

**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 COMMENTS OF
THE STATE OF NEW JERSEY DIVISION OF RATE COUNSEL**

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April 9, 2015

TABLE OF CONTENTS

SUMMARY	1
I. INTRODUCTION	4
II. ISSUES FOR COMMENT	4
A. Summary of Rate Counsel’s Position	4
B. The Telephone Consumer Protection Act prohibits certain unsolicited communications unless for emergency purposes or with the express consent of the customer	5
1. The TCPA allows otherwise prohibited communications for emergency purposes.	6
2. The TCPA allows otherwise prohibited communications with express customer consent.	8
3. The TCPA allows otherwise prohibited communications that are not made for a commercial purpose, as well as calls for a commercial purpose that do not adversely affect the privacy rights protected by the TCPA and do not include any unsolicited advertisement. Petitioners’ “informational” calls do not qualify for that exemption.	11
III. CONCLUSION.....	13

SUMMARY

The New Jersey Division of Rate Counsel (“Rate Counsel”), as an agency representing New Jersey consumers, submits that it supports the Petition to the extent that it requests a declaration that communications from public utilities to their customers involving emergent issues should be exempt from the statutory prohibition on unsolicited calls or text messages to cell phones using automated dialing equipment in the Telephone Consumer Protection Act (“TCPA”).¹ Rate Counsel does not support a declaration that would exempt from that prohibition informational communications that are not for emergency purposes.

Rate Counsel recognizes the importance of communications from public utilities with their customers on emergent issues that directly affect public safety and health and the provision of safe, adequate and reliable service. These communications involve public health and safety risks, including those presented by planned or unplanned interruptions of public utility service. To the extent the Petition requests a declaration recognizing that customer communications involving a wide range of emergent issues should be exempt from the statutory prohibition on unsolicited communications to cell phones using automated dialing equipment, Rate Counsel supports it.

Rate Counsel concurs with the Petition’s request for a declaration that communications for emergency purposes include contacts “to a) warn about planned or unplanned service outages; b) provide updates about outages or service restoration; 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; and ... f) warn about payment or other problems that

¹ 47 U.S.C. § 227.

threaten service curtailment.” Petition, at 3. These are certainly among the variety of service interruptions, hazardous conditions and public health and safety matters that qualify for the TCPA exemption so utility companies may communicate with their customers using all available methods.

Rate Counsel also supports including certain types of public utility communications to “e) verify eligibility for special rates or services, such as medical, disability, or low-income rates, programs and services,” Petition, at 3, to the extent these are necessary to prevent emergent public health and safety risks such as planned or unplanned utility service interruptions. The exemption would thereby become consistent with New Jersey Board of Public Utilities (“NJBPU”) rules for protecting vulnerable and low-income populations from utility service interruptions. Those rules require special notices and communications to, among others, customers over 65 years of age, those with life-sustaining equipment on the premises, and participants in several low-income assistance programs. See e.g., N.J.A.C. 14:3-3A.3, -3A.4, and -3A.5.

Rate Counsel, however, does not support a declaration that would exempt the entire range of utilities’ customer communications from the statutory prohibition. The Petition requests an exemption, for example, for unsolicited calls or text messages to cell phones that “provide reminders about time-of-use pricing and other demand-response events.” Petition, at 3, item g. Such communications do not relate to any emergency purpose. Instead, utilities manage time-of-use pricing and demand response through proprietary programs that are part of their commercial

operations.² Those programs solicit ratepayer participation through marketing information that can be provided readily through various media other than calls or texts to cell phones. Allowing unsolicited voice and text messages about utility companies' non-emergency related proprietary commercial services would impose a cost as well as an inconvenience on ratepayers, without any emergent purpose, in violation of the TCPA. Accordingly, Rate Counsel does not support a declaration that would exempt unsolicited informational calls or texts to cell phones for non-emergent issues such as time-of-use pricing and demand-response programs. Such calls or texts, when using automated dialing equipment, are prohibited by the TCPA.

Rate Counsel echoes the sentiments of other commentators who ask the Commission to ensure continued protection of cell phone consumers from unsolicited and possibly costly informational voice and text messages, while allowing public utility companies to communicate with customers for a wide range of emergency purposes. Therefore, Rate Counsel urges the Commission to:

- 1) Grant the Petition to the extent that it requests a declaration that communications from public utilities to their customers involving emergent issues be exempt from the statutory prohibition on unsolicited calls or text messages to cell phones using automated dialing equipment in the TCPA; and
- 2) Deny the Petition to the extent that it would exempt from that prohibition utilities' informational communications to customers' cell phones that are not for emergency purposes.

² See e.g., I/M/O Demand Response Programs for the Period beginning June 1, 2009 - Electric Distribution Company Programs, Docket No. EO08050326 Order (NJBPU Dec. 10, 2008) (discussing New Jersey demand response programs and financial incentives to encourage utilities' participation), available at <http://www.nj.gov/bpu/pdf/boardorders/12-8-08-2G.pdf>.

I. INTRODUCTION

Rate Counsel, as an agency representing New Jersey consumers, submits these Reply Comments based on its review of initial comments filed on March 26, 2015, by numerous interested parties in response to the Public Notice seeking comment on the Petition for Expedited Declaratory Ruling (“Petition”) filed by Edison Electric Institute (“EEI”) and American Gas Association (“AGA”) (“Notice”), issued by the Consumer and Governmental Affairs Bureau of the Federal Communications Commission’s (“FCC” or “Commission”) on February 24, 2015.³ The Notice requested comment on the Petition, which requested an expedited declaratory ruling that, under the TCPA, providing a telephone number to an energy utility constitutes “prior express consent” to receive, at that number, non-telemarketing, informational calls related to the customer’s utility service, which are placed using an automatic telephone dialing system (“autodialer”) or an artificial or prerecorded voice.⁴

II. ISSUES FOR COMMENT

A. Summary of Rate Counsel’s Position

Petitioners describe their duty to provide reliable electric and gas service to their customers, and the importance of communicating with their customers in fulfilling that responsibility. In particular, the public utilities cited their communications to customers warning of, among other things, “planned or unplanned outages, repair work, service cancellation, service

³ The Division of Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is in, but not of, the Department of Treasury. N.J.S.A. §§ 52:27EE-46 et seq.

⁴ Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed by Edison Electric Institute and American Gas Association on February 12, 2015 (“Petition”), at 4.

restoration.” Petition at 1. Rate Counsel supports a declaration that unsolicited, automated voice or text messages for these purposes are within the scope of the TCPA exemption for communications for emergency purposes.

Petitioners also request that the FCC include within that TCPA exemption unsolicited “informational” calls and text messages to customers, using automated dialing equipment, about “time-of-use and other demand-response events.” Petition at 3, item g. Rate Counsel considers such communications outside the scope of the exemption that Congress recognized in the TCPA and opposes a declaration that would exempt such statutorily prohibited communications.

B. The Telephone Consumer Protection Act prohibits certain unsolicited communications unless for emergency purposes or with the express consent of the customer.

The TCPA prohibits certain unsolicited communications, using automated telephone equipment, to any cell phone. The TCPA prohibits any person within the United States from making

any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a paging service, cellular telephone service ... or any service for which the called party is charged for the call. 47 U.S.C. § 227(b)(1)(A)(iii).

The Commission’s regulations contain similar restrictions. E.g., 47 C.F.R. §

64.1200(a)(1)(iii).⁵ Thus, the statutory prohibition on unsolicited, non-emergency automated calls or text messages to cell phones is clear.

1. The TCPA allows otherwise prohibited communications for emergency purposes.

The TCPA allows unsolicited communications to cell phones for emergency purposes. The Commission may exempt a call that is initiated for an emergency purpose from the prohibition on initiating “any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(B). Where, as here, the statutory language is clear, there is no need to clarify any statutory ambiguity. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

The clear language of the TCPA would seem to prohibit the broad interpretation sought here by Petitioners that would include informational calls unrelated to potential service interruption issues. Indeed, the legislative history of the TCPA, in particular the Statements in support of the TCPA by the House and Senate Committee Chairs cited by Petitioners, does not support the claimed exemption for a broad range of unsolicited “informational” calls. See Petition at 9. Instead, those Statements describe the intent of the TCPA to include within the scope of “emergency purpose” communications that notify customers of utility service

⁵ FCC rules prohibit initiating “any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice; (iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”

interruptions from a wide variety of causes. Those Statements clarify that “impending or current power outages” are among many potential health and safety risks that Congress intended to exempt from the statutory prohibition.⁶ Unsolicited solicitations or informational calls concerning participation in “time-of-use pricing and other demand-response events” are not among the emergent communications described by the bills’ sponsors.

Rate Counsel recognizes the importance of public utility calls to customers to communicate emergent information, using all media including voice and text messages to wireless devices, and supports the active use of those communications. Such unsolicited automated communications, however, must be consistent with the TCPA exemption for calls made “for emergency purposes.” See 47 U.S.C. § 227(b)(1)(A) and 47 U.S.C. § 227(b)(1)(B).

Rate Counsel has supported enhanced emergency communications by utilities with their customers. Commenters Public Service Electric and Gas Company (3/26/15 comment at 3-4) and New Jersey Natural Gas Company (3/26/15 comment at 5-6) cite examples where the NJBPU has ordered or recommended that public utility companies take steps to improve their emergency communications with their customers using all available media, including unsolicited automated calls and text messages to cell phones. For example, the NJBPU ordered electric utilities to “implement a cell phone application that customers can use to report outages and

⁶ See Statement of Cong. Edward Markey, Chair, House Telecom. & Fin. Subcommittee, 137 Cong. Rec. H 11307-01 (Nov. 26, 1991); see also Statement of Sen Ernest Hollings, Chair, Senate Committee on Commerce, Sci. & Transp., 137 Cong. Rec. S 18781-01 (Nov. 27, 1991) (“[T]he FCC could find that ‘emergency purpose’ includes any automated telephone call that notifies consumers of impending or current power outages, whether these outages are for scheduled maintenance, unscheduled outages caused by storms or similar circumstances, cut off power due to late payment of bills, power interruptions for load management programs, or other reasons.”)

receive system outage information.”⁷ Staff of the NJBPU recognized that “well-designed external communications must occur in all mediums with customers, media, local officials and employees,”⁸ and that “[a]ll communications channels at an EDC’s disposal should be mobilized as soon as potential major outage events are forecasted.”⁹ Those state regulatory actions arose from severe weather emergencies that caused the widespread failure of utility services.

Accordingly, Rate Counsel supports a declaration by the Commission that a call made or initiated for “emergency purposes” includes the range of communications to customers that relate to emergent or urgent situations, including “impending or current power outages.” Rate Counsel considers that such a declaration would be consistent with the letter and spirit of the TCPA, as well as with actual public utility company practice.¹⁰

2. The TCPA allows otherwise prohibited communications with express customer consent.

Petitioners ask the Commission to find that a customer’s providing a telephone number to an energy utility constitutes “prior express consent” to receive, at that number, non-telemarketing, informational calls or texts related to the customer’s utility service, which are placed using an automatic telephone dialing system or an artificial or prerecorded voice. Petition at 4. Such calls may be “commercial” in nature, and may include an advertisement for the utilities’ proprietary energy management, demand response or efficiency services. Rate Counsel asks the Commission to deny such a broad reading of the exemption. The declaration requested by Petitioners would allow a broad range of unsolicited “non-telemarketing, informational” calls

⁷ Order Accepting Consultant’s Report and Additional Staff Recommendations and Requiring Electric Utilities to Implement Recommendations, I/M/O the Board’s Review of the Utilities’ Response to Hurricane Irene, Docket No. EO11090543, 2013 N.J. PUC LEXIS 34 (NJBPU Jan. 23, 2013) (“2013 Storm Order”), at *126.

⁸ 2013 Storm Order, p.15.

⁹ Id., p.16, 23-G-1.

¹⁰ The Commission already has recognized a similarly broad exemption. See 1992 TPCA Order, ¶ 51, at **66-67.

to customers, using automated dialing equipment, that the TCPA clearly prohibits without customer consent or an emergency purpose.

Equating a customer's providing a telephone number to an energy utility company with "prior express consent" to receive calls prohibited by the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), would violate the TCPA requirement of express consent. "Express" means "explicit," not "implicit" consent, under the TCPA. Edeh v. Midland Credit Mgmt., 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010). This is consistent with the common law, requiring that consent must be voluntary. Osorio v. State Farm Bank, 746 F.3d 1242, 1252-53 (11 Cir. 2014). Congress is presumed to have incorporated the common law of consent into the TCPA. Id. Congress did not authorize unsolicited calls or text messages to cell phones using automated dialing equipment for informational purposes, without the customer's express consent.

In its comments to the Commission, New Jersey Natural Gas Company cites in support of the instant Petition the Commission's 1992 TCPA Order, which stated that "public utilities providing a third party notification service do not violate the prohibition against prerecorded calls to residences where the third party has given his or her prior express consent to the notification."¹¹ Rate Counsel agrees, given the purpose of third-party calls, which is to advise a responsible person that the ratepayer is at imminent risk of a utility service interruption. In fact, every year each New Jersey public utility must notify all its residential customers that they may request that the utility send notice of service discontinuance to a designated third party, as well as to the customer.¹² As New Jersey Natural Gas points out, the Commission has indicated that

¹¹ New Jersey Natural Gas 3/26/15 comments at p. 7, quoting I/M/O Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 8752, 1992 WL 690928, 1992 FCC LEXIS 7019, ¶51, at **66-67 (FCC Oct. 16, 1992) ("1992 TCPA Order").

¹² N.J.A.C. 14:3-3A.4.

it considers third-party calls to be exempt under a broad and comprehensive understanding that utility service interruptions implicate “significant risks to public health and safety.”¹³

Rate Counsel agrees with these statements, since they recognize the wide range of potential risks to public health and safety presented by an interruption of utility service. Several New Jersey public utility regulations recognize the importance of that risk, for example prohibiting utilities from discontinuing service to residential customers during the “heating” season from November 15 through March 15.¹⁴ Rate Counsel supports a declaration with an expansive understanding of the exemption for “emergency purposes” that includes threats of interruption of utility service.

The Commission, however, while approving a public health and safety exemption for certain unsolicited calls using automated dialing equipment,¹⁵ also emphasized that “telephone solicitations as defined in [FCC] rules can never be classified as ‘emergencies.’”¹⁶ Similarly, Rate Counsel would limit the scope of any relief to Petitioners to otherwise prohibited calls made for emergent purposes such as “significant risks to public health and safety,” including imminent or pending utility service interruptions. “Emergency purposes,” however, do not include calls to provide information relating to “time-of-use pricing and other demand-response events.” See Petition, at 3. Such calls are in the nature of a telephone solicitation and not an emergency.

As recently as 2012, the Commission reaffirmed that the TCPA, 47 U.S.C. § 227(b)(1)(A) and its own rules, “continue to require some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers” and “maintain the

¹³ 1992 TCPA Order ¶ 51; see also id. ¶ 49.

¹⁴ N.J.A.C. 14:3-3A.5(a).

¹⁵ 1992 TCPA Order, ¶51, at **66-67.

¹⁶ 1992 TCPA Order, at **67 n.85 (citing 47 C.F.R. § 64.1200(b)).

requirement of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers that are not subject to any exemptions under [47 U.S.C. § 227(b)(2)].”¹⁷

Petitioners’ interpretation of implicit consent would eliminate the requirement of express consent, and would exempt unsolicited calls using automatic telephone dialing system from the privacy safeguards of the TCPA. The recipients’ privacy rights would be compromised and they would be subject to the unsolicited calls expressly prohibited by the TCPA. In further violation of the TCPA, the recipients may be charged for receiving the unsolicited automated calls. These results would clearly violate the TCPA. Accordingly, Rate Counsel opposes a declaration that equates providing a telephone number to an energy utility company with “prior express consent” to receive the unsolicited calls prohibited by the TCPA.

3. The TCPA allows otherwise prohibited communications that are not made for a commercial purpose, as well as calls for a commercial purpose that do not adversely affect the privacy rights protected by the TCPA and do not include any unsolicited advertisement. Petitioners’ “informational” calls do not qualify for that exemption.

The Commission may grant an exemption, from the prohibition on initiating “any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party,” under 47 U.S.C. § 227(b)(2)(B).¹⁸ Under 47 U.S.C. § 227(b)(2)(B), the FCC may exempt, from the TCPA prohibition on unsolicited communications, calls made for a non-commercial purpose, 47 U.S.C. § 227(b)(2)(B)(i), and calls made for a commercial purpose that do not adversely affect the privacy rights protected by the TCPA and do not include any unsolicited advertisement, 47 U.S.C. § 227(b)(2)(B)(ii).

¹⁷ 2012 TCPA Order, ¶ 29, at **39.

¹⁸ 47 U.S.C. § 227(b)(1)(B).

Here, the Petition includes a request for an exemption for unsolicited “informational” calls that would adversely affect the privacy rights of the recipients, since the recipients would not have expressly consented and may be charged to receive them. Those unsolicited “informational” calls also may include the transmission of an unsolicited advertisement. Thus, this portion of the Petition does not qualify for an exemption under 47 U.S.C. § 227(b)(2)(B).

Therefore, Rate Counsel respectfully recommends that the Commission:

- 1) Grant the Petition to the extent that it requests a declaration that communications from public utilities to their customers involving emergent issues be exempt from the statutory prohibition on unsolicited calls or text messages to cell phones using automated dialing equipment in the TCPA; and
- 2) Deny the Petition to the extent that it would exempt from that prohibition utilities’ informational communications to customers’ cell phones that are not for emergency purposes.

III. CONCLUSION

For the reasons set forth above, Rate Counsel submits that granting the Petition limited to communications for emergency purposes, as described above, would assist utility operations while preserving the consumer protections in the TCPA.

Very truly yours,

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