

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of the** )  
 )  
**Rules and Regulations Implementing** )  
 ) **CG Docket No. 02-278**  
**the Telephone Consumer Protection** )  
 )  
**Act of 1991** )

**Reply Comments of Joe Shields Reply on the Comments on the Edison Electric  
Institute and American Gas Association Petition for Declaratory Ruling**

I hereby submit these reply comments addressing the comments on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling. The reply comments provide overwhelming evidence of the treatment of cell numbers like land line numbers by the business community providing electricity to consumers.

For example Puget Sound Energy openly admits that they treat cell numbers and landlines the same: “PSE does not require the customer to specify whether the phone number is a cell or land Line...” Another commentor Alliant Energy also openly admits that they treat cell numbers and landlines the same: “Currently, we do not distinguish between landlines and wireless calls because our systems only store one phone number for each customer.”

Some commentors even suggest completely eliminating prior express consent something the Commission is powerless to do. For example Puget Sound Energy: “...urges the Commission to issue a comprehensive ruling to exempt utilities from any prior consent requirement...” Another example is CenterPoint Energy which states: “CenterPoint would like to eliminate the opt-in requirement...” Yet another example is MidAmerican Energy Company which states that: “...the FCC rules should clarify that

calls regarding utility service are expressly exempted from the rules.” The TCPA is all about opting in to automated or prerecorded calls to cell numbers regardless of the purpose of the calls. Yet the business community providing electricity to consumers wants to do away with opt in and force opt out on their customers.

One commentor, Southern Company, admits that 33% of electricity users prefer not to receive payment alerts on their cell phones and 23% do not even want outage communications on their cell phones. A power outage does not require any outage notifications. Obviously residents know when their power is out. At best residents would like to know when power can be restored. The key here is “would like to know”. Likewise consumers may want to know when power has gone out at their residence when they are at work. Again the key here is “would like to know”. These are situations where a consumer can opt in to communications they desire.

An emergency may be present in the situation where lifesaving equipment is in use in a residence such as ventilators that provide oxygen or sensors that monitor individual’s health that require power. In such cases residents provide contact information expressly for emergency notifications.

Most importantly, the comments indicate that the petition is in reality another pro debt collection petition. Commentor National Grid claims that: “National Grid has been the target of several demand letters and lawsuits claiming violation of the TCPA for autodialed non-telemarketing informational calls (e.g., calls about overdue bills that could lead to service interruptions) to wireless phone numbers provided by customers.”

The complaint that National Grid refers to has nothing to do with “...wireless phone numbers provided by customers...” “The debt collectors retained by Defendants

obtain Class members' cellular telephone numbers by means that include "skip tracing" and "number trapping." *Jenkins vs. National Grid, USA et al.*, No. 2:15-cv-1219 (E.D. N.Y. 2015).

One commentor, New Jersey Natural Gas, gets it right:

"NJNG offers its customers the opportunity to opt-in to text messaging in order to receive alerts and account related information. When opting in, NJNG provides the mobile device with a link to a web page so they can manage each subscribed notification."

Sadly, after getting it right the same commentor then supports Consolidated Edison's illegal use of pre-recorded messages<sup>1</sup> to call cellular telephone numbers ... "to inform customers of the program and to tell them how to opt in." Even Consolidated Edison admits that their prerecorded messages to cell numbers were: "...campaigns to enroll customers in our outage text notification programs." As the Commission has noted a call asking someone to enroll in a service is a telemarketing call: "A call made by a telemarketer solely to determine whether a subscriber wishes to receive a telephone solicitation is, in effect, a solicitation from that telemarketer..." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12408, ¶ 15 (1995) (TCPA Memorandum Opinion and Order)

As pointed out above several commentors suggest that the Commission create an opt out requirement for consumers something the Commission cannot do. CenterPoint Energy suggests to: "...allow customers to opt-out at any time..." The Commission has already addressed this opt out suggestion: "This kind of "negative option" (in which the

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<sup>1</sup> *Grant v. Commonwealth Edison*, No. 1:13-cv-08310 (N.D. Ill.)

sender presumes consent unless advised otherwise) is contrary to the statutory requirement for prior express permission or invitation.” *Id.*

Some commentors suggest that the Commission leave TCPA enforcement up to state regulatory agencies. CenterPoint Energy suggests that: “to the extent a customer takes exception to a utility’s communication methods, that customer can always seek redress through the state regulator.” Oncore Electric Delivery Company LLC similarly suggest that “...should any utility company or REP abuse the process by sending too many or unwanted messages, the Public Utility Commission of Texas would address the issue swiftly...” Contrary to the commentors suggestions the Public Utility Commission of Texas has an even more lackluster consumer protection law enforcement record than the Commission!

Then there is the ubiquitous and *ad nauseam* claim that all TCPA law suits are frivolous. New Jersey Natural Gas and Exelon asks the Commission to grant the petition: “...in order to defeat frivolous claims.” Southern Company asks the Commission to grant the petition: “...in order to defeat meritless consumer TCPA claims.” Such unfounded *ad nauseam* comments damage the credibility of the commentors.

The vast majority of TCPA claims are legally sound. The increase in TCPA claims is not because of an opportunistic bar – it is the flagrant treatment of cell numbers like landlines by legitimate businesses. TCPA law suits lead to increased awareness of the illegal behavior of legitimate companies in regards to their callous and indifferent treatment of cell numbers.

The schema of prior express consent has worked since the enactment of the TCPA. Now that automatically dialed, text message or prerecorded message calls have become

so cheap businesses want to do away with the TCPA's prior express consent requirement. Yet the petitioner and commentors already have what they want. The petitioner and commentors can use efficiency all they wants as long as they respect the privacy of cell phone users and obtains prior express consent from the called party for each purpose the business would like to use the cell number for.

As New Jersey Natural Gas suggests consumers that want outage notifications can easily opt in. Legitimate companies must realize that prior express consent is not unlimited. If a consumer opts in to outage notifications that does not mean that the consumer has opt in to unlimited communications from that energy company. Legitimate companies must realize that prior express consent for outage notifications does not mean that the consumer has opted in to automated or prerecorded debt collection calls.

As an FCC Amicus Letter Brief clearly points out: "An individual's consent, once obtained, is "not unlimited." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, 27 FCC Rcd 15391, 15397 (¶11) (2012).

The TCPA treats informational and telemarketing calls the same. Just as the "frivolous" comments damage the credibility of the commentors so do comments that suggest that the Commission treat informational calls to cell phones differently than telemarketing calls. The TCPA has withstood constitutional challenges because it is content neutral on automated or prerecorded calls to cell phones. The Commission is oft cited for its comment in the Cargo Airline Association Order. : "...we find that these notifications are the types of normal, expected communications the TCPA was not designed to hinder..." No commentor admits that the Commission clarified that comment

in an accompanying footnote to be limited to an opt in condition: “Footnote 49 - Cf., e.g., H.R. Rep. 102-317 at 17 (1991) (“[t]he restriction...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.**”). Similarly, the Commission refers to the same citation in a foot note in the GroupMe Order: “Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications.” : “Footnote 21 - See, e.g., H.R. Rep. 102-317 at 17 (1991) (“[t]he restriction . . . 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.**”). Clearly, the Commission requires a consumer to opt in not out of desired business communications!

The TCPA’s prior express consent is not an evil as commentors imply. It is the only protection preventing unlimited automatically dialed or prerecorded calls to cell numbers. Consumers can opt in to automatically dialed or prerecorded calls and do so on the consumer’s terms. Further, commentors have failed to provide any evidence that a controversy or uncertainty exists. See 47 C.F.R. §1.2. The sought declaratory ruling will not terminate a controversy or remove any uncertainty.

When the statutory language is clear, as it is here, 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.”

Further, the Commission in its 2003 order addressed the exact same issues raised now: “Each of the circumstances described by the utilities is included within either the

broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent.” “In light of the comprehensive nature of the current exemptions, a specific exemption for public utilities to the general prohibition against autodialers and artificial or prerecorded voice message calls is not required.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774. Simply because utility company’s repeatedly raise the same duplicative issues every few years is not a reason to change prior Commission Orders. In fact it would be detrimental to the Commission’s reputation to issue conflicting Orders on the exact same issue.

Being sued for violating the TCPA is not a valid reason to create an overly broad blanket exemption from the consent requirement of the TCPA. Neither is caller efficiency. Those that use technology responsibly can and do enjoy the efficiency that comes with technology. The Commission should exercise its duty to the public to protect the privacy and safety of cell phone users.

The Commission must deny the Edison Electric Institute and American Gas Association petition as the petitioner already has what it wants and any Commission clarification will not terminate a controversy or remove any uncertainty. The Commission has already addressed the exact same issue(s) in a prior Order and increased use of cell phones does not warrant altering that prior Order.

Respectfully submitted,

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