

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Petition of ContextMedia, Inc. d/b/a Outcome)	
Health for Clarification, or, in the Alternative,)	
for Declaratory Ruling)	

REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE

I. INTRODUCTION AND SUMMARY.

The Edison Electric Institute (“EEI”)¹ respectfully submits these reply comments in support of the Petition of ContextMedia, Inc. d/b/a Outcome Health for Clarification, or, in the Alternative, for Declaratory Ruling (“Petition”).² The Petition asks the Federal Communications Commission (“FCC” or “Commission”) to “clarify or declare that a discrete technical error does not eliminate the liability protection afforded by the 2012 *SoundBite Declaratory Ruling* or preclude the granting of a safe harbor for good-faith compliance with such decision.”³ As

¹ EEI is the trade association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly and indirectly employ more than one million American workers. EEI’s member companies invest more than \$100 billion each year to build smarter energy infrastructure and to transition to even cleaner generation sources. In addition to its domestic members, EEI has more than 60 international electric company members, and 250 industry suppliers and related organizations as Associate Members. Organized in 1933, EEI provides public policy leadership, strategic business intelligence, and essential conferences and forums.

² See Petition of ContextMedia, Inc. d/b/a Outcome Health for Clarification, or, in the Alternative, for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 20, 2017) (“Petition”).

³ *Id.* at 2. In *SoundBite*, the FCC declared that a one-time text message confirming a consumer’s opt-out request does not violate the Telephone Consumer Protection Act (“TCPA”), provided that the confirmation message meets certain requirements. *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 27 FCC Rcd 15391 (2012).

discussed below, the Commission should grant the Petition and confirm that good-faith callers are not subject to liability under the Telephone Consumer Protection Act (“TCPA”) for technical glitches or other inadvertent administrative errors.

Legitimate callers attempting to comply in good faith with the TCPA should not be unduly penalized for inadvertent or unknowable errors. Rather, the Commission has rightly directed its attention to the key sources of many unwanted and illegal robocalls: unlawful spoofers, scammers, and other bad actors. Consistent with that approach, the Commission should ensure that callers acting in good faith do not suffer the risk of abusive TCPA class action litigation for discrete technical or administrative errors such as those described in the Petition or for similar incidents (*e.g.*, software glitches or other errors that may lead to calls placed at the wrong time of day or to a different list of numbers). Such relief is particularly important for EEI’s members, which often place critical, time-sensitive informational communications that electric utility customers expect and need. By granting the Petition, the Commission will help ensure that consumers continue to receive these important notifications.

II. THE COMMISSION SHOULD GRANT THE PETITION AND CONFIRM THAT GOOD-FAITH CALLERS ARE NOT SUBJECT TO TCPA LIABILITY FOR TECHNICAL GLITCHES OR OTHER INADVERTENT ERRORS.

The Commission should grant the Petition and continue to focus its TCPA and robocall efforts on protecting consumers against scammers, unlawful spoofers, and other bad actors.⁴ It should not prevent consumers from receiving communications they need and expect, and legitimate callers should not be subject to punitive class-wide liability under the TCPA when they act in good faith.

⁴ See, *e.g.*, Remarks of FCC Commissioner Michael P. O’Rielly, ACA International’s Washington Insights Conference (May 4, 2017), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0504/DOC-344718A1.pdf.

Granting the Petition is consistent with the Commission’s ongoing efforts to combat unlawful spoofers, scammers, and bad actors. The Petition details Outcome Health’s comprehensive and largely successful compliance efforts to ensure that unsubscribe requests were honored. Despite these efforts, following a change in third-party vendors, Outcome belatedly discovered that a limited number of recipients apparently could not unsubscribe for a brief period of time because the database of consenting subscriber mobile numbers assembled by the outgoing vendor included a “carriage return” character after each number.⁵

The circumstances described by Outcome bear no resemblance to the fraudulent calls by bad actors that represent the source of so many unwanted communications. Subjecting companies that adopt comprehensive compliance procedures to punitive TCPA liability simply because they suffer an obscure technical glitch serves no rational policy objective and deters no bad conduct.⁶

The Commission’s latest robocall-related efforts illustrate the point. In its *Notice of Inquiry* related to the call authentication trust anchor, for example, the Commission noted that “[c]aller ID spoofing and the robocalling it enables generate the *largest number of consumer complaints* to this Commission and to the Federal Trade Commission” on a year-over-year basis.⁷ Bad actors employ “cheap and accessible technologies to spoof their caller identity and scam victims with threats (such as false threats of legal action from the Internal Revenue

⁵ Petition at 6.

⁶ See also Comments of the American Bankers Association *et al.*, CG Docket No. 02-278, 2 (filed Dec. 11, 2017) (“ABA *et al.* Comments”) (stating that “[t]he Commission has an ongoing obligation to ensure that good actors are not penalized for employing modern technologies to reach their customers”).

⁷ *Call Authentication Trust Anchor*, CG Docket No. 17-97, Notice of Inquiry, FCC 17-89 ¶ 1 (rel. July 14, 2017) (citing YouMail Robocall Index, <https://robocallindex.com/2016/june>) (emphasis added).

Service), offers of loans, or purported awards of free travel.”⁸ Accordingly, the Commission has initiated a proceeding “to promote the adoption and implementation of authentication frameworks, including the SHAKEN and STIR frameworks.”⁹ At the same time, however, the Commission has recognized that not all spoofing is unlawful, and it has properly focused its attention on weeding out lawful spoofing from unlawful spoofing by malicious actors.¹⁰

Similarly, the Commission most recently authorized voice providers to block calls from phone numbers on a Do-Not-Originate list and those that purport to be from invalid, unallocated, or unused numbers.¹¹ As Commissioner O’Rielly observed, calls from invalid, unallocated, or unused numbers typically “are from bad actors attempting to scam consumers,” and “these types of calls should be blocked under appropriate circumstances.”¹² At the same time, the Commission promoted certain safeguards, including encouraging a dispute-resolution mechanism, to ensure that communications from legitimate callers were not being unfairly blocked.¹³

The Commission has also targeted its enforcement efforts against spoofers that display false caller ID information to effectuate scams. In June 2017, the Commission issued a \$120 million Notice of Apparent Liability against an individual who allegedly made 96 million

⁸ *Id.* ¶ 4.

⁹ *Id.* ¶ 14.

¹⁰ *Id.* ¶ 4.

¹¹ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, FCC 17-151 (rel. Nov. 17, 2017).

¹² *Id.* at Statement of Commissioner Michael P. O’Rielly.

¹³ *Id.* at ¶ 54.

robocalls with fraudulent caller ID information.¹⁴ More recently, the FCC proposed an \$82 million fine against an entity and its owner for making more than 21 million robocalls with spoofed information.¹⁵

Finally, the Commission has issued a *Notice of Inquiry* that explores ways to help good-faith callers avoid inadvertently calling reassigned numbers through no fault of their own.¹⁶ Among the measures under consideration in that proceeding is a safe harbor for callers that rely on third-party database solutions to ensure TCPA compliance.¹⁷ Such relief is analogous to that requested by the Petition.

III. GRANTING THE PETITION WOULD SUPPORT CRITICAL, TIME-SENSITIVE INFORMATIONAL CALLS FROM UTILITIES TO THEIR CUSTOMERS.

Like the informational, health-related calls described in the Petition, EEI's members place important, time-sensitive calls that their customers need and expect. EEI's members often need to contact their customers to, among other things, warn about planned or unplanned service outages; provide updates about outages or service restoration; ask for confirmation of service restoration or information about the lack of service; or warn about potential service curtailment on account of a failure to make payment.¹⁸ As illustrated in the aftermath of Hurricanes Irma

¹⁴ Press Release, FCC, *Robocall Scammer Faces \$120 Million Proposed Fine for Massive Caller ID Spoofing Operation* (rel. June 22, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-345470A1.pdf.

¹⁵ Press Release, FCC, *FCC Proposed \$82 Million Fine for Illegally Spoofed Robocalls* (rel. Aug. 3, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-346059A1.pdf.

¹⁶ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Notice of Inquiry, FCC 17-90 (rel. July 13, 2017).

¹⁷ *Id.* ¶ 14.

¹⁸ *See, e.g.*, Comments of the Edison Electric Institute, American Gas Association, and the National Rural Electric Cooperative Association, CG Docket Nos. 02-278, 05-338, at 4 (filed Mar. 10, 2017).

and Harvey, the loss of electric utility service carries a major impact on citizens' safety, well-being, and assets.

The Commission clarified in the *EEI/AGA Declaratory Ruling* that when energy utility customers provide their cellphone numbers to their utility, they thereby expressly consent to receive automated calls and texts reasonably and closely related to their utility service.¹⁹ As the Commission noted, state regulators often require or encourage these notifications, which are critical to providing safe, efficient, and reliable service and meeting their obligations to the communities they serve.²⁰ Indeed, the Commission 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.”²¹

Granting the Petition and clarifying that discrete technical or administrative errors, such as those described in the Petition and similar incidents (*e.g.*, software glitches or other errors that may lead to calls placed at the wrong time of day or to a different list of numbers), do not result in TCPA liability would be fully consistent with the policies underlying the *EEI/AGA Declaratory Ruling* and the Commission's other TCPA decisions and robocall efforts. Indeed, the likelihood of the technical or administrative errors described in the Petition may be magnified during or after a natural disaster or other catastrophe, as critical infrastructure and supporting

¹⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling and Edison Electric Institute & American Gas Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, FCC 16-88 (rel. Aug. 4, 2016) (“*EEI/AGA Declaratory Ruling*”).

²⁰ *Id.* ¶ 14.

²¹ *Id.* ¶ 28.

technologies may be compromised. Utilities that seek to place informational, time-sensitive communications in good faith under these circumstances should not be unduly penalized.²²

IV. CONCLUSION.

For the foregoing reasons, the Commission should grant the Petition and clarify that a discrete technical or administrative error does not eliminate the liability protection afforded by the 2012 *SoundBite Declaratory Ruling* or preclude the granting of a safe harbor for good-faith compliance with that decision, and that good-faith callers are not subject to liability under the TCPA for such inadvertent errors.

Respectfully submitted,

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²² See also ABA *et al.* Comments at 2 (stating that “the Commission has long recognized that consumers appreciate receiving timely, relevant information, and that the Commission should not inhibit these important, consumer-friendly communications”).