassigned and the time when that information is reported in the database.

still yet a different family member, who is neither on the account for electric service or associated with the telephone service. These types of living situations make it very difficult for an electric company to identify who is the current holder of the number, if the database's information for that number does not map the electric company's record of consents and will not be able to determine without some risk whether the number has been reassigned – that is, the best option would be to place a call. This type of situation means that in the absence of a safe harbor, the regulatory risk and potential liability for calling a reassigned number may inhibit electric companies from relying solely on the database, and the threat of TCPA liability will continue to chill some wanted communications with customers.

To be valuable, the Commission should develop a reassigned number database in combination with adopting a safe harbor that serves as an affirmative defense from TCPA liability for companies that make use of the database to locate and remove recycled numbers from their customer records. Such a safe harbor should apply to electric company callers and other entities that call a number for which the caller had obtained consent to place autodialed calls, but was subsequently reassigned to another consumer and conditioned upon the caller reviewing information in the database within the last quarter to determine whether the number has been reassigned and no evidence of reassignment was found. Such a safe harbor from TCPA liability for calls placed to reassigned numbers makes sense when a company takes steps to scrub its call lists against the database/query system in a regular and systematic way.

The Commission also should consider extending a safe harbor to companies that make use of current TCPA compliance solutions or, as other solutions develop, take other reasonable steps to prevent calls to reassigned numbers. This also would help promote competition among solutions providers to the benefit of callers and customers. Establishing such protections for callers that take steps to prevent against calling reassigned numbers will encourage companies to proactively scrub



their existing phone number lists to eliminate reassigned numbers and manage their costs. These types of safe harbor protections would promote predictability, fairness and efficiency in the TCPA enforcement process, enabling legitimate callers to use the best data available to comply with the TCPA and eliminating costly, time-consuming investigations into inadvertent violations.

## **II. Database Information, Access and Use.**

An effective reassigned numbers database should contain both comprehensive and timely data for electric company callers to discover potential reassignments of customer numbers before they occur. Such a database should be: (i) easy to use and cost-effective for callers; and (ii) be secure and maintain the privacy and confidentiality of the numbers queried by electric companies. As discussed below, electric company callers would need specific information from a reassigned numbers database, especially because electric company callers will have limited information about the last date on which an appropriate, compliance call was made to a specific number. Further, electric company callers will need more than just an indication of whether a specific number was reassigned. To facilitate timely awareness of reassignments for callers, the database should not only be searchable on a “pull-basis,” but also on a “push-basis.” Finally, the Commission can take steps to make the format of database information more user friendly and should establish eligibility criteria for accessing the database and should ensure that any database is not too expensive for electric company callers to utilize.

### **A. Type of information needed by electric company callers.**

As an initial matter, all callers will not have the same information on hand when seeking to search a reassigned database. The Second FNPM states that the Commission expects a caller would have certain information in its possession – the name of the customer the caller wants to reach, a telephone number associated with that customer, and a date on which the caller could be confident

that the customer was still associated with that customer.<sup>11</sup> Although an electric company's call-lists would have the customer names and associated telephone numbers, they may not have complete information for every customer regarding the date on which each customer was still associated with a number. Electric companies typically have a substantial number of customers that will have provided a number when initiating service but have not had reason or opportunity to update that number for years or even decades. Some customers will have initiated services prior to the enactment of the TCPA when there was little reason to track or request this kind of customer information. Therefore, the company may not have a record of the last date it contacted the customer at that number or have the date the customer last provided the number to the company, or the date the company obtained consent to call the customer at the wireless number.<sup>12</sup>

**1. The reassigned numbers database should provide information beyond an indication of whether a number was reassigned.**

The database should be designed with the ability to indicate whether a number has been reassigned since a date entered by the caller.<sup>13</sup> Furthermore, electric company callers would find it helpful to know the actual date on which the number was reassigned. This information could then be used by an electric company or its vendor to determine whether a number has been reassigned.<sup>14</sup>

Although it would be helpful for the database to provide callers with some additional information, electric company callers do not need the name of the individual currently associated with the number and would be concerned that having the ability to obtain this personal identifying information would implicate privacy concerns for the person currently associated with the number.<sup>15</sup> An electric company caller querying the database most likely would be obligated not to

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<sup>11</sup> See Second FNPRM at P 11.

<sup>12</sup> See *id.* at P 11.

<sup>13</sup> See *id.* at P 12.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

disclose any customer's personally identifying information to a third party without the consent of the customer because of state laws. Similarly, the FCC-designated database provider would have a similar obligation to respect these types of privacy concerns. Callers and database providers should not be required to provide more information about customers than necessary to achieve the limited objectives of a reassigned numbers database.

**2. The reassigned numbers database should contain information on disconnected and reassigned numbers.**

It would be helpful for the database to provide callers with information about when numbers are disconnected.<sup>16</sup> This information would be helpful so that electric company callers may identify when a subscriber can no longer be reached. It is true that merely providing callers with information on new assignments as opposed to when the number was disconnected would provide little or no lead time for electric company callers to update calling lists, which in the case of electric companies may be very extensive. Furthermore, it does not appear necessary for a database to provide information on temporary disconnections that may lead to false determinations of reassignments. Similarly, information about whether a customer has a temporary suspension of its service for non-payment or other reasons does not seem necessary to help electric company callers prevent calls to reassigned numbers.<sup>17</sup>

**B. Comprehensiveness of Database Information.**

Ideally, the reassigned numbers database would be comprehensive enough that electric company callers may rely upon it and would not have to depend on other databases to mitigate risk.<sup>18</sup> To address the dual problems of unwanted calls and liability for calling reassigned numbers under the current TCPA rules, a comprehensive database should contain data from all service

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<sup>16</sup> See Second FNPRM at P 14.

<sup>17</sup> See *id.* at P 16.

<sup>18</sup> See *id.* at P 17.

providers, including wireless, wireline, interconnected VoIP and non-interconnected VoIP providers. Given TCPA liability, information to distinguish whether a number is landline or wireless would be helpful. Additionally, while the more detailed the information, the more expensive and more complex it may be to maintain a reassigned numbers database, it would also be useful for the database to contain historical information because electric companies will commonly have customers that initiated electric service five or ten years ago and may not know whether the number provided to the company was provided before or after a reassignment.<sup>19</sup> For example, it would be useful for electric company callers to be able to identify the initial date the phone number was assigned to the customer and the final date it belonged to the customer. The final date is important, because there may be an extended time between the final date and the date of reassignment to another consumer. It would also be helpful to know the customer's address during the time of ownership of the phone number.

### **C. Timeliness of Database Information.**

To be valuable, a reassigned database must be both comprehensive and contain timely, useful information, which means that it must provide electric company callers with the opportunity to periodically scrub their customer call-lists against the database and remove reassigned numbers from their calling list to mitigate risk of calling a reassigned number.<sup>20</sup> While a daily reporting requirement for service providers that results that is as close to real-time as practicable has appeal, the Commission should also consider that such a requirement may result in greater costs. If the Commission makes differentiations in reporting requirements based on how long a service provider ages its numbers such that some providers would be allowed to report monthly,<sup>21</sup> it is even more

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<sup>19</sup> See Second FNPRM at P 20.

<sup>20</sup> See *id.* at P 21.

<sup>21</sup> See Tatango Comments at 13-14.

important that the Commission provide users of such a database with a safe harbor that is greater than 30 days.

While a “pull” approach to users placing queries to the database would be helpful, it would also be valuable to design the database to report to users on a “push” basis. For example, the Number Portability Administration Center (“NPAC”) database, which contains ported numbers with their relevant routing numbers in the US and Canada, both allows new providers to make requests within the NPAC database directly on a “pull” basis and “pushes” information out when the old provider initiates a port. Similarly, users of the reassigned numbers database should be able to enter phone numbers of customers and then receive update notifications when these numbers have been disconnected and reassigned.

#### **D. Format of Database Information.**

The database should contain information in an easily “accessible, usable and consistent file format.”<sup>22</sup> Electric utility callers do not need the Commission to specify the format of such information by rule and will have the ability to use information whether the administrator determines to use a format such as comma-separated values, eXtensible Markup Language format, or other alternatives.

#### **E. User Access to Database Information.**

Regarding eligibility to access the database, some electric utilities may wish direct access, but frequently will need access for their contracted vendors.<sup>23</sup> Therefore, the Commission should establish a requirement for identifying legitimate users and purposes for accessing the database, as well as what recourse should be available to an entity to whom access may be denied. In addition to

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<sup>22</sup> See Second FNPRM at P 23.

<sup>23</sup> Some electric utilities may contract with outside vendors to perform call functions and/or some compliance and audit functions.

privacy concerns related to this database, the Commission is correct that the database information may be business and market sensitive. Similarly, the Commission is right to be concerned that the data could be used by fraudulent callers or other bad actors for spoofing or other purposes.<sup>24</sup>

At minimum, users should have to register and identify themselves to gain access to the database.<sup>25</sup> Users should also be subject to a requirement to certify the purpose for which they seek access to the information. The Commission should consider a requirement to limit access to TCPA compliance or that the access is not for the purposes of marketing or other business competitive activities.<sup>26</sup> Additionally, users that may be denied access to the database should be provided some recourse to request reconsideration from the database administrator.<sup>27</sup>

#### **F. Cost to Use Database.**

The cost to use the database is a significant issue for electric companies, just as it is for small business callers. Electric companies use automated dialing systems to contact their customers for legitimate, time-sensitive and important reasons, but these companies have finite resources to reach their customers. The Commission must ensure that any database's creation and maintenance is not so expensive that regulated electric companies and small businesses would find it difficult to afford to use it.

### **III. Conclusion.**

EEI supports the Commission's efforts to help reduce the number of unwanted calls to reassigned numbers. Service-related informational messages delivered to wireless phones are the

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<sup>24</sup> See Second FNPRM at P 25. Given the serious impacts associated with utility scams and particularly the problems associated with scammers' fraudulent use of toll-free numbers, beginning in 2016, the utility industry, including electric, gas and water companies, began its efforts to organize a first-of-its-kind, all-utility collaborative, Utilities United Against Scams ("UUAS"). EEI and other utility trade associations are members of UUAS. This group's mission is to combat utility scams by providing a forum for utility companies and associations to share data and best practices and to work together to implement initiatives to inform and protect customers.

<sup>25</sup> *Id.* at P 27.

<sup>26</sup> *Id.* at P 26.

<sup>27</sup> *Id.* at P 27.

most effective means of providing time sensitive, non-telemarketing information to electric company customers. The Commission should ensure that electric companies can continue to employ emerging communication technologies to contact their diverse customers, including public safety entities, government users, enterprise customers and consumers, with time-sensitive information. In support of this goal, the Commission should make revisiting the 2015 TCPA Order's interpretation of "called party" a key priority and should also go forward with efforts to establish a centralized, FCC-designated database of reassigned numbers. Such a comprehensive tool for determining whether a number has been reassigned is important for electric utility companies to protect against lawsuits under the TCPA and should help reduce unwanted calls. To encourage companies to use such a database, it is essential that the Commission also establishes a harbor from liability under the TCPA for companies that make reasonable efforts not to call reassigned numbers.

Respectfully submitted,

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