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**VIA ECFS**

June 28, 2021

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
45 L St., NE  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation  
CG Docket No. 02-278**

Dear Ms. Dortch:

On June 24, 2021, Aryeh Fishman, Associate General Counsel, Edison Electric Institute (“EEI”), Leah Dempsey, Vice President and Senior Counsel, ACA International (“ACA”), and Steve Alterman, President, Cargo Airline Association (“CAA”), along with Mark W. Brennan and Arpan A. Sura of Hogan Lovells LLP on behalf of EEI, ACA, CAA, and the American Association of Healthcare Administrative Management (together, the “Petitioners”), met with staff from the Federal Communication Commission’s (“FCC” or “Commission”) Consumer and Government Affairs Bureau (“Bureau”). Mark Stone, Kristi Thornton, Aaron Garza, Erica McMahon, Kurt Schroeder, and Richard Smith attended the meeting on behalf of the Bureau.

During the meeting, we reiterated our support for the Commission’s goals of protecting consumers from illegal automated calls and ensuring that consumers continue to receive important, time-sensitive, informational calls from legitimate businesses about their health care and prescriptions, package deliveries, e-commerce transactions, electric services, groceries, student loans and mortgages, and other financial services. We discussed our Petition<sup>1</sup> to reconsider a limited portion of the *TCPA Exemptions Order*,<sup>2</sup> which adopted new and counterproductive restrictions on informational prerecorded calls to residential landlines that have been exempt from the Telephone Consumer Protection Act’s (“TCPA”) prior express consent requirements for approximately thirty years. This

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<sup>1</sup> Petition for Partial Reconsideration of ACA International, the Edison Electric Institute, the Cargo Airline Association, and the American Association of Healthcare Administrative Management, CG Docket No. 02-278 (filed Mar. 29, 2021) (“Petition”); see also Reply of ACA International, the Edison Electric Institute, the Cargo Airline Association, and the American Association of Healthcare Administrative Management, CG Docket No. 02-278 (filed May 7, 2021) (“Reply”).

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

longstanding prerecorded calls exemption is exceptionally important for consumers because it allows them to receive time-sensitive notifications affecting their health and safety. It is especially critical for the most vulnerable communities, like the elderly or those in rural areas, that rely exclusively on landlines. And because the exemption only relates to informational calls, it does not implicate the consumer and privacy harms that are thought to be associated with telemarketing practices because callers have no incentive to place any more informational calls than necessary.

During the meeting, we focused on the Petition's four requests:

1. To ensure that consumers can continue to receive the important informational calls that they have requested and consented to receive about their electric service, financial accounts, package deliveries, and healthcare, the Commission should promptly correct 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 promptly using the language proposed in the Petition.
2. The Commission should revisit the one-size-fits-all limitation of three calls per 30 days per line for exempted informational prerecorded calls to residential landlines. Instead of a per-line restriction, the Commission should adopt limits (e.g., per-account and per-event limits) that better reflect the unique, pro-consumer aspects of financial services, electric services, package delivery, and healthcare communications that must be placed to residential landlines.
3. 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.
4. To ensure that customers with a landline phone can continue to receive the same outage notifications, safety warnings, and other informational notifications that their neighbors with wireless phones will receive, the Commission should confirm that its past guidance regarding "prior express consent," including for example as it did in the electric power context under the 2016 *EEI Declaratory Ruling*, applies with equal force to calls placed to residential landlines.

Granting the Petition would not only promote consumer interests as discussed below, but it would also eliminate arbitrary disparities that the Commission introduced in the *TCPA Exemptions Order*. For example, the requests in the Petition support and advance the Commission's longstanding policy—and decades of TCPA decisions and precedent—confirming that telemarketing calls present different consumer protection concerns than informational calls. The requests also seek to ensure that landline consumers and callers should be able to continue receiving the same calls as their neighbors who rely on wireless service, without being subject to arbitrarily more restrictive burdens.

***The Commission should promptly confirm that telemarketing consent is not required for informational (nonmarketing) prerecorded calls to landlines.*** All commenters—including the consumer groups—agree that the Commission should promptly correct its codification of 47 C.F.R. § 64.1200(a)(3) to protect consumers who

reasonably expect time-sensitive informational calls on their landlines without disruption.<sup>3</sup> As drafted, that provision would inadvertently require “prior express written consent” for certain informational prerecorded calls placed to residential landlines. By imposing a telemarketing consent standard for informational calls, the provision as drafted would prevent consumers from receiving communications about their healthcare, electric service, financial accounts, and other informational matters. Importantly, imposing the telemarketing consent standard would do nothing to help protect consumers from illegal spam and fraud calls that the Commission has targeted in other proceedings.

Requiring written consent for informational calls also conflicts with the Commission’s existing definition of prior express written consent, which applies only to telemarketing messages.<sup>4</sup> Informational calls are subject to prior express consent because those calls are rightly viewed as posing fewer, if any, consumer harms compared to telemarketing calls. A written consent requirement also runs contrary to the Commission’s stated intentions throughout the *TCPA Exemptions Order* to bring some parity to wireline and wireless requirements.<sup>5</sup>

Collectively, these facts demonstrate that the current codification was the result of a drafting error instead of a deliberate change in policy.

As we explained during the meeting, many callers that rely on the existing exemption (including the Petitioners’ members) do not place telemarketing calls in the ordinary course and therefore do not have the infrastructure to operationalize a new written consent requirement for informational calls without undertaking major upgrades and expending significant resources. The *TCPA Exemptions Order* does not comment on or seek to address these burdens, and as the Petition explained, 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” (informational calls).<sup>6</sup>

Promptly fixing the drafting error would protect consumers by ensuring that they continue to receive the calls that they have been expecting while aligning the rules with

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<sup>3</sup> 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”).

<sup>4</sup> Trade Association Comments at 9; Sirius/XM Comments at 4-5 (“It is 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.”)

<sup>5</sup> 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.”)

<sup>6</sup> NCLC comments at 9 (contending that “there 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 (arguing that “[requiring written consent for a subset of informational calls] is counterintuitive and unsupported by the record, and is therefore arbitrary and capricious.”)

the Commission's past treatment of informational calls. Our proposed revision to the rule, as set forth in Appendix A of the Petition, would fix the drafting error and avoid creating unwanted side effects for consumers.<sup>7</sup>

***The Commission should reconsider its decision to impose uniform call frequency limitations (three calls per 30 days per line) on exempted informational landline calls.*** As we explained during the meeting, even if the Commission clarified that written consent is not needed for these informational calls, the three-call per line limit would nevertheless erect a new barrier to informational calls by requiring prior express consent in situations where doing so is not feasible or practical. The limit would prevent healthcare, package delivery, financial services, and electric consumers from receiving time-sensitive notifications about power outages, restoration efforts, account updates, service enhancements, and other non-telemarketing matters.<sup>8</sup> The record reflects that consumers welcome, expect, and rely on these calls.<sup>9</sup> On reconsideration, the Commission can and should revise its three-call limit in a way that maintains administrable standards, protects consumers, and gives callers more flexibility to place informational calls that are reasonably expected.

The Commission's three-call per line limit does not account for the types of notifications that consumers reasonably expect to receive in specific contexts. For example, a recent survey from JD Power shows that consumers expect electric companies to proactively communicate by phone about outages and service-related events.<sup>10</sup> Electric companies may need to send five notices about "blue sky" (unplanned) outages: (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.<sup>11</sup> Natural disasters, such as the Texas winter freeze and California wildfires, can last for weeks, and more than three notifications are often needed. Electric companies also may make more than three calls due to state regulatory expectations.

Even though callers have important reasons to contact a consumer more than three times during a 30-day period, the Commission adopted a new numerical limit and reversed decades of precedent without any evidence to justify the limit. This is not just unlawful under the Administrative Procedure Act, but more importantly also wrong as a matter of good public policy—it harms consumers.<sup>12</sup> No party supported the blanket three-call limit in the underlying rulemaking.

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<sup>7</sup> Petition at App'x A.

<sup>8</sup> 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").

<sup>9</sup> Petition at § III.

<sup>10</sup> 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].").

<sup>11</sup> See Joint Reply of California Utilities, CG Docket No. 02-278, at 2 (filed May 6, 2021).

<sup>12</sup> Indeed, the FCC's other exemptions support a higher limit. The exemptions for healthcare and package delivery calls (among others) permit more than three calls per month. These limits

The Petition does **not** ask the Commission to eliminate call frequency limits in their entirety. Instead, the Commission should adopt reasonable and administrable limits that will protect consumers and provide appropriate flexibility based on real-world use cases:

- **“Per account”**—A “per account” limit reflects that a caller has many different touchpoints with the same landline and consumers will reasonably expect a variety of calls to reach the same landline. For example, the same children’s healthcare clinic may call a single landline regarding each child’s upcoming checkup appointment. Alternatively, an electric company may seek to reach the same landline associated with separate consumer and business accounts. The current “per line” limitation does not account for these use cases and therefore unreasonably restricts calls to landlines.
- **“Per event”**—Consumers expect that calls made in response to a specific event reasonably may have different timing and call volume needs than other calls. Consider package delivery notifications, where call frequency is determined by the number of deliveries, specific delivery features (e.g., signature requirements), and other factors rather than a timing benchmark. The Petition includes similar examples in the healthcare, financial services, and electric power contexts. A strict per-line limit would prevent consumers from receiving these time-sensitive notifications.
- **Regulatory Parity**—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. The Commission should not second-guess consumer protection decisions made by sister agencies, such as the Consumer Financial Protection Bureau.
- **Completed Calls**—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. Here again, extending the call limit to attempted/missed calls would not benefit consumers in any way and would only serve to arbitrarily restrict calls that consumers want and expect.

By implementing these sensible factors on reconsideration, the Commission can maintain workable standards that protect consumers while giving callers more flexibility to reach consumers in situations where critical calls must go through.

***The Commission should reconsider its decision to extend its telemarketing opt-out and recordkeeping requirements to certain informational prerecorded calls.*** Many commenters agree that reconsidering the decision to extend the telemarketing opt-out rules to informational calls will best serve the FCC’s consumer-protection objectives. Reconsideration is particularly warranted because the *TCPA Exemptions Order* failed to

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reasonably reflect consumer interests/benefits, and ensure consumers continue to receive the calls they expect.

provide any consumer-protection basis to make informational calls subject to the telemarketing rules.

The Petition does **not** ask the Commission to eliminate an opt-out requirement for informational prerecorded calls to residential landlines. The FCC's existing opt-out rules for informational prerecorded calls already fully protect consumers.<sup>13</sup> These calls must identify the caller, provide a toll-free contact number, and allow the consumer to opt out.<sup>14</sup> These requirements have been in place for years, and informational callers are familiar with them. Indeed, as FedEx has explained, the opt-out rate for package delivery messages is vanishingly small: FedEx receives an average of one opt-out request through customer service per week. And of the 3.2 million messages sent per month, the opt-out via the text message channel (*i.e.*, "STOP") is only 0.004%.<sup>15</sup> This low frequency of opt outs illustrates that package delivery and other informational notifications are timely, welcome, and wanted.

Neither the FCC nor any other party have explained why existing opt-out rules for informational calls were inadequate—and indeed there are none. The telemarketing opt-out and recordkeeping rules serve no valid consumer purpose when applied to informational calls. In reality, the new rules would chill calls that consumers want and upon which they rely. In addition to the consumer harms described in the Petition, informational callers will incur significant cost and effort to implement the new telemarketing requirements—*e.g.*, interactive keypress opt-out, compliance training, recordkeeping, segregated do-not-call lists, opt-out recordings, and more.

To avoid these harms, the Petition has proposed a readily administrable fix that continues to protect consumers. Instead of imposing telemarketing opt-out requirements on informational calls, the Commission should confirm that informational prerecorded calls to landlines must abide by the same standards as exist for wireless calls under 64.1200(b)(1)-(2). Caller identification and a toll-free opt-out number are the appropriate safeguards to protect consumers from unwanted informational calls.

***The Commission should confirm that its past guidance regarding the proper level of consent for calls to wireless numbers also applies equally to landline calls.*** In 2016, the FCC clarified that when customers provide their wireless phone numbers to their electric company, they expressly consent to receive calls and texts reasonably and closely related to their electric service.<sup>16</sup> To ensure landline consumers can continue to receive the same outage notifications and other informational calls that their neighbors with wireless phones will receive, the Petition asked the Commission to confirm that the *EI Declaratory Ruling* applies with equal force to calls placed to residential landlines.<sup>17</sup>

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<sup>13</sup> 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).

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

<sup>15</sup> See Comments of FedEx Corporation, CG Docket No. 02-278, at 3 (filed Oct. 26, 2020).

<sup>16</sup> *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) ("*EI Declaratory Ruling*").

<sup>17</sup> Petition at § III.

Ambiguity in this space will only serve to harm consumers. For example, EEI's investor-owned electric company members place important calls that their customers need and expect. These time-sensitive calls may 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. There is no justification why only wireless consumers should be able to receive these vital messages.

A clarification is needed more than ever from the Commission because the *TCPA Exemptions Order* limited the landline exemptions as discussed above. No party in the record opposes the Petition's request, and NCLC agrees there was "little reason" to adopt different standards for wireless and landline calls.<sup>18</sup> We appreciate these comments, and it is imperative that the Commission clear up this uncertainty in the marketplace and clarify that landline consumers can continue to receive the same outage notifications and informational calls that wireless consumers are allowed to receive.

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Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact me with any questions.

Respectfully submitted,

/s/ Mark W. Brennan

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<sup>18</sup> NCLC Comments at 13.