

**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

**REPLY COMMENTS IN SUPPORT OF PETITION FOR EXPEDITED
DECLARATORY RULING**

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INTRODUCTION AND SUMMARY

The Federal Communications Commission (“Commission” or “FCC”) has been swamped with petitions on the Telephone Consumer Protection Act (“TCPA”). It is easy to see them as all alike and, indeed, there are many overlapping issues among them. But the pending Petition for Declaratory Ruling (“Petition”) filed by the Edison Electric Institute (“EEI”) and the American Gas Association (“AGA”) stands out.¹ First, most of the contacts utilities wish to make with their customers have public safety implications, and all of the rest vindicate important public policy goals advanced or mandated by regulators. Second, it is demonstrable that utility consumers want—and often demand—these contacts. Third, the utility industry is pervasively regulated, in a way that the communications industry has not been in many decades. Its regulators would put a stop to any possible overreach in communications with customers in a nanosecond. Finally, the petition does not seek a waiver or exemption from, a change in, or even an extension of existing law. Rather, it simply asks for a declaration about how existing law applies to utilities so as to provide sufficient clarification that appropriate communications between utilities and their customers will not be deterred.

Not surprisingly then, the comments overwhelmingly support the Petition. They confirm that the lack of clarification has and continues to limit the ability of utility companies to send important communications to their customers. Utilities want to send their customers critical informational messages, including warnings about planned or unplanned service outages, messages during natural disasters, service updates, and billing messages that can help customers prevent, plan for, or deal with an interruption in service. And the record demonstrates that utility customers want to receive these notifications. Yet, the comments also confirm that the threat of

¹ See Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 3-4, CG Docket No. 02-278 (filed Feb. 12, 2015) (“Petition”).

litigation under the TCPA deters utility companies from sending such notifications and, therefore, from serving utility customers as quickly and efficiently as possible. Although such lawsuits are without merit, utility companies will continue to face the possibility of needless, costly, and time-intensive discovery obligations—and the threat of significant damage claims—in TCPA cases until the Commission grants the Petition.

The requested clarification would produce only positive results. It would facilitate compliance with state regulatory requirements on sending informational messages to utility customers. Furthermore, state regulators—along with the availability of opt-out mechanisms—would provide utility customers with adequate protection against overly frequent or unnecessary communications from utilities. Consumers would benefit from increased access to information and decreased costs. And it is the right legal result: FCC precedent and legislative history make clear that the TCPA does not prohibit utilities from making informational calls or sending informational texts to their customers when prior express consent has been obtained. The Commission can and should set right this situation by granting the Petition without delay.

I. THE COMMENTS DEMONSTRATE THAT CLARITY IS NEEDED TO ENABLE ELECTRIC AND GAS UTILITY COMPANIES TO BEST SERVE THEIR UTILITY CUSTOMERS

A. Consumers Express a Strong Desire to Receive Service Notifications

The TCPA was designed to protect consumers from unwanted commercial messages. When it prevents them from receiving messages they want and need, something is wrong. It is critical for utilities to communicate effectively with their customers as part of a utility company's provision of safe, reliable, and efficient service. And, as the record reflects, utility customers value these notifications which enhance safe utility consumption and everyday convenience. Indeed, an independent consumer study conducted in 2012 by J.D. Power found that “customers who receive outage information through electronic sources, such as website, email, and text messages, are more

satisfied with their utility’s performance than are those who do not receive information electronically.”²

This independent finding is supported by industry experience and numerous surveys conducted by utility companies, all of which demonstrate that customers place significant value on receiving timely service notifications.³ For instance:

- 91.7% of American Electric Power customers indicated it is important to receive information regarding approaching storms, power outages, and service restoration⁴;
- 90% of CenterPoint customers appreciate timely notifications regarding their service⁵;
- Southern Company surveys indicate that customers would like outage and restoration notifications, and prefer communications via text message or telephone call, with email being the least requested method of contact⁶; and

² See L. Dennis Smith et al., *Customer Impact Report: Utility Outage Communications Preferences*, J.D. POWER AND ASSOCS. (July 2012). See also Comments of Eversource Energy on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 1, CG Docket No. 02-278 (filed Mar. 24, 2015) (“*Eversource Comments*”). Eversource serves 3.2 million gas and electric customers in the New England area. *Id.* See also Southern California Edison Company’s (“SCE”) Comments on Petition for Expedited Declaratory Ruling at 3, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*SCE Comments*”) (citing a 2014 J.D. Power Electric Utility Residential Customer Satisfaction Study that found that “[d]igital communications from utilities (e.g., blog, social media, text message, website, etc.) are more satisfying than traditional media (bill insert or newsletter, TV/radio, direct mail, etc.)”). SCE provides electrical service to approximately 5 million customers in California. *Id.* at 1.

³ See Comments of Pub. Serv. Elec. and Gas Corp. (“PSEG”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 4, CG Docket No. 02-278 (filed Mar. 26, 2015) (noting at 2014 J.D. Power Electric Utility Residential Customer Satisfaction Study finding customers of utility companies that proactively communicate outage information are more satisfied than others.) (“*PSEG Comments*”). PSEG serves more than 6 million customers in New Jersey. See *id.* at 2.

⁴ Comments of American Electric Power on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 4, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*AEP Comments*”). American Electric Power provides electricity service to more than 5.3 million customers in 11 states. *Id.* at 1.

⁵ Comments of CenterPoint Energy Houston Electric & CenterPoint Energy Resources Corp. (together “CenterPoint”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 3, Attachments A & B, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*CenterPoint Comments*”). CenterPoint serves approximately 5.4 million electric and gas customers in 6 states. *Id.* at 1.

⁶ Comments of Southern Company on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 4, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*Southern Company Comments*”). Southern Company provides electricity to more than 4.5 million customers across the Southeast through its subsidiaries Alabama Power, Georgia Power, Gulf Power, and Mississippi Power. *Id.* at 3.

- 77% of customers that Georgia Power surveyed responded that outage communications were very important or important and 67% responded that payment alerts were very important or important.⁷

Additionally, utility customers have acted on this expressed desire to receive service notifications from their utility companies. For instance, Puget Sound Energy offers a Mobile Outage Application that has been downloaded by proximately 30,000 customers, suggesting a strong interest in engaging with the utility via mobile devices to obtain outage information⁸; and 50% of MidAmerican’s customers have requested service restoration callback notifications, which informs them of when they can return home and have electricity.⁹ In fact, some utilities report that they more frequently receive complaints from customers when they have *not* been proactively notified of service interruptions than about having received a notification.¹⁰

Moreover, the comments demonstrate that text notification campaigns have proven to be a more effective method of communicating with customers than traditional phone calls, especially during and after service interruptions. Indeed, during major storms, many customers lack access to wired telephones due to power outages and, therefore, wireless is their only mode of communications.¹¹ Further, text messaging is important for hearing-impaired customers, who

⁷ *Id.* at 7.

⁸ Comments of Puget Sound Energy, Inc. (“PSE”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 2, CG Docket No. 02-278 (filed Mar. 24, 2015) (“*PSE Comments*”). PSE service more than 1.5 million customers in Washington. *Id.* at 1.

⁹ Comments of MidAmerican Energy Co. (“MidAmerican”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 3, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*MidAmerican Comments*”). MidAmerican provides electricity and natural gas service in Illinois, Iowa, Nebraska, and South Dakota. *Id.* at 1.

¹⁰ *See, e.g.*, Comments of Alliant Energy (“Alliant”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 3, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*Alliant Comments*”). Alliant serves more than 1.4 million electric and natural gas customers in Iowa, Wisconsin, and Minnesota. *Id.* at 1.

¹¹ *See PSEG Comments* at 3 (noting that during Hurricane Irene and Superstorm Sandy, many of PSEG’s customers “no longer had access to wired phones due to power outages, relying instead on their cell phone as the primary means of voice communication.”); *Eversource Comments* at 1 (noting the effectiveness of its text campaigns for outage communications during the Thanksgiving storm in 2014.).

have indicated to at least one utility that text messages and email notifications are their preferred method of notification.¹²

The comments, thus, overwhelmingly demonstrate that the service notifications which are the subject of the Petition here are critical to the safe, reliable, efficient, and customer-friendly provision of utility services. This is true both in actuality and in the view of utility customers.

B. Clarity Is Needed to Enable Utilities to Provide Desired Service Notifications

There is remarkable consensus among the commenters that the Petition's requested relief is necessary to provide clarity about the ways that utilities may communicate important information to customers.¹³ Such clarity from the Commission will allow utilities to provide important service information to their customers, including outages, power restoration, service management activities, and payment problems that threaten services without fear of frivolous, yet costly, litigation.¹⁴

Absent a definitive ruling from the Commission, many utilities have already curtailed important notifications that benefit customers because the litigation risks are too high.¹⁵ *This may be especially true in rural communities that often receive their power from local cooperatives.* These lawsuits harm customers by diverting resources away from the core responsibility of serving

¹² See *CenterPoint Comments* at 3.

¹³ See, e.g., Comments of AGL Resources ("AGL") on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 1, CG Docket No. 02-278 (filed Mar. 23, 2015) ("*AGL Comments*"). AGL serves more than 4.5 million natural gas customers. *Id.*

¹⁴ *AEP Comments* at 5 ("Unfortunately, recent court cases involving alleged violations of the TCPA by utilities have a chilling effect on utilities due to the risks associated with potential litigation. The [current] lack of clarity in the definition of 'prior express consent', especially as it related to cell phones, may result in future curtailment of customer communications.").

¹⁵ Comments of The National Rural Electric Cooperative Association ("NREC") on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 4-5, CG Docket No. 02-278 (filed Mar. 26, 2015) ("*NREC Comments*"). NREC is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million people in 47 states. *Id.* at 2.

customers and deterring adoption of best practices.¹⁶ Indeed, utilities express reluctance to bear litigation risk of notifications that are not strictly and clearly emergency calls.¹⁷ Demand letters and lawsuits claiming TCPA violations arise even when the notification at issue deals with overdue bills that could lead to service interruption—and regulators rightly insist on such notification.¹⁸ And in these cases, several courts have refused to rule on whether a customer has given “prior express consent” at the motion to dismiss stage, meaning utilities are being forced to pay for expensive and burdensome discovery in these frivolous cases.¹⁹ As a result of this lack of clarity, and fear of litigation expense and potential—though erroneous—liability, some utilities have been forced to restrict or suspend important communications.²⁰

The importance of a clear ruling from the Commission that utilities may provide the informational service notifications discussed in the Petition cannot be overstated. Beyond the risk

¹⁶ Comments of The National Association of Water Companies (“NAWC”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 2, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*NAWC Comments*”). NAWC represents the private water and wastewater services industry which serves nearly one in four Americans. *Id.* at 1.

¹⁷ *See, e.g., CenterPoint Comments* at 4-5 (“But because the FCC has never issued a definitive statement . . . potential litigants have construed ambiguity in the law to interpret almost any cell phone contact with a customer as triggering the private right of action and damages provisions under the [TCPA]. . . By [granting the relief requested in the Petition] the Commission would remove any ambiguity about its interpretation of the law and allow utilities to continue implementing these necessary programs without threat of litigation.”); *see also* Comments of American Water Works Company, Inc. (“AWW”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 6-7, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*AWW Comments*”). AWW provides water and wastewater services to approximately 15 million people in 15 states. *Id.* at 3.

¹⁸ *See* Comments of National Grid on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 7-8, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*National Grid Comments*”). National Grid provides electric and gas service to more than 7 million customers in the Northeast. *Id.* at 2.

¹⁹ *See Petition* at 10-11; Comments of Exelon Corporation (“Exelon”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 9, CG Docket No. 02-278 (filed Mar. 26, 2015) (“These suits can drain company resources, even if the suits are ultimately dismissed and the reality of statutory damages never comes into play.”) (“*Exelon Comments*”). Exelon’s utilities (Baltimore Gas and Electric, Commonwealth Edison Company, and PECO Energy Company) provide electricity and natural gas to more than 7.8 million customers in Maryland, Illinois, and Pennsylvania. *Id.* at 2.

²⁰ *See, e.g., id.* at 9.

of litigation to utility companies, the ultimate losers in the current environment are utility consumers who will not receive the critical and timely notifications they both deserve and want. As an example, communications to cell phones would have been particularly useful during Superstorm Sandy when many customers evacuated their homes and could have been reached most easily by text message—but, if such an event were to occur again, utilities expressed reluctance to use text messaging due to risk of fines and litigation.²¹

Far from using this proceeding “to obtain an edge in a civil matter” as the lone-dissenter wrongly and cynically argues,²² EEI and AGA filed this Petition in order to obtain industry-wide clarity on a fundamental and critical issue facing utilities and their customers. The need for Commission action is real and as the comments overwhelmingly demonstrate that failure to issue the requested clarification is untenable for utilities and harmful to their customers.

II. UTILITIES NEED CLARITY TO FULFILL STATE REGULATORY OBLIGATIONS

The Petition should also be granted in order to allow utilities to send their customers messages that are required by state regulators in the most efficient manner possible, without having to fear TCPA liability. The comments demonstrate that many state regulators either mandate or strongly encourage customer notifications regarding storm alerts, outage notifications, and service restoration. For example:

- As Alliant reports, Wisconsin law imposes duties on utilities to “strive to give reasonable advance notice to affected customers of each planned service interruption expected to last more than 30 minutes” and to “make a reasonable effort to have a personal or telephone contact with the residential customers prior to disconnection.”²³

²¹ Comments of New Jersey Natural Gas Company (“NJNGC”) on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 8, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*NJNGC Comments*”). NJNGC provides natural gas service to approximately 51,000 customers in New Jersey. *Id.* at 3.

²² Comments of Joe Shields on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 1, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*Shields Comments*”).

²³ *Alliant Comments* at 2 (citing Wis. Admin. Code Elec. PSC §§ 113.0502, 113.0301(11)(a)).

- Alliant also reports a duty in Iowa to notify customers of an electric or natural gas activity in advance of certain service outages.²⁴
- National Grid states that its “operating companies in New York, Massachusetts, and Rhode Island must . . . comply with regulations that have strict notification requirements prior to and in certain cases, following, termination of service for non-payment.”²⁵
- The New Jersey Board of Public Utilities has encouraged the New Jersey Natural Gas Company’s efforts to inform customers about conservation and energy efficiency programs.²⁶

Additionally, regulators recognize that modern communication technologies can and should be used so that communications are efficient and timely. For example, the New York State Public Service Commission has encouraged utility companies to call and send texts to wireless numbers.²⁷

Intense weather events have highlighted how crucial accurate customer notifications are, and that state regulators are taking steps to ensure customers receive up-to-date and accurate information from their electric utility company. After Hurricane Irene and Superstorm Sandy, New Jersey regulators established extensive requirements for pre- and post-storm utility communications and notice before major events. They also required that utilities make outage information available via text, mobile, and/or through another push or messaging notification.²⁸ Similarly, comments report that Louisiana regulators’ plans to request an emergency

²⁴ *Id.* at 2 (citing Iowa Admin. Code r. 20.7(11), 19.7(7)(b)).

²⁵ *National Grid Comments* at 4.

²⁶ *NJNGC Comments* at 3.

²⁷ *See, e.g.,* Comments of Consolidated Edison Company of New York, Inc. (“Con Edison”) and Orange and Rockland Utilities, Inc. (“O&R”) at 2, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*Con Edison Comments*”). Con Edison serves over three million electric, gas, and steam customers in New York City and Westchester County, New York. O&R, with its subsidiaries Rockland Electric Company and Pike County Light & Power Company, serves 750,000 electric and gas companies in New York, New Jersey, and Pennsylvania. *Id.* at 1-2.

²⁸ *NJNGC Comments* at 6 (citing *The Board’s Review of the Utilities’ Response to Hurricane Sandy*, NJ BPU Docket No. EO12111050, at 15 (May 29, 2013)).

communications system for electric utilities, which would include automated telephone and text messages for customers impacted by an outage.²⁹

Notifications are especially important for customers who depend on life support equipment, and some states mandate that utilities provide special notices for such customers. For example, the record before the Commission shows that New York utilities must communicate with customers who use certain life support equipment and check on the well-being of these customers within 24 hours following an outage and daily thereafter until power is restored.³⁰

States also recognize the importance of utility energy efficiency programs, and have urged utilities to engage proactively with customers to implement such programs. For example, the Colorado Public Utilities Commission requires utilities to set “demand-side management” goals to promote efficiency.³¹ Massachusetts law “requires all electric and gas distribution companies and approved municipal aggregators . . . to develop three-year energy efficiency plans that are designed to provide for the acquisition of all available energy efficiency and demand resources that are cost effective or less expensive than supply.”³² Less than a month ago, the Washington Utilities and Transportation Commission “amended its rules to ensure regulated utilities are

²⁹ *AEP Comments* at 4.

³⁰ *National Grid Comments* at 4.

³¹ COLORADO PUB. UTILS. COMM’N, 2014 Report to the Colorado General Assembly on Demand Side Management (DSM) Pursuant to § 40-3.2-105, C.R.S. (Apr. 20, 2014), *available at* <http://cdn.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22HB071037+April+30%2C+2014+DSM+Report.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251976201644&ssbinary=true>.

³² COMMONWEALTH OF MASSACHUSETTS DEP’T OF PUB. UTILS., Investigation by the Department of Public Utilities on its own Motion into Updating its Energy Efficiency Guidelines, *Order Approving Revised Energy Efficiency Guidelines*, at 4 (Jan. 31, 2013) *available at* <http://www.mass.gov/eea/docs/dpu/electric/dpu-11-120-a-phase-ii.pdf>.

pursuing all cost-effective energy conservation” steps.³³ To meet these goals, utility customers must be able to communicate efficiency-related information effectively to their customers. As the Florida Public Service Commission has stated, “the potential demand and energy savings from utility-sponsored conservation programs are affected by consumer education and behavior,” which are, in turn, shaped by communications from utilities.³⁴ And, as the Iowa Utilities Board has noted, the success of energy efficiency programs relies on utilities “helping customers reduce energy consumption.”³⁵ Granting the Petition will enable utility customers to meet these regulatory goals and requirements by sending important informational messages quickly and efficiently.

III. UTILITY CUSTOMERS WILL BE AFFORDED ADEQUATE PROTECTIONS

Removing the threat of TCPA liability does not present a significant risk of consumer harm. Contrary to the suggestion of the only commenter who filed comments opposing the Petition,³⁶ increased informational communications from utility companies create consumer benefits, not harms. As discussed above, the commenters have shown that consumers are frustrated because they receive too *few* communications from electric and gas utilities, not too many.³⁷

Moreover, built-in safeguards afford consumers adequate protection from receiving overly frequent or unnecessary messages from their utilities in the future. Public utilities are heavily regulated, especially at the state level. Consumers can (and do) turn to state regulators regarding

³³ UTILS. & TRANSP. COMM, *State regulators roll out new rules for energy conservation, renewables*, Press Release (Mar. 13, 2015) available at <http://www.utc.wa.gov/aboutUs/Lists/News/DispForm.aspx?ID=310>.

³⁴ FLORIDA PUB. SERV. COMM’N, *Annual Report on Activities Pursuant to the Florida Energy Efficiency & Conservation Act*, at 9 (Feb. 2015), available at <http://www.psc.state.fl.us/publications/pdf/electricgas/FEECA2015.pdf>.

³⁵ IOWA UTILS. BOARD, *Energy Efficiency Plans & Programs in Iowa*, <https://iub.iowa.gov/energy-efficiency> (last accessed Apr. 3, 2015).

³⁶ *Shields Comments* at 3.

³⁷ *See supra* Part I.A.

all aspects of their utility service, including with any complaints regarding the communications received from a utility.³⁸ If particular instances arise where customers believe they are receiving too many or unwanted messages, regulators can be trusted to step in.³⁹ Our experience is that different state regulators have somewhat different views on messaging, and, thus, may impose somewhat different requirements. The Commission should allow such diversity.

Moreover, while most customers want more communications from their utilities, we are aware that “most” and “all” are not the same. Utility customers, thus, also have the ability to opt out of non-emergency messages that they do not wish to receive. The pending Petition simply points out what is obvious in the real world: when a customer provides a utility with a phone number, the customer is consenting to the utility using that number. But utilities recognize that such consent can be withdrawn. Indeed, many comments in this proceeding confirm that utility companies routinely offer customers convenient opt-out options. For example, CenterPoint’s Power Alert Service allows customers to opt-out of the notification service at any time, including by sending a reply message to any text message they receive.⁴⁰ Exelon explains that customers who are not interested in receiving “near real-time information about their service, including during outages, and especially during natural disasters” via prerecorded and text messages “can choose to restrict [the messages] or opt-out of them entirely.”⁴¹

³⁸ See *CenterPoint Comments* at 5-6.

³⁹ We Energies’ Comments in Support of Edison Electric Institute and American Gas Institute’s Petition for Expedited Declaratory Ruling at 2-3, CG Docket No. 02-278 (filed Mar. 25, 2015) (“*We Energies Comments*”). We Energies provides electric, gas, and steam to over 2.2 million customers in Wisconsin. *Id.* at 1.

⁴⁰ See *CenterPoint Comments* at 6. See also *Eversource Comments* at 2 (“Customers. . . can opt out of receiving cellphone communications at any time.”); *MidAmerican Comments* at 5 (“MidAmerican has always provided an opt-out option for messages not related to disconnection.”); *NJNGC Comments* at 3. See also *Grant v. Commonwealth Edison*, No. 1:13-cv-08310 (N.D. Ill.) (alleging TCPA violation where Commonwealth Edison sent to customers who had provided a cell phone number a text message containing instructions for opting out of future informational text messages).

⁴¹ See *Exelon Comments* at 6.

Instead, consumers have much to gain from a Commission ruling specifying that utility companies can use prerecorded messages and autodialers to send important information to their customers who provide their wireless phone numbers. First and foremost, a Commission ruling would result in customers who are better informed about important services that profoundly impact daily life.⁴² As a significant added benefit, autodialed calls, text message notifications, and prerecorded messages are cheaper methods of communication than traditional, manually dialed calls. For instance, one utility estimated that autodialed calls cost approximately one-seventh of the price of a live agent call.⁴³ This lower cost means that utilities' customers will also receive cost savings from such forms of communications, since state regulators generally set utility rates based on the cost of providing service.

IV. THE TCPA DOES NOT PROHIBIT UTILITIES FROM MAKING INFORMATIONAL CALLS OR SENDING INFORMATIONAL TEXTS TO THEIR CUSTOMERS

The TCPA does not prohibit informational messages that utilities send to their customers who provide a wireless contact number to their utility company.⁴⁴ As an initial matter, public utilities are not in the general business of telemarketing, or encouraging consumers to purchase

⁴² See *supra* Part I, A.

⁴³ *MidAmerican Comments* at 4.

⁴⁴ Contrary to the assertion of commenter Joe Shields, EEI and AGA are not seeking a “blanket exemption.” *Shield Comments* at 2. Rather, the TCPA and FCC precedent make clear that no exemption is needed because the activity at issue in the Petition is not prohibited. Instead, EEI and AGA request the FCC provide a limited clarification to mitigate the risk of unwarranted and costly litigation and to remove the detrimental effect that actual and threatened litigation has on consumers. Likewise, Shields is wrong to imply that the TCPA treats informational and telemarketing calls to wireless numbers the same. *Shields Comments* at 3. As EEI and AGA explained in its Petition, the FCC declined to impose more stringent rules on non-telemarketing calls to wireless phones. See Petition at 6-7.

more of whatever resource they provide.⁴⁵ To the contrary, commenters recount that public utilities actively encourage consumers to take steps to use *less* of a resource that they sell.⁴⁶

Rather, the messages that utility companies want to send their customers are informational in nature. As the commenters have shown, the messages utility companies send to their customers contain information about utility outages and restoration of service,⁴⁷ service-related work and appointment reminders,⁴⁸ natural disaster response information,⁴⁹ billing information that can enable customers to avoid service interruptions,⁵⁰ and information regarding utility consumption and conservation.⁵¹

Many of these communications fall within the broad TCPA exemption for calls made for “emergency purposes.” As the Commission previously determined, “[s]ervice outages and

⁴⁵ See 47 U.S.C. § 277(f)(12) (defining “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”).

⁴⁶ See, e.g., *AWW Comments* at 4 (describing use of customer communications in “appeals for the conservation of water.”). Cf. *Shield Comments* at 2-3. Far from having a deleterious impact on consumers or increases the bottom line for utility companies, information regarding energy efficiency programs and special rates or services actually reduce the amount of resources that a utility company sells to a customer and lessens the customer’s bill.

⁴⁷ *AGL Comments* at 1; *Alliant Comments* at 1; *AEP Comments* at 2-3; *AWW Comments* at 4; *CenterPoint Comments* at 1-2; *Con Edison Comments* at 2-3; *Eversource Comments* at 1; *Exelon Comments* at 6; *MidAmerican Comments* at 3; *National Grid Comments* at 3; *NREC Comments* at 3; *NJNGC Comments* at 2; *PSEG Comments* at 2; *SEC Comments* at 4; *Southern Company Comments* at 4; *Comments of Vectren Corp. (“Vectren”)* at 2, CG Docket No. 02-278 (filed Mar. 26, 2015) (“*Vectren Comments*”) (Vectren and its subsidiaries provide electric and natural gas service to over 1 million customers in Indiana and Ohio); *We Energies Comments* at 1-3.

⁴⁸ *AGL Comments* at 1; *Alliant Comments* at 1; *AEP Comments* at 2; *AWW Comments* at 4-5; *Con Edison Comments* at 2-3; *Eversource Comments* at 1; *Exelon Comments* at 5; *NAWC Comments* at 1; *National Grid Comments* at 3; *NREC Comments* at 3; *NJNGC Comments* at 2; *PSEG Comments* at 2; *Southern Company Comments* at 4; *Vectren Comments* at 2; *We Energies Comments* at 1-2.

⁴⁹ *AGL Comments* at 1; *Con Edison Comments* 2-3; *National Grid Comments* at 3; *NREC Comments* at 3; *PSEG Comments* at 2; *We Energies Comments* at 1-2.

⁵⁰ *Alliant Comments* at 1, 3; *AEP Comments* at 2-3; *AWW Comments* at 1; *Con Edison Comments* at 2-3, 5; *Eversource Comments* at 1; *Exelon Comments* at 2, 5; *MidAmerican Comments* at 3; *National Grid Comments* at 3; *NREC Comments* at 3; *NJNGC Comments* at 2; *PSEG Comments* at 2; *PSE Comments* at 2; *Southern Company Comments* at 4; *Vectren Comments* at 2; *We Energies Comments* at 1-2.

⁵¹ *AWW Comments* at 4-5, 8; *Exelon Comments* at 8; *NAWC Comments* at 1; *National Grid Comments* at 3; *NREC Comments* at 3; *PSEG Comments* at 2; *Southern Company Comments* at 3-4; *We Energies Comments* at 1.

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” is permissible under the TCPA because it “could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public.”⁵² But what constitutes an emergency really isn’t clear and one wonders if “service outages ... *could in many instances* pose significant risks to public health and safety,”⁵³ whether there are service outages that do not pose such risks.

For calls that are arguably non-emergency calls, the fact that utility companies engage in informational messaging rather than telemarketing has important legal consequences.⁵⁴ Because utilities send informational, non-telemarketing messages, they need only to obtain prior express consent from their customers, rather than the level of consent required of telemarketers.⁵⁵ Prior express consent sufficient for informational messages exists “when the called party has provided the telephone number of such a line to the caller for use in normal business communications,”⁵⁶ and that consent “extends to a wide range of calls ‘regarding’ that transaction.”⁵⁷ Thus, when a customer provides a utility company with a wireless telephone number during service initiation or

⁵² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, ¶ 51 (1992) (“1992 TCPA Order”).

⁵³ *Id.* (emphasis added).

⁵⁴ *Cf. Shields Comments* at 3. *See supra* note 44.

⁵⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830, ¶ 29 & n.79 (2012) (“2012 TCPA Order”).

⁵⁶ H.R. Rep. 102-317 at 17 (1991) (“The restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers. For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid.”). *See also 1992 TCPA Order* ¶ 31.

⁵⁷ *GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 29 FCC Rcd. 3442, ¶ 11 (2014).

as part of another transaction, the customer expressly consents to receiving normal business communications related to utility services.⁵⁸ Information regarding planned or unplanned outages, repair work, service cancellation, service restoration, and energy efficiency alerts or program information is exactly the type of information that customers desire and expect to receive as a part of “normal business communications.”⁵⁹

The conclusion is clear from the Commission’s prior precedent: the TCPA does not prevent utility companies from sending informational messages to their customers who provide a wireless contact number. All that remains to remove the unwarranted specter of TCPA liability is for the Commission to provide a clear confirmatory statement to that effect.

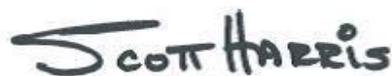
⁵⁸ Commenter Joe Shields wrongly asserts that the Commission addressed this issue in a letter filed in the case *Nigro v. Mercantile Adjustment Bureau*, No. 13-1362 (2d Cir. Oct. 16, 2014). *Shields Comments* at 1. The *Nigro* case presented the question of whether a person contacting a utility to discontinue the account of his deceased mother had given consent to be contacted at the number he had provided during that call for communications he later received regarding a debt collection matter on his mother’s account. The FCC asserted that obtaining the number during the account closing call did not amount to consent for purposes of the later debt collection. Here, utility customers have given their prior express consent during service initiation or service-related transactions. *See also* Petition at 7-9.

⁵⁹ *See also* Comments of Genesys Telecommunications Laboratories, Inc. at 3, CG Docket No. 02-278 (filed Mar. 26, 2015) (“when a consumer provides a contact number it is with the expectation, even the desire, that the number will be used to contact them. . . .”); *MidAmerican Comments* at 4 (describing that many customers relay on frequent payment reminders to avoid service disruptions.).

CONCLUSION

The comments in this proceeding confirm that the Commission should ensure that the energy utility industries can continue to employ emerging communication technologies to contact their customers with important, time-sensitive information. Accordingly, in the public interest, the Commission should issue without delay a declaratory ruling that the utility customer's provision of a telephone number, including a cellphone number, to an energy utility satisfies the TCPA consent requirements for such customer to receive non-telemarketing, informational calls at that number related to the customer's utility service.

Respectfully submitted,



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