

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

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of
1991

CG Docket No. 02-278

COMMENTS OF SOUTHERN COMPANY

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I. INTRODUCTION.

Southern Company¹, on behalf of its operating electric utility affiliates, files Comments in this proceeding pursuant to the *Public Notice* issued by the Federal Communications Commission (“Commission”) regarding the Edison Electric Institute (“EEI”) and the American Gas Association’s (“AGA,” and together, “Petitioners”) Petition for Expedited Declaratory Ruling (“Petition”) requesting that the Commission confirm that providing a telephone number to an energy utility constitutes “prior express consent” to receive non-telemarketing, informational communications related to the customer’s utility service at that number, and that such communications do not violate the Telephone Consumer Protection Act (“TCPA”).² Southern Company fully supports the Petition. As discussed further below, Southern Company’s customers have made clear that they value real-time communications regarding their power service. However, the current lack of clarity surrounding application of the TCPA to informational communications from energy utilities to their customers has had a significant chilling effect on such communications from Southern Company to its customers. Southern Company agrees with Petitioners that, unless and until the Commission clearly establishes its position on these issues, misguided and unwarranted lawsuits will continue to prevent energy utilities from effectively and efficiently communicating with their customers.

As described in the Petition, a few courts have misinterpreted the TCPA’s application to these communications in such a way that utilities now risk expensive litigation and

¹ Southern Company is a super-regional energy company in the Southeast United States that owns four electric utility subsidiaries – Alabama Power, Georgia Power, Gulf Power, and Mississippi Power– which provide retail and wholesale electric service throughout a 120,000 square mile service territory in Georgia, most of Alabama, and parts of Florida and Mississippi.

² See Federal Communications Commission, Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Edison Electric Institute and American Gas Association*, CG Docket No. 02-278 (Feb. 24, 2015).

enormous damages for their efforts to provide a critical service to the American public in a transparent manner that protects both customer convenience and public safety. Southern Company agrees with Petitioners that both the Commission and Congress have already indicated that utilities' non-emergency, informational (i.e., not marketing-related) communications to their customers do not violate the TCPA, just as such utilities' emergency communications to the public are exempt from any prior consent requirement in the TCPA.

However, an aggressive plaintiffs' bar continues to file and pursue litigation against energy utilities that, because of the TCPA's strong consumer protections,³ can be extremely expensive and time-consuming to defend. Because of these significant liability risks, Southern Company entities and other energy utilities have largely refrained from using common and highly effective means of communication (i.e., automated text messages or calls to customers' wireless telephones) to inform customers of critical, service-related issues. Southern Company urges the Commission to issue a comprehensive and clear ruling on this subject, in order to allow energy utilities to protect public safety, improve customer service, and otherwise serve the public interest by being able to efficiently deliver important information to their customers.

II. SOUTHERN COMPANY'S OPERATING COMPANY UTILITIES DEPEND ON REAL-TIME CONTACT WITH POWER CUSTOMERS TO SUPPORT PUBLIC SAFETY AND CUSTOMER SATISFACTION.

Atlanta-based Southern Company serves over 4.5 million customers across the Southeast through its operating company subsidiaries – Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, and provides approximately 46,000 megawatts of generating capacity to the region. Southern Company strives to provide its customers energy innovation, excellent customer service, high reliability, and retail electric prices that are below the national

³ The TCPA provides a statutory penalty of \$500 per violation and the possibility of treble damages. *See* 47 U.S.C. 227(b)(3).

average. Members of the Southern Company family use a variety of communications technologies to support the delivery of energy services to their customers. Specifically, Southern Company utility operating companies routinely rely on proactive calls to customers to provide information about critical, service-related issues, including planned or unplanned outages, repair work, service restoration, delinquent bill reminders, potential disconnection notifications, communications to pre-pay customers regarding their accounts, and energy-efficiency messages that provide for an improved customer experience. Southern Company believes that such notifications are key to providing safe, efficient, and reliable service, and to meeting its obligations to the communities it serves.

While no Southern Company entities are currently required to provide such customer notifications by state regulators, Southern Company's customers have made clear that they rely on proactive communications from their power utility for safety, cost savings, and everyday convenience. For example, customers have indicated that, when outages occur, they would like notification when power is predicted to be restored, the cause of the outage, and when power is actually restored. In response to customer feedback, Mississippi Power began providing its customers with automated telephone notifications regarding outages in July 2009. Similarly, Georgia Power proactively implemented outage communications via email, text, or telephone call to its customers in November 2013. Importantly for this proceeding, Southern Company customers have indicated in regular and recurring surveys that they prefer communications to be via text message or telephone call, with email being the least requested method of contact.

III. THE COMMISSION SHOULD CLARIFY THAT THE TCPA DOES NOT PROHIBIT NON-TELEMARKETING, INFORMATIONAL COMMUNICATIONS FROM A UTILITY TO ITS CUSTOMERS.

A. Informational Communications to Utility Customers Are Not Prohibited by the TCPA.

Energy utilities have long used prerecorded message telephone calls and automatic telephone dialing systems to reach customers regarding service-related issues.⁴ As Americans increasingly “cut the cord” on traditional landline telephone service in favor of wireless technologies, many of these calls and messages are now delivered to wireless phones. In fact, many Americans (including Southern Company customers, see above) prefer to receive such notifications on wireless phones via automated text message. Unfortunately, the TCPA’s distinction between communications to landline and wireless phones has led to confusion, difficulty and, ultimately, misguided litigation against utilities who attempt to keep customers informed about the status of their power service by contacting them via wireless technologies.

In the *1992 TCPA Order*, the Commission found that “[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public.”⁵ To that end, Commission’s 2012 TCPA rule left intact the “prior express consent” requirement for non-telemarketing communications, noting that communications by utilities to their customers regarding energy consumption, planned and unplanned outage notifications, and appointment reminders are the types of wireless

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 92-443, 7 FCC Red 8752, ¶ 49 (1992) (“*1992 TCPA Order*”) (“Many public utilities note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes.”).

⁵ *1992 TCPA Order* ¶ 51.

communications that should not require prior express written consent (emphasis added).⁶ However, some courts have misinterpreted this guidance and allowed lawsuits to proceed under the TCPA that have considerably clouded the appropriate interpretation of the TCPA concerning wireless communications and customer relations.⁷ Southern Company agrees with Petitioners that the clear language of the TCPA rules and the Commission's implementing orders make it seem that the Petition requests clarification of an issue that is already clear: namely, that informational communications between utilities and their customers do not violate the TCPA, regardless of whether they occur via landline or wireless technology. However, notwithstanding this seeming clarity, utilities continue to grapple with lawsuits raising these issues under the TCPA.

B. Commission Guidance Is Necessary To Prevent The Chilling Effect of Further TCPA Litigation On Utility Best Practices for Customers.

Unfortunately, as the Petition makes clear, energy utilities across the country have been faced with numerous consumer lawsuits alleging violations of the TCPA arising out of informational communications with customers. These lawsuits have burdened utilities with significant expenses and other non-monetary costs to defend against such actions. Until the Commission issues a definitive statement of its position regarding these communications, such litigation will continue to create substantial impediments to efficient and effective utility operations.

These impediments not only damage customer satisfaction, but also present significant

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 12-21, 27 FCC Rcd 1830 (2012) (“2012 TCPA Order”) at ¶ 29 & n.79.

⁷ See, e.g., *Charvat v. Allstate Corp.*, 29 F. Supp. 2d 1147, 13-cv-7104, 2014 WL 866377, *1; *Thrasher-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 905 (N.D.Ill. 2012); *Robbins v. Coca-Cola Co.*, No. 13-cv-132, 2013 WL 2252646, *2 (S.D. Cal. May 22, 2013); *Manfried v. Bennett Law, PLLC*, No. 12-cv-61548, 2012 WL 6102071, *2 (S.D. Fla. Dec. 7, 2012).

and serious public safety risks. For example, Georgia Power has ceased its efforts to automatically enroll customers who depend on life-support equipment in outage notification programs, despite the fact that such customers' health and safety would greatly benefit from receiving communications prior to possible scheduled or unplanned outages. Georgia Power has similarly halted its efforts to send its customers text messages regarding disconnect notices, missed payment reminders and other similar useful information, despite research showing that customers want these types of services. In fact, in an online panel survey of Georgia Power residential customers in November 2013, more than 77 percent responded that outage communications were very important or important to them, and 67 percent responded that payment alerts (payment due, missed payments, and payment confirmations) were very important or important to them. Actual sign-up statistics show that customers preferred to receive customized information (i.e. alerts) from Georgia Power in texts and by telephone. Similarly, Mississippi Power's customer notification program via telephone calls has a 75-80% success rate preventing power disconnections due to delinquent bills. However, Southern Company entities are reluctant to institute further notification programs that extend beyond outage communications because of the current lack of clarity surrounding implementation of the TCPA in this context.

Southern Company agrees with Petitioners that, until the Commission clarifies its position on these issues, energy utilities will continue to be reluctant to bear the significant litigation risk of making such communications to customers. This is particularly true where those calls or messages may not be considered emergency communications because they are, for instance, about service restoration, non-payment and disconnection, energy usage, or conservation. Because of the current legal environment, in which utilities must undergo expensive litigation procedures in order to defeat meritless consumer TCPA claims, Southern

Company utilities are among the many utilities who have chosen to limit their telephone and text message communications with customers in order to limit such liability risks (which ultimately affect ratepayers).

As EEI noted earlier this year, “the mere threat of such an improper application of the Commission’s TCPA rules to these utility/customer communications may have begun to have a chilling effect.”⁸ The Commission should counter this effect by issuing an unequivocal statement that: (1) Emergency communications to customers about their utility service are exempt from TCPA requirements; and (2) Non-telemarketing, informational communications to customers about their utility service at the number provided by the customer in connection with establishing or continuing service do not violate the TCPA.

IV. CONCLUSION.

Southern Company agrees with Petitioners that service-related informational messages delivered to wireless phones are the most effective means of providing time sensitive, non-telemarketing information to utility customers. Moreover, based on Southern Company’s experience and information, customers desire and prefer such communications to traditional landline calls. The Commission should grant Petitioners’ request for a Declaratory Ruling in order to ensure that energy utilities can continue to employ emerging communication technologies to contact their customers, including public safety entities, government users, enterprise customers, and consumers, with time-sensitive information. Specifically, the Commission should clearly state that a utility customer’s provision of a telephone number, including a wireless phone number, to an energy utility satisfies TCPA consent requirements for such customer to receive non-telemarketing, informational calls at that number related to

⁸ Letter from H. Russell Frisby, Jr. Counsel, Edison Electric Institute, to Marlene H. Dortch, Secretary, FCC, CG 02-278, (June 25, 2014).

the customer's utility service.

Respectfully submitted on this 26th day, March 2015.

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