

9 June 2015

**Ex Parte**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,  
CG Docket No. 02-278*

Dear Ms. Dortch:

The Edison Electric Institute (“EEI”) has pending a petition asking the Commission to declare that providing a telephone number to an energy utility constitutes “prior express consent,” under the Telephone Consumer Protection Act (“TCPA”), to receive non-telemarketing, informational calls at that number related to the customer’s utility service.<sup>1</sup>

The record contains surprisingly little opposition, and reflects a strong consensus, that energy utilities should be permitted under the TCPA to make most of the calls outlined in the petition. It is perhaps not a shock that the utility industry uniformly and strongly supported EEI’s petition. But the evidence it placed in the record about consumers’ interest in information about their utility service was unusually powerful.

Perhaps more interesting was the support, though qualified in some respects, for the petition from the National Association of Regulatory Commissioners (“NARUC”) and the New Jersey Division of Rate Counsel (“Rate Counsel”). NARUC is, of course, the association of state regulators who oversee the activities of the EEI members. Rate Counsel is a well-known and active agency tasked with representing utility consumers.

While neither NARUC nor Rate Counsel supported EEI’s petition in its entirety, both agreed that the utility industry should be able to make most of the calls (or texts) covered by the petition. The only calls they both opposed were those for debt collection after service termination, and those about demand-response pricing. NARUC and Rate Counsel also suggested an alternative legal theory to justify the calls they supported: the emergency call exemption. However, both would also embrace EEI’s “prior express consent” approach as a fallback.

NARUC said the FCC could construe all calls about planned and emergency service outages, service restoration information during emergencies, service restoration confirmation, and certain utility-related work to be within the emergency exemption.<sup>2</sup> Likewise, Rate Counsel suggested that all of the calls covered

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<sup>1</sup> Petition for Expedited Declaratory Ruling of Edison Electric Institute and American Gas Association, CG Docket No. 02-278 (filed Feb. 12, 2015) (“EEI Petition”).

<sup>2</sup> Reply Comments of the National Association of Regulatory Commissioners at 2, CG Docket No. 02-278 (filed Apr. 10, 2015) (“NARUC Comments”). NARUC states that “it is reasonable for the FCC to clarify the rules to

by the EEI Petition, with the exception of post-termination collection calls and demand-response pricing calls, are “communications for emergency purposes.”<sup>3</sup> Rate Counsel argued, for example, that utilities should be able to contact consumers to let them know they may be eligible for subsidized service due to their income, age, or disability—because loss of service due to an inability to pay would be an emergency. These are, for certain members of the community, truly “lifeline” calls.

EEI surely agrees that many of the calls covered by its petition could be considered emergency communications, and also agrees that it should be able to inform consumers that they may be eligible for subsidized service. But the law is not clear as to where to draw the line between emergency calls under the TCPA, and other calls that may not be an emergency but do contain critical information consumers want. In addition, consumers do not have the right to “opt out” of receiving emergency calls. EEI members recognize that their consumers greatly value the ability to opt out, and some regulators agree. For instance, the Pennsylvania Public Utility Commission confirms that “it is imperative that customers be able to tailor the alerts they receive. . . . [C]ustomers should always retain the choice to opt out of all utility messaging. . . .”<sup>4</sup> Accordingly, EEI believes the soundest legal basis to allow these calls is to confirm that a customer that provides its number to a utility has provided “prior express consent” to receive them.

The record reflects, however, some disagreement as to the scope of consent consumers give when they provide their phone numbers to their utility company. In particular, both NARUC and Rate Counsel assert that certain calls that utilities might wish to make—specifically for debt collection after service has been terminated or about demand-response pricing—are not encompassed within a customer’s consent.<sup>5</sup>

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allow an energy utility to contact existing customers through wireless texting/calling about public safety concerns such as: ‘(a) warn[ing] about . . . service outages; (b) provid[ing] updates about outages or service restoration; (c) ask[ing] for confirmation of service restoration or information about the lack of service’ (unless the text or call references and is related to an overdue/unpaid or underpaid bill); and ‘(d) provid[ing] notification of meter work, tree-trimming, or other field work’ (but only when said field work is likely to inconvenience a group of the targeted homeowners). These all can be reasonably construed to fit with the definition of ‘emergency purposes.’”) *Id.* at 5 (citing EEI Petition).

<sup>3</sup> Reply Comments of The State of New Jersey Division of Rate Counsel at 1-2, CG Docket No. 02-278 (filed Apr. 9, 2015) (“Rate Counsel Comments”) (citing EEI Petition) (concurring with the EEI Petition 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 threaten service curtailment.’”). Rate Counsel also supports including calls made to verify eligibility for special rates or services, such as medical, disability, or low-income rates, programs and services within the emergency exemption to the extent the calls “are necessary to prevent emergent public health and safety risks such as planned or unplanned utility service interruptions.” *Id.* at 2. *See also* Rate Counsel Comments at 10 (stating that “[e]mergency purposes. . . do not include calls to provide information relating to ‘time-of-use pricing and other demand-response events.’”).

<sup>4</sup> Reply Comments of the Pennsylvania Public Utility Commission at 4, CG Docket No. 02-278 (filed Apr. 10, 2015) (“PA PUC Comments”).

<sup>5</sup> *See* NARUC Comments at 5 (urging the FCC to make clear that its ruling does not extend to calls regarding “energy efficiency or other utility services, service disconnection for non-payment, calls concerning customer disputes, collection efforts, marketing and other commercial messages.”). Notably, while urging the FCC not to include calls regarding service disconnection for non-payment, NARUC recognizes that “[m]ost jurisdictions

Upon reviewing these comments and the entire record, EEI recognizes that the precise relief sought in its petition—that by providing their phone numbers to utilities consumers are consenting to “*all* calls relating to that service”—may itself be a little less clear than is ideal. Whether a consumer is really consenting to “*all* calls” or what constitutes a call “relating to that service” could be the subject of debate. Accordingly, to address the concerns in the record, EEI is narrowing its requested relief and would ask that the Commission simply declare that by providing their phone numbers to utilities, consumers have consented to receive the following calls:

- Calls that warn about planned or unplanned service outages;
- Calls that provide updates about service outages or service restoration;
- Calls that ask for confirmation of service restoration or information about the lack of service;
- Calls that provide notification of meter work, tree-trimming, or other field work;
- Calls that warn about payment or other problems that threaten service curtailment, but *not post service termination debt collection calls*;
- Calls that notify consumers they may be eligible for subsidized or low-cost service due to age, income, or disability; and
- Calls that provide information related to potential brownouts from heavy energy usage.

The FCC need not rule on other calls made by utility companies at this time.

It is also worth noting that some local officials have also supported the “prior express consent” approach laid out in the EEI Petition. In particular, the city of Houston urged the Commission to “clarify that a customer has given ‘prior express consent’ to receiving non-telemarketing informational communications related to the customer’s utility service upon providing a phone number to the utility company” because it will facilitate “the critical public policy goal of ensuring the safe, reliable and efficient provision of utility services to our citizens.”<sup>6</sup>

Moreover, adopting the EEI Petition to the extent that it allows calls related to service curtailment—that is, calls about payments, brownouts, or other problem that threaten service curtailment—is consistent with the notification requirements that state utility regulators impose on utility companies. For example, the Illinois Commerce Commission recently revised its rules to bolster the obligations for utilities to provide notification to customers who are facing disconnection. In particular, the new rules require utility companies to “provide a warning call to the customer a minimum of 48 hours prior to the scheduled disconnection. . . A second call shall be required 24 hours prior to the schedule disconnection if the first

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have in place specific procedures [sic] that require specific types of notification before service can be disconnected.” *Id.*

<sup>6</sup> See Letter from Stephen C. Costello, Houston City Council Member At-Large Position 1, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed May 21, 2015). See also Letter from Jack Christie, D.C., Houston City Council Member At-Large 5, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed May 21, 2015).

call does not reach a person or an answering machine.”<sup>7</sup> *The Illinois rules expressly permit notification calls to be automated.*<sup>8</sup> That’s because without the capability to use automated calls, utility companies would be hard-pressed to meet the notification requirements.

In strengthening its utility notification rules, the Illinois Commerce Commission recognized that providing adequate notice allows customers to remedy the problem and avoid service curtailment.<sup>9</sup> And while consumers may not want to receive post-service termination debt collection calls, they surely want to receive warnings about potential service curtailment. For example, electric utilities have found that notification calls to customers whose loss of service is imminent has resulted in a sixty to eighty percent success rate, meaning that *between sixty and eighty percent of customers facing power loss due to payment or other problems are able to avoid service curtailment as a result of utility-provided notifications.*<sup>10</sup>

EEI asks the Commission to move quickly to grant its petition as outlined in this letter, which will enable energy companies to prepare for the inevitable storms and peak demand that routinely occur during the summer season. NARUC also agrees that swift Commission action on this petition is needed.<sup>11</sup> While other industries have filed in connection with this petition, EEI asks that the Commission rule only on the narrow issues presented by, and affecting, the utility company petitioners.

If you require any additional information please contact the undersigned.

Sincerely,



Scott Blake Harris  
*Counsel for Edison Electric Institute*

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<sup>7</sup> 83 Ill. Adm. Code 280.130(j)(1)-(2). The new rules became effective on Nov. 1, 2014. Utility companies have 18 months to come into compliance.

<sup>8</sup> 83 Ill. Adm. Code 280.130(j)(2).

<sup>9</sup> *Id.* 83 Ill. Adm. Code 280.130(a).

<sup>10</sup> 81.1% of We Energies year to date pre-disconnect calls have resulted in a response that avoided service termination. In 2013, payment or payment arrangements were made on 61% of the accounts customer notification calls made by Georgia Power, and, in 2014, it had a 60% rate of avoided disconnects. Florida Power & Light reported its automated calling campaigns were approximately 60% effective in preventing customers from having their service disconnected remotely.

<sup>11</sup> NARUC Comments at 2. *See also* Letter Harold Kim, Executive Vice President, U.S. Chamber Institute for Legal Reform, and William Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce, to Marlene H. Dortch, Secretary, FCC, at 2, CG Docket No. 02-278 (filed Apr. 23, 2015).